IN THE SUPREME COURT OF FLORIDA

DARRYL MOODY,

Appellant,

vs. CASE NO. SC94435

STATE OF FLORIDA,

Appellee.

_______________________________/

ON APPEAL FROM THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

At trial, Laurie Ward, a supervisor in the crime scene section at the sheriff's office, received notice to go to the crime scene about 2:49 p.m. She noticed the victim's red truck and another car, a green Buick, about fifty-seven feet from the front of the truck (Vol. XX, TR 1856-1859). A bullet had hit the left front fender and ricocheted off and hit the windshield. There was a bullet hole entrance into the driver's door; there were wounds to the victim's head and his foot was on the brake (TR 1862-69). She videotaped the scene and took measurements (Vol. XXI, TR 1891) and took the victim's watch, ring and wallet with $312.00 from his person (TR 1893). The victim's truck was removed to the impound lot and a projectile was recovered between the outside of the door and the inside of the door (TR 1905). A number of photographic exhibits were introduced including Exhibits A-K, photos of a Cadillac belonging to Teresa Carmichael (TR 1919-1922). A number of exhibits were identified and introduced into evidence through Ward and crime scene technician Nancy Shipman.

Teresa Carmichael testified she owned a red with white vinyl top Cadillac Brougham and woke up on Sunday morning April 10, 1994 and discovered her car was missing. She reported it stolen to the sheriff's department and described the stolen contents of the car including a gun. She had previously bought a .38 Rossi special gun with serial number Z826832 and kept the loaded gun under the

driver's seat. She identified Exhibit 236 as that gun. The following week she recovered some items taken from the car but not the gun and the car was towed to Fields' Cadillac (Vol XXII, TR 2180-90). David Carmichael added that the car was totaled, things were ripped out of the car, a mirror and fancy wheels and battery were missing (TR 2190-93). Deputy sheriff Burgess arrived at the Carmichael residence at 10:07 a.m. on April 10, took the report of the Cadillac theft and entered the VIN into the teletype (TR 2194-95). Deputy sheriff Mary Gaertig was involved in the recovery of a stolen Buick station wagon on April 10 at 10:30 a.m. in a grove area. The paperwork found there included a title transfer for Carmichael's stolen 1988 Cadillac and her driver's license (TR 2196-2200). Deputy Regina Hulverson responded to a grove area on April 14, 1994 and found the abandoned and stolen 1988 Cadillac (owned by Carmichael). The vehicle had no wheels or tires, the radiator and battery were missing and the steering column had been tampered with (TR 2203-10).

Hubert Hurley who had been living with the victim Scott Mitchell for about three or four months testified that on May 16, 1994 Scott left early to see the crew, returned about 10:00 a.m. to put stain on the front of the porch and finished it about noon. Mitchell said he was going to the grove to check on the crew, then go into Bartow for lunch. He left the residence about 12:30 driving his 1994 Chevy pickup truck and he carried a cell phone

with him. About 2 to 2 ½ hours later Hurley learned Scott was found in the grove (Vol. XXIII, TR 2213-19). Michael Stenger, a citrus caretaker, spoke to Scott that morning on the radio to avoid conflict on working the same grove. The victim's father Preacher Mitchell called him on the radio after lunch about 1:30 or 2:00 and was shaken up. Stenger called 911 on a cell phone, told them to go to Mud Lake Road off of 80 Foot Road and he arrived 10-15 minutes later. The truck brake lights were on. The harvesting area was farther to the west 2000 feet away (TR 2226-46). The victim's brother Ray Daniel Mitchell described Scott as a supervisor of Preacher's business with authority to direct all those who subcontracted work. The witness received a phone call from his father around 1:00 p.m. after lunch, called 911 and drove to the scene. Harvesting was to the west and no other pruning or spraying work was being done where Scott's truck was found (TR 2267-81).

Deputy sheriff Eddie Smith was the first deputy sheriff to arrive at 2:28 p.m. (after being dispatched at 2:16 p.m.). The driver's door was closed, the engine was still running, and the brake lights were on. No one entered the crime scene after he did. Preacher told him he had a crew picking further west of the area and Smith wasn't able to see any of the harvesting from his vantage point (TR 2287-99). Sheriff's lieutenant Hugh Taylor became aware of the incident about 1:30; he was contacted by phone at his office and arrived about 1:50 (TR 2314-19). Harvester Eraclio Martinez

was picking oranges that day about 700 yards from Mud Lake Road to the west side. He saw the victim earlier that day and a second time no later than 11:00. He also saw two cars, one right behind the other very close together go into the grove; it wasn't normal to see cars pull into the grove like that (TR 2328-39).

Officer Terry Dowdy testified that while on patrol in an unmarked unit with his partner Bly on Monday, May 23, 1994, he saw appellant Moody about 4:00 p.m. driving a faded yellow station wagon in the Lincoln Avenue area of Lake Wales. He told Bly they needed to stop the driver and called for a marked unit to do so. Dowdy gave Moody a citation for suspended license (the reason for stopping him). The car was impounded and inventoried. They removed a zippered bag containing a handgun (Exhibit 254). They documented the items but only took the handgun into custody. Bly got on the computer which showed the handgun to be stolen (they had a .380, the computer showed .38 but the serial numbers matched the stolen weapon). The officer explained that it was routine to keep the weapon in those circumstances, and the next day the sheriff's office contacted Dowdy (Vol. XXIII, TR 2356-71). Officer Bly similarly testified that the only item kept by the police was the firearm - Exhibit 254, a Davis P 380 handgun (Vol XXIV, TR 2388-92). The weapon was turned over to property and evidence custodian Pam McIntosh (TR 2390).

Deputy sheriff Thomas Dombrowski became involved in the

investigation on May 24. He went to a residence at 2430 Lisa Lane in Lake Wales. A search warrant was secured for the residence, he searched one of the bedrooms and recovered a zippered pouch containing assorted bullets and some car emblems in the dresser (Vol. XXIV, TR 2413-18). Retha Cotton who lived at 3080 80 Foot Road in Bartow recalled that on May 16 while waiting to go to town to pay a light bill or doctor bill - as she was going to the mailbox between 10:30 and 12:00 - she saw a silver car, Cadillac, go by with a green car behind it. Each car had one black driver. The cars were sitting on the left hand side and she told her husband that somebody broke down on the road. She thought she heard a gunshot and when she looked the green car with straight up and down lights was still there. She later went to the salvage yard in Lakeland and was positive in recognizing the silver Cadillac (Vol. XXIV, TR 2426-43). Her husband Johnny Cotton described the Cadillac with a silver gray color that he saw between 11 and 11:30 and subsequently identified in the Lakeland yard (TR 2479-90).

Deputy Michael Pruitt was on surveillance when the search warrant was executed at 5:15 p.m. for the house at 2430 Lisa Street in Lake Wales (TR 2529-32). Ammunition was found in a chest drawer (TR 2554). They then went to a second location - at 305 North First Street in Lake Wales at about 6:00 p.m. and conducted a search of the apartment. They took shoes, a pair of speakers

underneath the bunk beds, a pair of black boots behind the bedroom door. There was a small metal cap in the shoe, subsequently identified by the owner Bryant Upshaw (Vol. XXV, TR 2554-61). The 1980 Ford station wagon outside the apartment complex was impounded (TR 2569).

Deputy sheriff Tim Ellis came to work at 6:00 p.m. on May 25, 1994; he didn't know about the Scott Mitchell homicide investigation. While at an area of Laura Street at about 11:00 p.m., a thin black male initiated contact with him. After two more contacts, Ellis searched for an item he was told would be there and recovered a black revolver and zipper style handgun case (TR 2579-88). He turned this gun, Exhibit 236, over to Det. Bowen (TR 2590). Ellis went back to the convenience store area with Det. Hayes, Det. Schaill and Det. Bowen. Ellis immediately recognized the young black male located by Hayes at a residence on Laura Street at about 2:30 a.m. and Ellis transported him to the command center in Lake Wales for questioning (TR 2591-92).

Forensic firearms examiner Dominic Denio opined that the Exhibit 8 bullet was fired from the Exhibit 236 .38 Rossi revolver, that the Exhibit 9 bullet was not fired in the Rossi, and that the Exhibit 9 and 18 bullets could have been fired down the same barrel of firearm (Vol. XXV, TR 2674-89). Deputy sheriff James Bowen testified that the search warrant for 2430 Lisa Street was served at 5:00 p.m. on May 24, 1994 and there was a gray Cadillac

underneath the carport. He described the items seized (Vol. XXV, TR 2718-2800).

EMT personnel Nutkins and Thigpen described the unsuccessful attempt to find a pulse upon their arrival at the scene after 2:00 p.m. on May 16 (Vol. XXVI, TR 2823-59). Crime technician Cynthia Holland arrived at 2430 Lisa Street at 5:45 on May 24 and took into custody and impounded the gray Cadillac parked under the carport. Then at the second site at 305 North First Street officers conducted a search of Apartment B and a second vehicle, a yellow Ford station wagon, was taken into custody (Vol. XXVII, TR 2890-04). Jerome Leeks' name was still on the car title of the station wagon he sold to appellant in March of 1994 (Vol. XXVII, TR 2896-2901).

Dr. Alexander Melamud, associate medical examiner, performed the autopsy on Scott Mitchell May 17. The victim suffered two gunshot wounds to the head. There was residue and stippling on the forehead wound, a close range finding but no soot or gunpowder stippling on the left temple gunshot wound (fired at a distance beyond two feet)(TR 2930-40). Two bullets were recovered. Exhibit 8 was found deformed and mushroomed, about a .38 caliber recovered from the neck (entrance wound to the forehead) and the second bullet Exhibit 9 entered the left temple and was found in the brain. The cause of death was multiple gun shot wounds. The victim would have lost consciousness within a second or two and

would not have been able to move his hands or feet (Vol. XXVII, TR 2946-52).

FBI special agent Bodziak, an expert in footwear and tire impressions opined that photos of shoe impression in Exhibit 91 A-D showed the same design as Sierra boots, Exhibit 213 (TR 2988). Bryant Keith Upshaw owned the 1981 green Buick Regal in May of 1994. He parked it Sunday night and the next morning when he came out to go to work it was gone. He described property in the car stolen with it including Exhibit 254, a Davis P 380 handgun kept in a black zippered case, Fosgate amplifier, equalizers and speakers (TR 3034-57). Officer Berry responded on May 16 at 7:00 a.m. to take Upshaw's report of auto theft. The gun was a .380 black semi-automatic, serial number AB406108 (Vol. XXVIII, TR 3062-69).

Bruce Foster, age twenty, testified he did not have his own car; he used to ride around in appellant's station wagon but never drove it and he never drove Dexter's Cadillac (Vol XXVIII, TR 3087-94). He recalled an occasion when he was with appellant at the Conversation Club in which Moody had a .38 revolver in his car and appellant tucked the loaded gun into his pants (TR 3095-3106). He didn't see Dexter Moody there. He had not seen appellant's .38 before this and the next time he saw it was when he purchased it (TR 3111-12). Appellant said something happened earlier that day, that he had been stopped by Lake Wales police and he told Foster he

had a gun for sale. Foster expressed interest. Moody mentioned the police had gotten a .380 out of his car; Foster had not seen a .380 (TR 3116-18). Foster agreed to pay Moody sixty dollars; appellant said he needed money. When he gave him the money Foster recognized it and told appellant that was the same gun he had that night at the club and Moody told him to be careful, "that gun's been through a lot of stuff" (TR 3118-37).

Days later after a conversation with Duck (Darron Moore), Foster decided to give the .38 revolver to police. He told Sherita Leeks he was going to turn the gun over to police and say he got it from two guys or throw it in the lake. He decided to turn the weapon in, thinking it would help get appellant out of jail since he was like a brother to him (TR 3142-49). Foster admitted making up to police a story about a Puerto Rican and a white guy, believing they would look for someone else they could not find and the case would end up being unsolved (TR 3151-53). Foster also admitted he initially told the officer his name was Leroy Jones because he didn't want anything to do with it. After he got home, police arrived within fifteen minutes and took him in for questioning. Officers didn't believe his story and after a couple of hours he told the truth. Exhibit 236 is the .38 gun he bought from appellant (TR 3156-68). Foster also stated that May 16 was the day he went to court - school records indicated he was not in

school that day - in the Bartow juvenile court and his mother took him there (TR 3169-71). Afterwards he went to his grandmother's house and caught a bus home. He never saw appellant's brother Dexter with a .38 or any firearms (TR 3172-85).

Janet Stinson drove and turned right on Mud Lake Road at about 12:30 p.m to take lunch to her husband and noticed an older model gray Cadillac, and a green car inside the grove (Vol. XXIX, TR 3357-63). Johnny Harris recalled that Bruce Foster came to him and asked for $60.00 that he had previously given to him to hold for him (Vol. XXX, TR 3428). Tyrone Seege testified that appellant normally drove a yellow station wagon but recalled a time when he gave him a ride to his girlfriend's apartment. Appellant said his car got impounded and he was worried about a gun that might be still in it (Vol. XXX, TR 3441-42). Appellant's brother Dexter normally drove a silver Cadillac and he saw Dexter putting stereo equipment - big speakers - into his car (TR 3444-46).

Alwyn Leeks in early 1994 was living at Apt. B at 305 North First Street and eventually her sister Sherita would spend the night there in bedroom two which had a bunk bed. Alwyn met Moody through her sister. The witness testified that Dexter Moody had a gray Cadillac, and appellant had her father's Ford Fairmount station wagon which he was in the process of buying. Appellant drove his car and Dexter drove his own. Sherita began staying at

the apartment full time and appellant started to stay at night three to five nights. He would sleep in the second bedroom on the lower bunk with Sherita. In May of 1994 police searched her apartment the same day they arrested Moody and took his station wagon (Vol. XXX, TR 3467-87). Dexter on the two occasions he stayed there would sleep on the living room couch, not on the bunk beds. Bruce Foster never stayed there. The witness had not seen the speakers before investigators took them from under the bed (TR 3488-94).

Vincent Crawford and Roddis Dewdney saw appellant at the Conversation Club and saw appellant with a handgun, a black revolver size of a .38 (Vol. XXX, TR 3545-49; Vol. XXXI, TR 3594-98) as did Hillary Brinson (Vol. XXXI, TR 3625).

Barbara Foster, Bruce's mother, testified that she got off work to take him to a juvenile court hearing in Bartow (Vol. XXX, TR 3558-60). The parties stipulated that court records show that court began at 11:25 and twenty minutes later or at 11:45 Foster's case was called and that he was before the judge for approximately one minute and forty-five seconds, then another case was called (Vol. XXX, TR 3561-62). Mrs. Foster added that after court she dropped him off at her mother's house and he was at home when she arrived later at about 3:45 p.m. (Vol. XXX, TR 3566-69). Sherita Leeks also testified and claimed she didn't recall her deposition

or grand jury testimony or much of her prior testimony (Vol. XXXI, TR 3693-96; TR 3735-50, 3766). On cross-examination she claimed she was threatened and was not truthful (Vol. XXXII, TR 3779-94). After further redirect examination, the state relied on case law permitting the use of grand jury testimony for impeachment purposes and as substantive evidence (Vol. XXXIII, TR 4027-4041). See Webb v. State, 426 So.2d 1033 (Fla. 5DCA 1983); State v. Moore, 424 So.2d 920 (Fla. 4 DCA 1982), approved Moore v. State, 452 So.2d 559 (Fla. 1984).[1]

Lori Rappold, a detective with the Lake Wales police department was on duty in uniform and in a marked patrol car on April 13, 1994 at 8:30 p.m. Darron (Duck) Moore had called, met her outside and said he had seen appellant and Dexter Moody in separate vehicles and someone was in possession of a gun (Vol. XXXV, TR 4263-65).

Assistant State Attorney Cowden was assigned to the case of Bruce Foster on charges stemming from an incident on April 25, 1997; the information was filed June 26, 1997. The victim’s family did not want to go to trial and didn’t want Foster to go to jail.

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[1]Attorney Richard Mars was appointed to represent Sherita Leeks on the perjury by affidavit complaint (Vol. XXXIV, TR 4102-03). He talked with her, then sat in on an interview where the prosecutor asked questions. He advised her that if she was going to testify she needed to tell the truth (TR 4104). He would have gone to the prosecutor’s boss if a client told him of being intimidated or coerced by law enforcement. Mars did not appear in the prosecutor’s boss about this case (TR 4130-31).

The state made a plea offer to Foster to plead guilty for 2½ years community control. The family's decision and provability were factors in Cowden's decision. Foster plead guilty and received two years community control followed by eight years probation. She didn't know about or give consideration to the factor of Foster being a witness in this case (Vol XXXV, TR 4277-93).

William Wedge assisted the sheriff's office in this investigation. He met with Darron Duck Moore on July 13, 1994. Moore believed he had seen the same gun either a .32 or .38 revolver that might be the murder weapon that he had previously seen in the possession of appellant. Moore said he saw Dexter driving a Buick and appellant driving a stolen Cadillac between 2 a.m. and 6 a.m. on May 16, the day of the murder (Vol. XXXV, TR 4392-96).

Deputy sheriff James Bowen described his activities at the crime scene on May 16 and thereafter. The green Buick left in the grove was a stolen vehicle out of Orlando belonging to Bryant Upshaw and they had a list of items taken out of the car reported by Upshaw (Vol. XXXV, TR 4322). On Tuesday May 24, Det. Cosper informed Det. Schaill that Lake Wales police department had advised they recovered a firearm reported stolen from the Upshaw Buick (TR 4324). They obtained photos of Darryl and Dexter Moody, typed up a search warrant for 2430 Lisa Street and the Ford Fairmount. A

judge approved the search warrant signed at 9:00 a.m. (TR 4324-26). Bowen drove over to Lake Wales to help execute the search warrants, first to 2430 Lisa Street, then to the other location where the station wagon was (the apartment of Alwyn Leeks). He arrived at the second location at 8:15 p.m. Appellant was taken into custody, the station wagon was taken into custody pursuant to the search warrant and towed to the crime scene unit. The next day they executed the search warrant on the vehicle (TR 4327-28). When going through the station wagon that morning they found four .38 caliber bullets in the front passenger floorboard. Stereo equipment was also seized from the station wagon. On May 26, Detective Schaill called at 12:25 informing him they believed they had recovered the murder weapon (TR 4329-30). He was briefed by Deputy Tim Ellis and they searched and found Bruce Foster at home. Foster agreed to talk at the substation, said he'd heard from Duck Moore that the .38 was involved in a murder and initially told the officers he bought the gun from a white male and a Mexican but then changed his story and said he bought the gun from appellant on May 23 at the Alwyn Leeks' apartment (TR 4331-33). Foster explained his made up story was to divert attention to get the heat off the Moody brothers (TR 4334). Deputy Bowen later learned that the .38 Rossi came from a stolen Cadillac belonging to Teresa Carmichael. Foster said he had seen appellant with that gun weeks earlier at

the Conversation Club. On May 27 he met with Retha and Johnny Cotton who followed police to the substation where Dexter's Cadillac was being held in custody. No .38 caliber bullets were found in that car but there was stereo equipment (TR 4336-40). On May 31 the lab reported that the Rossi .38 recovered from Foster was positively identified as the weapon that fired the shot into the victim's forehead (TR 4340). Among the items seized at the Leeks' apartment were several pairs of shoes. Alwyn Leeks admitted that appellant spent the night there and had left four pairs of shoes and two speakers in Sherita's room (TR 4347). He also interviewed Sherita Leeks on June 1 (TR 4349) and again on June 9 (TR 4355). They used a "confrontational interview", a proven method with Foster and Sherita together, to resolve conflicting answers (TR 4355-56). Bowen also testified that the Carmichael vehicle was recovered - stripped and abandoned - about sixteen miles from where it was stolen but only .7 mile from 2430 Lisa Street (TR 4358-60). In July Darron Moore said appellant sold the gun to get the heat off him, saw appellant with this gun on April 13 and later saw this gun which Moody sold to Foster (TR 4362-65). Moore related that early in the morning prior to the murder he saw appellant driving a stolen Cadillac and Dexter driving a stolen Buick at 1:30 a.m. Both were wearing gloves. He also saw Sherita driving around town in appellant's yellow station wagon and that

she was looking for the Moodys (TR 4366). Moore saw the report in the paper about the murder, thought about it logically and told Foster to get rid of the gun (TR 4366). Bowen met with Sherita Leeks on July 28 at the state attorney's office and under oath she made contradictions. She was placed under arrest (TR 4367-69). He explained to her she could be arrested for lying (TR 4370-71).

Dexter Moody was subsequently arrested in Delaware on other charges (TR 4374-75). Bowen related that the distance from where the victim lived at the Hurley residence to the murder site was 5.4 miles; the distance from Alwyn Leeks' apartment to the murder site was 14.8 miles; the distance from Ruthie Mae Foster's house to the temporary court house was 16.9 miles and the distance from the location of the recovered Carmichael Cadillac to 2430 Lisa Street was .7 mile (TR 4376-80). Bowen did not take Bruce Foster's shoes because he wore a size 12 and Laura Ward indicated the prints in the ground seemed a size 8-10 (TR 4384). Some of the recovered property was from the vehicle belonging to Dexter, some from appellant's vehicle, some from the Lisa Street bedroom shared by both and some at the Leeks' apartment (Vol. XXXVI, TR 4538). Sherita expressed fear of retaliation by the Moodys; she was in fear that Dexter was still out and loose (TR 4544).

Tim Ellis testified about his meeting on the street with Bruce Foster and the recovery of the gun (Vol. XXXVI, TR 4555-81).

Detective Schaill was called and testified as a defense witness. On cross-examination he explained they got a search warrant for the residence at 2430 Lisa Street; the gray Cadillac was seized since it was at the residence. They got a search warrant for the yellow Ford station wagon. A search warrant was not prepared for the Alwyn Leeks' apartment but it was searched because of consent given. Four pairs of shoes were found there (Vol. XXXVIII, TR 4856-57).

The jury returned guilty verdicts on the offenses of burglary, grand theft, shooting at an occupied vehicle, first degree murder and dealing in stolen property (Vol. XLI, TR 5331).

At penalty phase the prosecutor called prison release officer Eston Hunter who testified that Moody was on controlled release at the time of the Scott Mitchell homicide on May 16, 1994 (Vol. XLII, TR 5578). It had a scheduled termination date of November 2, 1997 (TR 5579). The state also introduced victim impact evidence from Christopher Charles Mitchell, Beverly Sue Mitchell and Roy Daniel Mitchell (TR 5585-95). The defense introduced testimony of appellant's sister and brother Barbara Moody and Myron Moody (Vol. XLII, TR 5604-5616; Vol. XLIII, TR 5644) and Myron's wife Teresa Moody (TR 5644-49). The defense decided not to present expert testimony to the jury (TR 5666). The jury recommended death by a vote of nine to three (Vol. XLIII, TR 5794).

The lower court imposed a sentence of death finding three aggravating circumstances - capital felony committed while under a sentence of imprisonment, while engaged in the commission of or flight from a burglary, and committed to avoid or prevent a lawful arrest and gave little or some weight to the mitigators presented (Vol. VIII, R 1214-1225).

This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I. The lower court did not err in denying appellant's motion to suppress evidence. Officer Dowdy stopped appellant's vehicle because he had a reasonable belief - proven accurate - that appellant was driving on a suspended license and the seizure of the stolen gun found therein was proper. The subsequent discovery and seizure of stolen property pursuant to a search warrant was proper. The police recovery of the murder weapon used by Moody was through an independent source, Bruce Foster, and is not attributable either to the initial stop by Dowdy or subsequent search warrant.

ISSUE II. The lower court properly denied the motion for judgment of acquittal as there was sufficient evidence presented for the jury to conclude that appellant was a participant in this premeditated and felony murder.

ISSUE III. The trial court did not err in allowing an alternate juror to be substituted for a juror who became ill. The claim is both procedurally defaulted for the failure to object below and if error was invited and insisted upon by the appellant's request below that such substitution be made. There is no fundamental error present and no evidence or suggestion of coercion by the jury.

ISSUE IV. The lower court's sentencing findings which articulate the presence of the avoid arrest aggravator are amply supported by

the record. This was the dominant motive and no other purpose for the killing is manifest.

ISSUE V. The sentence of death imposed is proportionate. The evidence disclosed the presence of three aggravators, including the avoid arrest aggravator and the mitigation presented was insubstantial with no mental health expert testimony or evidence of abuse or use of drugs and alcohol.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE FOLLOWING THE OFFICERS' STOPPING OF THE VEHICLE DRIVEN BY APPELLANT WHILE ON A SUSPENDED LICENSE.

The Suppression Hearing Testimony and Order

At the hearing on December 21, 1995, Officer Terry Dowdy testified that he has known the appellant Darryl Moody since 1987 or 1989 (Vol. III, TR 343). On May 23, 1994, he and his partner were patrolling a high-crime drug area in the Lincoln Avenue area, dressed as a civilian in an unmarked vehicle. He observed appellant about 4:10 p.m. driving a faded yellow station wagon. Dowdy had not seen Moody for a year or two earlier (he didn't know when appellant had gone to prison or when he had gotten out) but ever since he'd known him appellant has had a suspended driver's license and he'd had occasion to check the records (TR 344-346). Dowdy told his partner Eugene Bly he was driving on a suspended driver's license and needed to get somebody to stop him; they called for a marked unit to stop him and Patrolman Cooper stopped appellant. Dowdy explained that he did not get on the radio to run a check on the license because they would have needed, and did not have, appellant's date of birth. Dowdy and Bly approached the driver Darryl Moody (there were no passengers in his car), asked

for his driver's license and appellant advised it was suspended - he did not have a driver's license (TR 346-348). Appellant was arrested for driving while the license was suspended. The officers started doing an inventory on the car in preparation for its being towed to Tony and Son's Salvage. They noticed some speakers and other items and located a gun in a zipper case stuffed between the driver's door and driver's seat. The gun was seized and the dispatch advised the serial number was a hit, i.e. a reported stolen weapon. But since this gun was a .380 and the dispatch reported the stolen gun as a .38, the officers took possession of it until they could further investigate (TR 349-351). Moody was fingerprinted, photographed and released at the station with a citation and a notice to appear in court. Tony and Sons were informed they could release the car to the registered owner (TR 353). The next day the sheriff's department was advised the gun was suspected of being used in a homicide. Dowdy testified that he would have stopped the defendant under similar circumstances if he had seen him a week or two earlier. It was stipulated that this seized gun was not the murder weapon but a firearm stolen with a car and that car (Brian Upshaw's green Buick) was found at the murder scene (TR 354-355).

The officer further testified that he was not looking for appellant when the encounter took place nor had he any information

that he committed any particular offense; he was aware of the Scott Mitchell homicide but not of any particulars (TR 357). The motive in arresting appellant was not to discover incriminating evidence in the search of the car (TR 362). The parties apparently stipulated that Moody had been continuously in custody from November 4, 1992 to December 28, 1993 (TR 363-364). Court records reflected that appellant's driver's license expired since 1977 and then was suspended since 1984 or 1985. Moody pled guilty or no contest to the charge of driving with a suspended license (TR 365-366).

At a subsequent hearing on May 30, 1996 Dowdy repeated his testimony about the stop and explained the inventory/impound policies. The vehicle was registered to an Emanuel Coleman or a Jerome Leach (Vol. V, TR 673-681). Officer Eugene Bly described his work with Dowdy that day and stated that he took possession of the gun (Vol. V, TR 704-715).

Following those hearings, Judge Young entered an order denying the Motion to Suppress on June 24, 1996 (Vol. V, R 778-784). His order recites:

> "Clearly, this was not a case of random or capricious police activity. Nor was this an "inarticulate hunch" or "unparticularized suspicion" condemned by Terry v. Ohio, supra. Sgt. Dowdy had an articulable, particularized suspicion that the Defendant was committing a criminal traffic offense." (Id. at 782)

Judge Young also ruled the officer’s suspicion was reasonable, that Dowdy knew the defendant had no license at the time of their last encounter, knew that he was inclined to drive without lawful authority and from common experience it is unlikely that driving privileges are restored during incarceration. Thus, it was reasonable to be suspicious that defendant’s driving privileges had not been restored. Since the stop of the vehicle was lawful, the full custody arrest was authorized upon Moody’s admission to having a suspended license and the seizure of the gun was lawful (Vol. V, R 703).[2]

Subsequently, officers obtained search warrants for appellant’s residence at 2430 Lisa Street and his automobile and they received consent to search the apartment where Moody was staying with his girlfriend. Stolen stereo property and other inculpatory evidence was seized pursuant to those searches.

Moody argues entitlement to relief based on State v. Perkins, 760 So.2d 85 (Fla. 2000). On a certified question this Court held that where the identity of a driver is an essential issue that must

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[2]At a subsequent hearing on February 26, 1998 before the judge who ultimately presided at trial, the Honorable Susan W. Roberts, the defense announced that it did not “necessarily attempt to step all over Judge Young’s order” but disagreed with it and would now only update the case law. The defense wanted Judge Roberts to review the prior transcript but did not suggest the need for additional testimony on the stop issue (Vol. VI, TR 853-856). Judge Roberts later announced having read the transcripts of Judge Young’s hearing on December 21, 1995 and others (Vol. XIX, TR 1687).

be proven (as to a prosecution for driving with a suspended license) that identity is subject to suppression if it is discovered as a result of an unlawful search and seizure. The state apparently conceded that the stop was unlawful but urged that knowledge of his name and driving record could not be suppressed under O'Neal v. State, 649 So.2d 311 (Fla. 3 DCA 1995) and Ware v. State, 679 So.2d 3 (Fla. 2 DCA 1996). This Court ruled that O'Neal and Ware reliance on language in INS v. Lopez-Mendoza, 468 U.S. 1032, 82 L.Ed.2d 778 (1984) was misplaced. The Lopez-Mendoza language occurred in the context of a claim that an illegal arrest operated to deprive the immigration court of jurisdiction not in the context of a claim to suppress evidence (indeed he had not objected to evidence offered against him). Unlike Perkins, here the trial court determined that the stop was lawful, that the officers had an articulable reasonable basis for their suspicion as required by Delaware v. Prouse, 440 U.S. 648, 59 L.Ed.2d 660 (1979) including Officer Dowdy's knowledge that appellant had no driver's license in their last encounter and knowledge that appellant was inclined to drive without lawful authority and the unlikelihood that driving privileges are restored during incarceration (Vol. V, R 783).[3] Additionally, this is unlike Perkins because the state is

[3]See United States v. Sokolow, 490 U.S. 1, 7, 104 L.Ed.2d 1 (1989)("We have held that probable cause means 'a fair probability that contraband or evidence of a crime will be found' and the level

not seeking to establish the identity of the driver, a required element in a traffic prosecution; Officer Dowdy knew appellant prior to the stop and Moody's identity as the driver of the car stopped by the officers was not an essential element of the homicide prosecution.

Appellant argues that the trial court's ruling was incorrect citing cases such as State v. Levya, 599 So.2d 691 (Fla. 3 DCA 1992), State v. Wade, 673 So.2d 906 (Fla. 3 DCA 1996), and State v. Carrs, 578 So.2d 120 (Fla. 5 DCA 1990) all of which held that orders suppressing evidence should be reversed under circumstances where the officer's information was more recent. But as the trial court's order indicates broader time frames have been upheld in other jurisdictions and there is no bright line time period. See State v. Gibson, 665 P.2d 1302 (Utah 1983)(officer had reasonable suspicion driver's license still revoked fifteen months after prior encounter); State v. Duesterhoeft, 311 NW.2d 866 (Minn. 1981)(stop based on information of a month earlier upheld; it was not the product of whim or caprice or desire on the part of the officer to harass the defendant who reasonably believed the driver's license was still under revocation and no Fourth Amendment violation); Stewart v. State, 469 S.E.2d 424 (Ga.App. 1996)(stop by officer who

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of suspicion required for a Terry stop is obviously less demanding than for probable cause"); State v. Malone, 729 So.2d 1008 (Fla. 5 DCA 1999).

had previously encountered defendant in court and knows individual did not have a driver's license, had knowledge of a specific articulable fact sufficient to give rise to a reasonable suspicion). See also United States v. Lacy, 119 F.3d 742 (9th Cir. 1997)(Information relied on was ten months old in a possession of child pornography prosecution and the information in support of the application for a search warrant not deemed stale since the lapse of time is not controlling but must be viewed in the light of the particular facts of the case).

Additionally, at least one court has observed that the "staleness" argument refers to whether there is probable cause to believe a crime is being committed or about to be committed in order to support a search, not to the well-founded suspicion necessary to support the investigatory stop of a vehicle. See Denton v. State, 524 So.2d 495, 498 (Fla. 2 DCA 1988), rev. denied, 534 So.2d 398 (Fla. 1988):

> "The staleness" argument relates to whether information relied upon to establish probable cause to support a search is too stale to indicate that a crime is being committed or is about to be committed. The "staleness" principle is not fatal to the establishment of a reasonable, well founded suspicion necessary to support the investigatory stop of a vehicle."

It must be emphasized that the Fourth Amendment is concerned with reasonableness; only unreasonable searches are proscribed by

the Fourth Amendment. An officer would be derelict not to make inquiry and to allow someone whom he has always known to drive on a suspended license to continue to do so when he sees him, and thus to endanger others properly using the roads and streets. Here, the officer engaged in a limited stop to determine if Moody had a valid license. The officer was not otherwise attempting to discover incriminating evidence, nor trying to harass the driver, nor was he impermissibly relying on the report of an anonymous tipster, whose reliability and the accuracy of the information provided was unknown to him. The officer's reasonable beliefs were confirmed by this brief stop and necessitated issuing a citation for a court appearance.[4] See Voorhees v. State, 699 So.2d 602, 610 (Fla. 1997)(suppression of evidence obtained in violation of the Fourth Amendment is a judicial remedy imposed to promote two purposes: (1) deterring police misconduct and (2) maintaining the integrity of the judicial system. Issue of exclusion is separate from whether the Fourth Amendment has been violated and exclusion is appropriate only if the remedial objectives of the rule are thought most efficaciously served).

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[4]Appellee would submit that officers Dowdy and Bly upon the discovery that the Davis P380 gun in Moody's station wagon matched the serial number of a gun reported stolen (from Upshaw) had probable cause at that point to arrest Moody for possession of stolen property and to seize the stereo equipment in his vehicle which was subsequently identified as Upshaw's stolen property even if the officers acted more cautiously in waiting to check out the discrepancy in the description of the weapon between .38 and .380.

But even if the stop were somehow deemed impermissible, there are limits to the fruit of the poisonous tree doctrine, e.g. attenuation, independent source, and inevitable discovery. See U.S. v. Bailey, 691 F.2d 1009 (11th Cir. 1982). Under the independent source doctrine,[5] the actual murder weapon - the .38 Rossi stolen from the Teresa Carmichael vehicle - is not subject to suppression since it was not recovered either by the stop or from the subsequently-issued judicially approved search warrant. Rather, the murder weapon was provided to police by the independent actions of Bruce Foster who purchased the gun from Moody for sixty dollars and he stepped forward on his own volition to provide this evidence. It is not a fruit of any poisonous tree.

Also, once Bruce Foster came forward with the murder weapon he had purchased from appellant and upon informing law enforcement authorities of Moody's having sold it to him, clearly the officers would then have obtained search warrants and recovered the stolen materials in the residence and automobile. Thus, under the inevitable discovery doctrine the material would still have been seized. See Nix v. Williams, 467 U.S. 431, 81 L.Ed.2d 377 (1977).

Finally, the material recovered at the Alwyn Leeks' apartment was properly retrieved pursuant to the consent she gave to officers

[5] See Murray v. United States, 487 U.S. 533, 101 L.Ed.2d 472 (1988) discussing the independent source doctrine.

to conduct a search after discussing the matters with her father (SR Vol. I, TR 62, 77, 85, 98).

ISSUE II

WHETHER THERE IS SUFFICIENT EVIDENCE TO ESTABLISH APPELLANT'S GUILT.

In Woods v. State, 733 So.2d 980, 985 (Fla. 1999) this Court reiterated the standard courts must apply in considering motions for judgment of acquittal:

> In *Gordon v. State*, 704 So.2d 107 (Fla. 1997), we reemphasized the standard courts must apply in considering motions for judgment of acquittal:
>
> > We have repeatedly reaffirmed the general rule established in *Lynch v. State*, 293 So.2d 44 (Fla. 1974), that:
> >
> > > [C]ourts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law.
> >
> > *Id.* at 45; *see Gudinas v. State*, 693 So.2d 953 (Fla. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 345, 139 L.Ed.2d 267 (1997); *Barwick v. State*, 660 So.2d 685 (Fla. 1995); *DeAngelo v. State,* 616 So.2d 440 (Fla. 1993); *Taylor v. State*, 583 So.2d 323 (Fla. 1991). In circumstantial evidence cases, "a judgment of acquittal is appropriate if the State fails to present evidence from which the jury can exclude every reasonable hypotheses except that of guilt." *Barwick,* 660 So.2d at 694.
> >
> > Therefore, at the outset, "the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences." *Barwick*, 660 So.2d at 694. After the judge determines, as a matter of law, whether such competent evidence exists, the "question of whether the evidence is inconsistent with any

> other reasonable inference is a question of fact for the jury." *Long v. State*, 689 So.2d 1055, 1058 (Fla. 1997).
>
> *Gordon*, 704 So.2d at 112-13; *see also State v. Law*, 559 So.2d 187, 188-89 (Fla. 1989) (applying circumstantial evidence rule to determination of motion for judgment of acquittal). On review, we must view the conflicting evidence in a light most favorable to the state. *See Peterka v. State*, 640 So.2d 59, 68 (Fla. 1994). So long as competent, substantial evidence supports the jury's verdict, it will not be overturned on appeal. *Id.*
>
> [4-7] Premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose 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.
>
> *Wilson v. State*, 493 So.2d 1019, 1021 (Fla. 1986). Premeditation may be established by circumstantial evidence. *See id.; Holton v. State*, 573 So.2d 284, 289 (Fla. 1990). Such evidence of premeditation includes "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." *Spencer v. State*, 645 So.2d 377, 381 (Fla. 1994).

See also Barwick v. State, 660 So.2d 685, 694-95 (Fla. 1995); Orme v. State, 677 So.2d 258, 261-262 (Fla. 1996); Beasley v. State, ___ So.2d ___, 25 Fla. L. Weekly S915 (October 26, 2000, Case No. SC93310)(motion for judgment of acquittal properly denied in this circumstantial evidence case and there was competent, sufficient evidence to support the jury verdict both for premeditated and felony murder).

Of course, a judgment of conviction can be upheld, even if premeditation is lacking, on a felony murder theory. See G.W. Brown v. State, 644 So.2d 52 (1994); Mungin v. State, 689 So.2d 1026 (Fla. 1995); Jackson v. State, 498 So.2d 406 (Fla. 1986). In the instant case the jury returned guilty verdicts for the offenses of burglary, grand theft, shooting at an occupied vehicle, first degree murder, and dealing in stolen property (Vol. VII, R 1033-34; Vol. XLI, TR 5331-32). The burglary, of course, suffices as a predicate felony for felony-murder.

No citation of authority is needed for the proposition that premeditation may be established by circumstantial evidence. Woods v. State, 733 So.2d 980 (Fla. 1999); Spencer v. State, 645 So.2d 377 (Fla. 1994); Esty v. State, 642 So.2d 1074 (Fla. 1994); Provenzano v. State, 497 So.2d 1177 (Fla. 1986).

The victim Scott Mitchell was murdered when, and because, he came upon appellant Moody and his companion - in the process of stripping the green Buick stolen from its owner Bryant Upshaw earlier in the morning of May 16, 1994 - as Mitchell patrolled the orange groves he managed for his father. The victim received a fatal gunshot wound, execution-style, at close range to the forehead (the wound left gunshot residue and stippling) according to pathologist Dr. Melamud (Vol. XXVII, TR 2935) after Mitchell had attempted to escape the scene he had come upon by backing up his vehicle some fifty feet from the Buick (Vol. XX, TR 1859).

Mr. Mitchell was not robbed. His body was discovered in the vehicle with a watch, ring, and wallet totaling three hundred and twelve dollars untaken (Vol. XXI, TR 1893-94). The gun used to inflict the fatal wound to the forehead was a .38 Rossi special which had been taken from a vehicle which was owned and stolen from Teresa Carmichael on April 10th.[6] That vehicle was recovered having been abandoned 16.4 miles from where it was stolen but only 7/10 of a mile from appellant's and his mother's residence at 2430 Lisa Street (Vol. XXII, TR 2180-87; Vol XXII, TR 2204-05; Vol. XXXV, TR 4359-60). The Upshaw stolen green Buick was left at the orange grove murder site near Mitchell and his pickup truck. One week after the Mitchell killing, on May 23, Lake Wales police officers Dowdy and Bly stopped appellant as he drove his yellow Ford station wagon in the belief that he was driving on a suspended license. After confirmation of that fact they gave him a citation, impounded the vehicle (Moody was not the registered owner of the vehicle) and inventoried its contents. The only item seized was a Davis P 380 handgun in a zippered container. The serial number on this firearm matched on the computer showing it to be stolen (Vol.

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[6]Additionally, evidence at the crime scene indicated that four bullets had been fired at Mitchell or his vehicle. One bullet hit the left front fender, and ricocheted off and hit the windshield; it was not recovered. A second bullet entered the driver's door and was recovered inside the vehicle between outside and inside of the door. A third bullet struck the victim in the left temple - it was not fired at close range - and was recovered at the autopsy by Dr. Melamud (Vol. XX-XXI, TR 1862, 1896, 1905; Vol. XXVII, TR 2934-48). The gun firing these bullets was not recovered.

XXIII, TR 2359-70; TR 2388-2412). This Davis P 380 gun was owned by Bryant Upshaw and had been stolen along with the green Buick where he kept it (Vol. XXVII, TR 3031-41). His auto and gun were reported stolen in the early morning hours of May 16 (Vol. XXVII, TR 3063-69). Upshaw's green Buick remained at the scene of the Mitchell homicide later that afternoon on May 16, as noted supra.

Appellant Moody had been observed by various people in possession of the .38 Rossi revolver both before and after the Mitchell killing. After the theft of the Carmichael vehicle and gun (and before the Mitchell homicide) Moody was seen by witnesses in mid-April at the Conversation Club: Bruce Foster saw appellant with this .38 revolver tucked into his pants (Vol. XXVIII, TR 3102-3106) and later bought it from him (TR 3112); Vincent Crawford and Roddis Dewdney similarly agreed that appellant had a black revolver .38 type caliber at the Conversation Club (Vol. XXX, TR 3548-49; Vol. XXXI, TR 3597-98).

Darron Moore told William Wedge that he believed he had seen the .38 revolver that might be the murder weapon, previously in the possession of appellant and that he had seen appellant driving the Cadillac and Dexter Moody driving the Buick between 2 and 6 AM on May 16 (the day Mitchell was killed) (Vol. XXXV, TR 4395-96). Other witnesses had observed in the late morning or noontime on May 16, two vehicles, a Buick and Cadillac, driving and stopping in the orange grove area before the victim was killed there - Retha Cotton

described a silver Cadillac car go by with a green car behind it between 10:30 AM and 12 (Vol. XXIV, TR 2430-35) and later identified Dexter Moody's silver Cadillac at the salvage yard (TR 2443). Her husband Johnny Cotton also recalled seeing the silver Cadillac and identifying it (TR 2481-91). Terry Stevens who had gotten stuck on Pond Lake Road recalled seeing two vehicles, a large green one and a Brougham (TR 2501-09).

Following Moody's auto stop on the suspended driver's license on May 23, he reported to Bruce Foster that something had happened earlier that day, that the police had gotten a .380 out of his car, that he needed money and sold him the Rossi .38 for sixty dollars (Vol. XXVIII, TR 3116-33). When Foster mentioned that was the same gun he'd seen appellant with at the Conversation Club, Moody warned him to be careful, that the gun had been through a lot of stuff (TR 3137). Appellant also told Tyrone Seege that his car was impounded and he was worried about a gun that might still be in it (Vol. XXX, TR 3442). On May 24, the law enforcement officers realized that the stolen gun recovered in the stop of Moody's station wagon (the Davis P 380) had belonged to Upshaw whose stolen green Buick was left at the homicide scene. They obtained search warrants for the residence where he stayed with his mother, and for his Ford station wagon and also received consent to search the Alwyn Leeks' residence at 305 First Street where he occasionally stayed with his girlfriend. Those searches led to the recovery of Bryant Upshaw's

stereo and audio equipment and other evidence. Dexter's gray Cadillac was impounded and appellant was arrested for possession of stolen property on May 24. (TR 4327)

On May 25 Bruce Foster approached deputy Tim Ellis and indicated a desire to turn over a gun used in the homicide and told Ellis where he could locate what turned out to be the .38 Rossi special which he had purchased from appellant. Initially he made up a story that he had purchased it from two others. Foster explained that he was hopeful this misinformation would lead the police to release appellant and to stop their seeking Dexter Moody, but ultimately he revealed Moody's sale of the gun to him when police did not believe his original story. (TR 3151-68)

Additional evidence submitted at the trial below included a pair of Sierra boots recovered in the bedroom of Alwyn Leeks - where appellant stayed with Sherita Leeks - that may have left the impression at the scene of the homicide. Bryant Upshaw identified the stolen items from his car: including Fosgate amplifier, equalizers, speaker noise suppressor subsequently found either in appellant's Ford station wagon or Dexter Moody's Cadillac or residence where appellant stayed.

Appellant argues that the evidence fails to exclude a reasonable hypothesis that the crimes were committed by someone other than appellant Moody, and his suggested candidates include Dexter Moody and Bruce Foster. Initially Moody urges that the

evidence establishing his possession of the .38 Rossi murder weapon both before and after the murder should be rejected because - he claims - the sighting of Mr. Moody with the gun at the Conversation Club may have been on April 9 whereas it was not yet stolen from Mrs. Carmichael's car until April 10. Moody's subsequent warning to Bruce Foster when he sold him the gun that it had been through "a lot" was equivocal and may have meant it had been through a lot with someone else. This claim is meritless. The testimony about the Conversation Club incident was somewhat imprecise on the exact date. Vincent Crawford stated he saw Dowdy with the gun at the club "around" the second weekend in April, "around that time frame" (Vol. XXX, TR 3545-46). Roddis Dewdney stated that the incident at the Conversation Club was "after black beach week" (Vol. XXXI, TR 3594-95). Teresa Carmichael woke up on Sunday morning April 10 and discovered that her car was stolen, along with the .38 Rossi she left inside it (Vol. XXII, TR 2182). Bruce Foster did not provide a date when testifying about seeing Dowdy with the gun at the Conversation Club (Vol. XXVIII, TR 3095-3112). Obviously, the fact finder could permissibly conclude that the Conversation Club incident occurred on a Saturday after April 10.

Appellant also attacks the credibility of witness Bruce Foster who stated that he purchased the same gun from Moody after the homicide that he had seen earlier with him at the club. Credibility choices are of course for the finder of fact; appellate

courts are at a disadvantage in gauging the testimony of witnesses they do not see or hear. See State v. Spaziano, 692 So.2d 174, 178 (Fla. 1997); Wainwright v. Witt, 469 U.S. 412, 434, 83 L.Ed.2d 841, 858 (1995)(quoting from an earlier case that "face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded"). Suffice it to say the jury heard and decided which witnesses were credible. See also Creamer v. Bivert, 214 Mo. 473, 113 S.W. 1118, 1120-121 (Mo. 1908):

> "We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness, may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify."

Witness Bruce Foster was familiar with guns since he had owned

a few (Vol. XXVIII, TR 3107-08). He saw Moody with a loaded .38 revolver (TR 3106-08), had not seen Moody's .38 before and the next time he saw this gun was when he bought it (TR 3111-12), and when appellant mentioned that police had gotten a .380 out of his car Foster had not seen a .380 (TR 3118). Vincent Crawford's trial testimony was that appellant had a black revolver type about the size of a .38 (Vol. XXX, TR 3548-51).[7] The fact finder was not required to disbelieve the testimony presented simply because a witness described the color of the pouch as brown or black. Dexter Moody was not seen with this gun. While appellant did not explain to Bruce Foster what he meant by the gun had been through "a lot", the jury could attach whatever weight they chose to appellant's warning to be careful.

Appellant next contends that while various items taken from the Upshaw stolen vehicle found at the scene of the homicide in the orange grove were found in appellant Moody's car and other stolen items were found in a bedroom that appellant was known to occupy, that is insignificant since similar stolen items were also found in the Dexter Moody vehicle, and he argues the state failed to show how appellant came into possession of these items. Appellee acknowledges that at trial - certainly in closing argument - the state urged that appellant did not act alone and was aided by

[7]Darron Moore also related to Deputy Bowen that he saw appellant with this gun on April 13 and on a later date saw that gun with Bruce Foster (Vol. XXXV, TR 4365).

Dexter Moody in the burglary of the Upshaw vehicle in the orange grove when Scott Mitchell was killed. But appellant and not Dexter Moody was in possession of the .38 Rossi murder weapon both before and after the killing and owned the Sierra boots which left an impression at the scene of the homicide. As for appellant's hypothesis submitted here that Bruce Foster was the perpetrator, that contention must be rejected since not only did Foster not have any transportation available to commit the theft of the Upshaw vehicle but also he did not have the murder weapon until after the homicide and Foster had an alibi - he was at the Bartow juvenile court with his mother at 11:45 a.m. on May 16 (Vol. XXX, TR 3561-62; Vol. XXVIII, TR 3169-3171) and thus the jury could permissibly conclude on the totality of evidence that he could not have been one of the parties driving the Buick or Cadillac, seen by Mr. and Mrs. Cotton and Mr. Martinez, into the orange grove between 10:30 and twelve noon (Vol. XXIV, TR 2430-37), TR 2481-85; Vol. XXIII, TR 2333-34).

Appellant suggests that Tyrone Seege somewhat afforded an alibi. A closer reading of his testimony reveals otherwise. He thought he saw appellant washing his car (the station wagon) the same day he saw Dexter putting stereo equipment into his Cadillac but he couldn't remember if it was Monday, May 16 or Tuesday, May 17 (Vol. XXX, TR 3459-61).

Appellant next posits that the Sierra boots found in the

bedroom he shared with Sherita Leeks at the Alwyn Leeks apartment could have been worn by Dexter Moody. But there was testimony that appellant Darryl Moody was the better fit on these shoes (Vol. XXXIV, TR 4172). Moreover, Alwyn Leeks testified that Dexter Moody only spent the night on two occasions at the apartment and would sleep on the living room couch not on the bunk beds (Vol. XXX, TR 3488) in contrast to appellant's frequent staying overnight and sleeping in the bunk bed of the bedroom where the boots were found (Vol. XXX, TR 3485; Vol. XXIV, TR 2557).[8] Bruce Foster, by the way, had a size 12 shoe (Vol. XXXV, TR 4384). Finally, that Dexter Moody may also have been a participant in the burglary of the Upshaw vehicle in the orange grove and the shooting death of Scott Mitchell in concert with appellant Darryl Moody is not a reasonable hypothesis of innocence; rather, Darryl remains equally culpable as a principal. See e.g. Hall v. State, 403 So.2d 1321 (Fla. 1981).

While it is true that appellant did not leave the Polk County area, even after being stopped by Officers Dowdy and Bly and that Dexter Moody fled before police could effectuate his arrest when they arrested appellant on May 23, 1994, that fact is misleading in the absence of additional clarifying points, the most important of which was opportunity on the day of arrest. When appellant was stopped in his vehicle the afternoon of May 23 (a week after the

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[8]Defense soil expert witness explained on cross-examination that it would be too much speculation to say that the Sierra shoes were not anywhere close to the area where the soil samples were collected (Vol. XXXII, TR 3878).

Mitchell murder) he would have had no reason to flee up to that point since there was no connecting him to that crime. Obviously his concern began at that point - as he indicated to others - since he left the Upshaw stolen gun in that car and it was the Upshaw stolen car abandoned at the murder scene. But it was only a day later - on the 24th - that law enforcement had put it all together, obtained search warrants and placed the residence on surveillance. Appellant was arrested that day when execution of the search warrants resulted in discovery of the other stolen property. Dexter Moody was simply luckier. When the police arrived he was able to leave unobtrusively on a bicycle (Vol. XXVIII, TR 3151). Both appellant and Dexter Moody, when subsequently apprehended, waived Miranda and talked freely in denying culpability (Vol. XXXVI, TR 4428-29). Consequently, that appellant was apprehended without an escape attempt is not significant. Once competent evidence has been submitted to the jury - as here - determining the credibility of witnesses is solely within the province of the jury. Woods, 733 So.2d at 986; Davis v. State, 703 So.2d 1055, 1060 (Fla. 1997); Terry v. State, 668 So.2d 954, 962, n. 9 (Fla. 1996); Holton v. State, 573 So.2d 284, 290 (Fla. 1990); Carter v. State, 560 So.2d 1166, 1168 (Fla. 1990). This Court should affirm.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN ALLOWING AN ALTERNATE JUROR TO BE SUBSTITUTED FOR A JUROR WHO BECAME ILL AFTER DELIBERATIONS HAD BEGUN?

(A) No relief is available as the claim is both procedurally barred and was invited by the defense.

The record is abundantly clear that the replacement of juror Fagan with juror Martin has not been preserved for appellate review by contemporaneous objection below and by argument therein that substitution would be improper. *See generally* Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Mordenti v. State, 630 So.2d 1080 (Fla. 1994); San Martin v. State, 705 So.2d 1337, 1345 (Fla. 1997) ("we note that San Martin's intelligence level was never argued to the trial court as a basis for suppressing the statements. Thus, that issue is not available for appellate review."); Hazen v. State, 700 So.2d 1207, 1211 (Fla. 1997)(issue regarding admissibility of witness' statements about Hazen staring during a pre-trial hearing procedurally barred for lack of a contemporaneous objection, although asserted in motion in limine prior to witness' testimony); Lindsey v. State, 636 So.2d 1327, 1328 (Fla. 1994) (When the sister testified some three witnesses after the proffer of Williams Rule evidence, Lindsey did not object specifically to her testimony about the car accident and claim was procedurally barred. Because Lindsey failed to object to the testimony when given and on the ground now argued, he failed to

preserve this issue for review.); Correll v. State, 523 So.2d 562, 566 (Fla. 1988)(challenge to introduction of similar fact evidence "is not properly before this Court because of defense counsel's failure to object to the testimony at trial. Even when a prior motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review.")(emphasis supplied); Lawrence v. State, 614 So.2d 1092, 1094 (Fla. 1993) (same); Norton v. State, 709 So.2d 87 (Fla. 1997) (appellant's motion for mistrial at the close of the witness' testimony insufficient to preserve issue for appellate review); Pomeranz v. State, 703 So.2d 465, 470 (Fla. 1997) (failure to object to collateral crime evidence when it is introduced violates contemporaneous objection rule and waives the issue for appellate review); Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994) (failure to object at time collateral crimes evidence is introduced waives issue for appellate review, even where prior motion in limine relating to that evidence has been denied); Feller v. State, 637 So.2d 911 (Fla. 1994); Harmon v. State, 527 So.2d 182 (Fla. 1988); Perez v. State, 717 So.2d 605 (Fla. 3DCA 1998) (opinion granting rehearing holding that following the Criminal Reform Act of 1996 the appellant's failure to preserve the Williams-Rule claim by contemporaneous objection precluded reversal on appeal); Chandler v. State, 702 So.2d 186, 195 (Fla. 1997) (failure to renew objection contemporaneously at the time of the testimony precludes

review); Zack v. State, 753 So.2d 9, 22 (Fla. 1999). *See also* Goodwin v. State, 751 So.2d 537, 544 (Fla. 1999):

> Our appellate cases are filled with examples of errors that are unpreserved either because no objection was made[6] or because the objection was not specific.[7] If the error is "invited,"[8] or the defendant "opens the door" to the error, the appellate court will not consider the error a basis for reversal.[9] In addition, if it is alleged that evidence has been improperly excluded and the appellate record does not establish that a proffer has been made, the lack of an adequate record will be grounds to affirm.[10] Indeed, our case law is filled with procedural pitfalls that may preclude an error from being considered on appeal. (footnotes omitted)

See also Rhodes v. State, 638 So.2d 920, 926 (Fla. 1994) (defendant waived objection to erroneous instruction by defense counsel's failure to object to curative procedure); Sexton v. State, ___ So.2d ___, 25 Fla. L. Weekly S818 (Fla. 2000).

Moreover, the instant claim was not only unobjected to; the asserted error was requested as a basis for relief by trial defense counsel. A challenge to such invited error should not be countenanced. See McPhee v. State, 254 So.2d 406 (Fla. 1971)(defendant estopped from asserting that trial judge committed fundamental when it was defendant's motion which induced the erroneous action taken); State v. Belien, 379 So.2d 446, 447 (Fla. 3 DCA 1980) ("In other words, 'gotcha!' maneuvers will not be permitted to succeed in criminal, any more than in civil litigation"); Goodwin, supra. Consider the following

representations made by trial defense counsel below:

> MR. TOWARD: Your Honor, I really thought yesterday when I was doing closing argument and even a little bit this morning when she walked in she looked ill. The look in her face and the look in her eyes looked very stressed to me.
>
> If she's indicating to this Court that she is not feeling well and is not mentally and physically, or physically, capable of continuing, I would suggest, and in fact I would request on behalf of the defense that she be sent home and Ms. Martin be brought in because we run the risk at this point in time of continuing on for several more hours or whatever it's going to take and then losing her anyway. If we're going to lose her, I'd just as soon do it now, get the alternate in and let's continue.
>
> THE COURT: Well, I checked on Ms. Martin because I didn't know but what it might not come to that, and I've spoken to her and she said she could come back today.
>
> MR. TOWARD: I would request that we do that. I'm concerned about Ms. Fagan based upon what I saw yesterday and to a lesser degree this morning. I didn't see her as long this morning. But we could be just throwing good time after bad if we try to push this thing forward with her and we end up losing her anyway. (Vol. XLI, TR 5310-11)
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> MR. TOWARD: I'm still inclined to request that a substitution be made.
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> \+ +
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> MR. TOWARD: Your Honor, my observation of Ms. Fagan is that in all likelihood she is very close to having some sort of nervous breakdown. I believe that she is just about mentally shut down and is totally incapable of serving on this jury.
>
> THE COURT: You do?
>
> MR. TOWARD: Yes, ma'am, I do.

> THE COURT: Well, report for the record what you see that makes you come to that conclusion.
>
> MR. TOWARD: She was unable to focus on you, she was crying, she could not respond verbally to any question. The question that she did respond to was just about unintelligible and the court reporter couldn't even get it down. Even when the words were articulated the thought itself made very little sense, although I think we were able to gather that she said whenever she gets in stressful situations she usually has to rest.
>
> This apparently is not the first time that this sort of thing has happened to her. She indicated that she has reactions of this sort whenever she is in stressful situations.
>
> She, to me, just mentally was unable to cope even with the simplest of questions that were being posed to her and could not even verbally respond. All she did was just nod or shake her head and she wasn't even doing that very well. (TR. 5317-18)
>
> \+ +
>
> MR. TOWARD: Your Honor, that may be strong language but I think what it amounts to is I think that she is on the verge of being completely incapacitated for the purpose of serving as a juror because that requires a level of mental acuity and thinking and rationalizing and being able to assert your position, whatever that position might be, pro, con, or some place in the middle, and I do not see that Ms. Fagan is able to assert anything to anyone about any decision she's made concerning this evidence. And in that regard to me she is rendered totally ineffective and unfit to serve as a juror. (TR. 5319-20)

When the Court agreed juror Fagan could not continue to serve, counsel answered that he had no objection to the Court's excusing her (TR 5325). Subsequently at the Spencer hearing on October 5,

1998, defense counsel repeated (Vol VIII, R 1166):

> First of all, I acknowledge that the record reflects that it was the defense's request that Ms. Fagan be released and Ms. Martin be brought in due to her obvious physical condition. I think I even noted that based upon my observations I was fearful she was going to have a mental breakdown or a stroke. I was that concerned about her welfare. So I acknowledge that.

(B) There is no fundamental error present:

Appellant is not entitled to relief under Rule 3.280 R.Cr.P. Subsection (a) provides for the discharge of an alternate juror in a non-capital case when the jury retires to consider its verdict and subsection (b) explains that in a capital case the alternate juror(s) will be excused with instructions to return for an additional hearing should the defendant be convicted of a capital offense. In Sotola v. State, 436 So.2d 1001 (Fla. 5 DCA 1983) - a non-capital case - the district court ruled that there was no constitutional impediment to substitution of a juror after commencement of deliberations "and it is not fundamental error to permit it in the absence of timely and proper objection". Id. at 1009. See also United States v. Phillips, 664 So.2d 971 (5th Cir. 1981) (substitution of an alternate juror after deliberations have begun is not so inherently coercive that a per se reversal rule is warranted); Accord, U.S. v. Register, 182 F.3d 820, 843 (11th Cir. 1999); People v. Collins, 17 Cal. 3d 687, 131 Cal. Rptr. 782, 552 P2d 742 (1976), cert. denied, 429 U.S. 1077 (1977); U.S. v.

Acevedo, 141 F.3d 1421, 1425, n. 7 (11th Cir. 1998); U.S. v. Guevera, 823 F.2d 446, 448 (11th Cir. 1987); United States v. Kopituck, 690 F.2d 1289, 1308-1310 (11th Cir. 1982).

The trial court in the instant case agreed with the defense suggestion that when alternate juror Martin returned that the jury should be told to begin their deliberations anew and they were so instructed (Vol. XLI, TR 5327-29).

Moody relies on McGill v. State, 468 So.2d 356 (Fla. 3 DCA 1985) and appellee submits such reliance is unavailing. There, an alternate juror was seated after being discharged and the jury had begun its deliberations. Before leaving the alternate told the judge ex parte that he would have found the defendant guilty. Forty minutes later a juror was discharged because he was not sufficiently fluent in English to discharge his duties as a juror. The defendant refused to stipulate to a continuation of the deliberations with only five jurors and the court granted the state's motion to seat the discharged alternate juror over defense objection. On appeal, the district court determined that on the facts of the case reversal was required because of the alternate juror's having formed an opinion on guilt before joining the deliberation and expressing that opinion prior to entering into deliberations. The alternate juror sub judice did not have or express any opinion prior to deliberations.

Appellant's claim that the court violated same "condition"

with defense counsel is meritless. When the trial court ruled that following the emergency medical technician report that juror Fagan was manifestly unable to carry out her responsibilities as a juror (TR 5325), the court wondered whether it was appropriate to give alternate juror Martin any instruction. Defense counsel was comfortable with the fact that she had simply gone home and gone to bed without talking to anyone or doing anything. Defense counsel suggested that on Martin's arrival they adjourn and allow the jurors to go to the motel room. Counsel did not mind if the court asked the jurors and counsel even indicated the jury "may want to take a time to kind of bring her up to date or talk to her about what's been going on and that sort of thing" (TR 5326-27). The defense agreed it was "fine" for the court to ask the jury what they wanted to do, ask if they wanted to adjourn to their respective motel rooms for the evening or to continue (TR 5327). The court agreed with the prosecutor's suggestion to tell the jury to begin their deliberations anew and leave it up to them whether to continue or recess that night (TR 5328). The court instructed the jury to start over again and the options included deliberating, have supper or start in the morning. The jury retired to the jury room, returned to the court and announced a desire to continue for a little bit and the court provided dinner menus. The jury returned with its verdict at 8:45 p.m. (TR 5329-30). There was no violation of any defense condition.

Appellant relies on United States v. Lamb, 529 F.2d 1153 (9th Cir. 1975) which involved a substitution over defense objection. The substitution occurred after the return of a guilty verdict which the judge refused to accept because of his belief that the verdict was inconsistent with the instruction given. After twenty-nine minutes of deliberations the newly-constituted jury found defendant guilty a second time and the appellate court commented on the inherent coercive effect upon a juror who joins a jury that has already agreed on the accused's guilt.[9]

As this Court noted in Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970), fundamental error which can be considered on appeal without objection in the lower court is error which goes to the foundation of the case or goes to the merits of the cause of action. The Appellate Court shall exercise its discretion under the doctrine of fundamental error very guardedly. As explained, supra, the substitution of an alternate juror - as requested and

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[9]The Ninth Circuit decision in U.S. v. Lamb, 529 F.2d 1153 (9th Cir. 1975) has been criticized and questioned. See, e.g. U.S. v. Hilliard, 701 F.2d 1052, 1059 (2nd Cir. 1983) (unlike the situation in Lamb, there is no suggestion in the record of a coercive effect on the alternate juror); U.S. v. Jesefik, 753 F.2d 585, 588 (7th Cir. 1985) (noting that no other circuit has followed the Lamb dictum that a violation of Federal Rule 24 cannot be waived and that even panels of the Ninth Circuit have repeatedly rejected it). See also U.S. v. Foster, 711 F.2d 871, 886 (9th Cir. 1983) (court declined to presume that the jury failed to follow the court's instructions when it properly instructed the newly-constituted jury to begin deliberations anew); U.S. v. Crisco, 725 F.2d 1228, 1233 (9th Cir. 1984) (Lamb was a case suggesting impermissible coercion on the alternate juror after substitution made but her it is permissible for parties to stipulate to substitute alternate juror when good cause shown).

urged by the defense - does not constitute error going to the foundation of the case nor does it constitute a violation of due process (especially where there has been no indication of coercion). Appellant's claim must be rejected.

ISSUE IV

WHETHER THE RECORD SUPPORTS A FINDING OF THE AGGRAVATOR THAT THE HOMICIDE WAS COMMITTED TO AVOID OR PREVENT A LAWFUL ARREST.

The trial court's sentencing findings recite:

> 3. The crime for which defendant is to be sentenced was committed to avoid or prevent a lawful arrest.
>
> The facts show that the victim was acting in his capacity as overseer of a citrus grove and came upon the burglary of an automobile. The evidence demonstrates that the victim tried to escape and put his truck in reverse and rapidly backed out of the area. The evidence indicates that the victim had his cell phone in his lap and did not have any weapon in either hand. The evidence indicates that the only threat to the defendant presented by the victim was that of identification. The evidence also shows that the gun known to be carried by the Defendant expelled a projectile from close range into the forehead of the victim. The facts also show that another gun was used by an unknown person to shoot the victim from a greater distance. The shots were fired in close proximity to each other. Either shot rendered the victim unconscious and each shot was fatal. The victim died immediately. Defendant killed the victim to avoid or prevent his lawful arrest. This aggravating factor was proved beyond a reasonable doubt. The Court considered this aggravating circumstance and gave it great weight.

(Vol. VIII, R 1216)

This Court has previously articulated that:

> To establish the avoid-arrest aggravator when the murder does not involve a law enforcement officer, the requisite intent to

> avoid arrest must be "very strong," *Riley v. State*, 366 So.2d 19, 22 (Fla. 1978); that is, the proof must demonstrate beyond a reasonable doubt that the victim was murdered solely or predominantly for the purpose of witness elimination. *Urbin v. State*, 714 So.2d 411 (Fla. 1998); *Consalvo v. State*, 697 So.2d 805 (Fla. 1996), *cert. denied*, 523 U.S. 1109, 118 S.Ct. 1681, 140 L.Ed.2d 819 (1998).

Rodriguez v. State, 753 So.2d 29, 47-48 (Fla. 2000)

And in Jones v. State, 748 So.2d 1012, 1027 (Fla. 1999) this Court reiterated that:

> We have previously held that when the victim is not a law enforcement officer, the evidence must demonstrate "beyond a reasonable doubt that the victim was murdered solely or predominantly for the purpose of witness elimination." *Knight v. State*, 721 So.2d 287, 298 (Fla. 1998) (quoting *Urbin v. State*, 714 So.2d 411, 416 (Fla. 1998)). The aggravator can be based on circumstantial evidence. *See Preston v. State*, 607 So.2d 404, 409 (Fla. 1992); *see also, e.g., Urbin,* 714 So.2d at 416; *Consalvo v. State*, 697 So.2d 805, 819 (Fla. 1996), *cert. denied*, 523 U.S. 1109, 118 S.Ct. 1681, 140 L.Ed.2d 819 (1998).

Accord, Hall v. State, 614 So.2d 473, 477-478 (Fla. 1993) (circumstantial evidence can be used to prove this aggravator... Here, the evidence leaves no reasonable inference except that Hall and Ruffin killed the victim to eliminate the only witness to their having kidnapped and raped her and having stolen her car.)

Moreover, the Court explained in Zack v. State, 753 So.2d 9, 20 (Fla. 2000):

> Application of the "avoiding lawful arrest" aggravator requires strong proof that the dominant motive for the murder was witness

> elimination. *See Mahn v. State*, 714 So.2d at 402. This aggravator has been applied to cases in which the evidence supported a finding that the victim would have summoned the authorities and in cases where the defendant had expressed an apprehension regarding arrest. *See, e.g., Sliney v. State*, 699 So.2d 662 (Fla. 1997) (aggravator justified where defendant testified that his accomplice told him that "Sliney would have to kill the victim because '[s]omebody will find out or something'"); *Peterka v. State*, 640 So.2d 59 (Fla. 1994) (aggravator applicable where defendant, who feared incarceration, had established a new identity which the victim threatened to expose).

The Court found the aggravator inapplicable there but it constituted harmless error.

See also Knight v. State, 746 So.2d 423 (Fla. 1998) (evidence supported conclusion that the defendant executed victims in remote location to avoid arrest after kidnapping and robbing them); Young v. State, 579 So.2d 721 (Fla. 1991)(avoid arrest factor approved; defendant knew he would be arrested when police arrived, victim died trying to keep defendant from fleeing the scene).

In the instant case, the evidence adduced below included the fact that Moody had recently been released from prison and personally instructed on the conditions of his control release (Vol. XLII, TR 5578). Moody was aware that if caught in the commission of any of his crimes his control release would be revoked and he would receive additional years of imprisonment on his prior sentence.

Appellant chose to arm himself to be able to use deadly force

if he were discovered during the commission of his crimes. It seems that appellant chose this area to strip the car because it was an area he believed would be secret (the block of grove being harvested was to the west of this area).

The Buick automobile was partially visible from the roadway as one passed by. Testimony established that several persons did drive by this area of the grove on Monday but none drove into the grove to investigate this Buick. The victim Scott Mitchell drove into the grove to investigate because he felt a sense of responsibility for this block of grove. His father’s company which employed him was responsible for this block of grove. Comparatively speaking, the victim was acting in much the same manner as a law enforcement officer might, i.e. checking into any suspicious activity.

The evidence also established that once Mitchell drove his truck up to the front of the Buick to investigate, he decided to exit rapidly. When his father arrived at the scene and found him dead in the truck, the engine was still running, the truck was in reverse gear and Scott’s foot was on the brake pedal. The victim had driven straight back for approximately fifty feet in an effort to escape the immediate area of the stripped Buick. The mounding of dirt under the truck tires showed the truck had been moving rapidly. There was no effort made by Scott to reach the rifle kept in the truck. The evidence established that Scott was only trying

to escape and was no threat to appellant other than as a witness to his criminal activity.

Two significant facts establish the dominant motive to eliminate Scott as a witness. First, the Rossi .38 gun determined to have been fired at close range into the forehead of Scott was always in the custody of the defendant unless it was under the seat of his station wagon. The other .38 firearm used to shoot Scott in the temple was fired from long range, was fired first and would have disabled the victim allowing appellant to approach very closely and kill him, execution style. Just as the victim was bound and rendered helpless in her own house and murdered when she no longer posed a threat in Willacy v. State, 696 So.2d 693 (Fla. 1997),[10] here victim Mitchell only represented a danger to defendant once he threw the truck in reverse and attempted to flee and be a witness to the crime being committed there. Secondly, there is no other motive to kill; after Scott was killed nothing from his person or truck was taken. If Moody had a motive other than to eliminate Scott as a witness and avoid apprehension by law enforcement officers - appellant's desire to obtain property of value included having stolen the Buick in Orlando under cover of darkness to avoid detection and chosen this remote grove to strip the car, - he would have taken Scott's rifle, phone, wallet and any

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[10]The Court in Willacy explained that "Sather posed no immediate threat to Willacy: she was incapable of thwarting his purpose or of escaping and could not summon help". Id. at 696. (emphasis supplied)

other items of value in the truck. Scott was not the victim of a robbery who was killed; rather, he was killed only because he was acting like a law enforcement officer would and discovered appellant in criminal activity.

In conclusion the instant case satisfied the Knight-Hall removal to a remote location factor since the parties already were in a remote locale selected by the appellant and Scott was immediately killed when attempting to flee the area. Scott himself was not a robbery target or victim but rather killed for no other reasonable, discernable purpose than to stop his flight and his alerting authorities to the criminal activities observed. This aggravator has been established and the lower court committed no error in finding it applicable in the instant case.

ISSUE V

WHETHER THE SENTENCE OF DEATH IS DISPROPORTIONATE.

This Court recently stated in Robinson v. State, 761 So.2d 269 (Fla. 1999):

> Upon review, we find that death is the appropriate penalty in this case. In reaching this conclusion, we are mindful that this Court must consider the particular circumstances of the instant case in comparison with other capital cases and then decide if death is the appropriate penalty. *See Sliney v. State*, 699 So. 2d 662, 672 (Fla. 1997)(citing *Terry v. State*, 688 So. 2d 954, 965 (Fla. 1996), *cert. denied*, 118 S.Ct. 1079 (1998)); *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988). Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances. *Terry*, 668 So. 2d at 965. Following these established principles, it appears the death sentence imposed here is not a disproportionate penalty compared to other cases.*9* (footnote omitted) *See Spencer v. State*, 691 So. 2d 1062 (Fla. 1996); *Foster v. State*, 654 So. 2d 112 (Fla. 1995).

(Id. at 396)

In performing its proportionality review function the Court must "consider the totality of the circumstances in a case and ... compare it with other capital cases." Nelson v. State, 748 So.2d 237, 246 (Fla. 1999); Terry, 668 So.2d at 965. Proportionality review requires a discrete analysis of the facts entailing a qualitative review by the Court of the underlying basis for each aggravator and mitigator, rather than a quantitative analysis. Urbin v. State, 714 So.2d 411 (Fla. 1998); Porter v. State, 564

So.2d 1060, 1064 (Fla. 1990); Beasley v. State, supra. It is not a comparison between the number of aggravating and mitigating circumstances. The Court must consider and compare the circumstances of the case at issue with the circumstances of other decisions to determine if death penalty is appropriate.

The lower court found applicable three aggravating circumstances: (1) defendant was under a sentence of imprisonment (on control release); (2) the capital felony was committed while defendant was engaged in the crime of burglary and (3) the homicide was committed to avoid or prevent a lawful arrest, which was accorded great weight (Vol. VIII, R 1215-16). Appellant argues that this Court should afford lesser "weight" to the first two aggravators because he had been in prison for a property crime and the burglary he was committing during this homicide merely involved acts done to a Buick rather than injury to a person. This argument loses force upon the realization that appellant chose to extinguish a human life - and chose to prepare for such a course of conduct by arming him so that he could complete his venture in the orange grove - for what he now asserts to be insignificant crimes and to avoid returning to prison, demonstrating his unwillingness to learn from his prior unfortunate encounter with the criminal justice system and a willingness to engage in the most callous of acts for his own selfish purposes.

Moreover, proportionality review function is "not to reweigh

the mitigating factors against the aggravating factors; that is the function of the trial judge." Holland v. State, ___ So.2d ___, 25 Fla. L. Weekly S796 (Fla. 2000); Bates v. State, 750 So.2d 6 (Fla. 1999).

In Kearse v. State, ___ So.2d ___, 25 Fla. L. Weekly S507, 512 (Fla. 2000) the Court after reiterating that proportionality was not a comparison between the number of aggravating and mitigating circumstanced added:

> In the instant case, Kearse claims that the robbery aggravator is so intertwined with the avoid arrest aggravator that these should be considered one aggravator. He also contends that the trial court did not properly weigh the "lifetime of mitigation leading up to this incident." As discussed above, however, the robbery aggravator was properly found in this case and did not constitute doubling. The trial court also considered the various mitigating circumstances urged by Kearse, considered the suggested factors, and gave some weight to them. The court concluded , however, that "the statutory and nonstatutory mitigating circumstances found proven are not individually or in toto substantial or sufficient to outweigh the aggravating circumstances." It. is within the sentencing judge's discretion to determine the relative weight given to each established mitigator, and that ruling will not be disturbed if supported by competent, substantial evidence in the record. *See Spencer v. State*, 691 So.2d 1062, 1064 (Fla. 1996); *Johnson v. State*, 660 So.2d 637, 646 (Fla. 1995). Nor does this Court conduct a reweighing of the aggravating and mitigating circumstances. Absent demonstrable legal error, we accept those aggravating factors and mitigating circumstances found by the trial court as the basis for our proportionality review. *See State v. Henry*, 456 So.2d 466, 469 (Fla.

1984).

Thus the instant case involves two aggravating factors (committed during a robbery and avoid arrest/hinder law enforcement/murder of a law enforcement officer) and a number of nonstatutory mitigating circumstances and the statutory mitigating circumstance of age. The trial court afforded the mitigating circumstances only "some" or "little" weight. Kearse cites *Fitzpatrick v. State*, 527 So.2d 809 (Fla. 1988), as evidence that the death sentence is disproportionate in his case. While both cases involved the murder of a law enforcement officer in order to avoid arrest, *Fitzpatrick* is distinguishable from the instant case. The record in *Fitzpatrick* supported the trial court's finding of the statutory mitigators of extreme emotional or mental disturbance, substantially impaired capacity to conform his conduct to the requirements of the law, and low emotional age. In addition to eyewitness and family testimony about Fitzpatrick's "psychotic" and "goofy" behavior, several experts testified that Fitzpatrick had an emotional age between nine and twelve years old' a neurologist testified that his examination revealed "extensive brain damage with symptoms resembling schizophrenia"; and all of the experts agreed that Fitzpatrick suffered from "extreme emotional and mental disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired." *Id.* at 811-12. In contrast, in the instant case the trial court found no evidence of organic brain damage and concluded that Kearse "exhibited sophistication rather than naivete." Thus, Kearse's reliance on *Fitzpatrick* is misplaced.

To the contrary, <u>we find the instant case is comparable to *Burns*</u> *v. State*, 699 So.2d 646, 651 (Fla. 1997), *cert. denied*, 522 U.S. 1121 (1998), in which we concluded that the circumstances were "sufficient to support the death penalty." <u>*Burns* also involved a defendant who murdered a law enforcement officer in order to avoid arrest</u>. As in the instant case, the trial court merged these

> factors into one aggravator and afforded it great weight. *Id.* at 650. Also like the instant case, *Burns* was "devoid of the statutory mental mitigators," and the statutory and nonstatutory mitigators that were found were afforded only "minimal weight." *Id.* Accordingly, we reject Kearse's contention that his death sentence is disproportionate. (emphasis supplied)

Appellant repeats his challenge to the avoid arrest aggravator and contends that appellant's conduct after the murder negates the finding because he did not flee the scene. Appellee will rely on its argument in Point IV and add that Moody's inability to flee prior to arrest suggests only that the quick response by law enforcement officers to the residence did not afford him the same opportunity as his brother to escape. While it is true that the HAC and CCP factors are not present, it is also true that they are not the sine qua non of a proportionality determination. Indeed, this court has upheld a death sentence when it finds the weighty aggravator of avoid arrest or witness elimination. See, e.g. Holland v. State, supra (death affirmed with three aggravators of prior violent felony, during commission of a robbery, and to avoid arrest even when accompanied by the mitigators of history of drug and alcohol abuse and history of mental illness); Armstrong v. State, 642 So.2d 730 (Fla. 1994)(four aggravators, two of which were duplicative, which outweighed several nonstatutory mitigators); Reaves v. State, 639 So.2d 1 (Fla. 1994)(Two valid aggravators of avoid arrest and prior violent felony after HAC

stricken with relatively weak mitigation).

The trial court's finding on avoid or prevent a lawful arrest bears repeating:

> 3. The crime for which defendant is to be sentenced was committed to avoid or prevent a lawful arrrest.
>
> The facts show that the victim was acting in his capacity as overseer of a citrus grove and came upon the burglary of an automobile. The evidence demonstrates that the victim tried to escape and put his truck in reverse and rapidly backed out of the area. The evidence indicates that the victim had his cell phone in his lap and did not have any weapon in either hand. The evidence indicates that the only threat to the defendant presented by the victim was that of identification. The evidence also shows that the gun known to be carried by the Defendant expelled a projectile from close range into the forehead of the victim. The facts also show that another gun was used by an unknown person to shoot the victim from a greater distance. The shots were fired in close proximity to each other. Either shot rendered the victim unconscious and each shot was fatal. The victim died immediately. Defendant killed the victim to avoid or prevent his lawful arrest. This aggravating factor was proved beyond a reasonable doubt. The Court considered this aggravating circumstance and gave it great weight. (R1216)

This was not a simple robbery; in fact no property was taken from the homicide victim. He was shot at close range execution style to avoid the apprehension of the perpetrators.[11]

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[11]To the extent that appellant's citation of Heynard v. State, 689 So.2d 239 (Fla. 1996) and Jones v. State, 690 So.2d 568 (Fla. 1996) is meant to imply that the proportionality requirement is satisfied only with the presence of four or more aggravators or with multiple

The mitigation presented was largely insubstantial and the trial court was generous in its findings and appropriately gave it some or little weight (Vol VIII, R 1217-19). As noted in the state's sentencing memorandum (Vol. IX, R 1277-78) the testimony concerning being raised in poverty and seizure disorders was subject to some dispute. Appellant's sister testified they had what was necessary for a happy childhood (Vol. XLIII, R 5622). While siblings described a seizure disorder, there was no mental health expert testimony about it[12] and no evidence to relate childhood seizures to any aspect of his conduct as an adult for the last several years. Myron Moody couldn't comment on appellant's learning disability - he wasn't sure (Vol. XLIII, R 5630-31). This Court has not hesitated to affirm even jury override cases where only supported by weak close family ties mitigation. See, e.g. Coleman v. State, 610 So.2d 1283, 1287 (Fla. 1992); Washington v. State, 653 So.2d 362, 366 (Fla. 1995). In any event the lower court properly considered all that was presented and the non-statutory mitigation submitted in the instant case does not mandate

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murders, appellee would answer that the case law does not impose such a requirement. And other cases cited by appellant are inapposite. Farinas v.State, 569 So.2d 425 (Fla. 1990) involved an extreme mental or emotional disturbance and a heated domestic confrontation where the defendant was obsessed with the idea of having the victim return to him (there was no such mental mitigation sub judice) and Menendez v. State, 419 So.2d 332 (Fla. 1982) was not a witness elimination or execution-style murder.

[12]The record reflects that the defense chose tactically not to present mental health expert testimony to the penalty phase jury (Vol. XLII, R 5539, 5570; Vol. XLIII, R 5666-67)

reversal of the considered judgment of the trial court and jury below.

To summarize, this is one of the least mitigated of cases reviewed by this Court. There was no lack of love by the parents (TR 5623). Appellant dropped out of school before the death of his father in 1981 (TR 5638) not because of it. Moody was unable to get a job at Mountain Lake because of his criminal record for stealing (TR 5642). This case presents no scenario - as some others do - of psychological or psychiatric problems supported by expert testimony or intoxication or drug abuse or physical or sexual abuse perpetrated on appellant earlier in his life. This is simply a case of murdering a complete stranger who unfortunately happened on appellant's criminal enterprise, the disclosure of which would have sent Moody back to prison.[13] Appellant's claim is meritless. This Court should affirm.

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[13]As to the mitigator that appellant was an accomplice in the crime, the lower court's sentencing findings report that appellant "was, at least, an equal participant in these events", that "the close range shot came from the gun that proved to be the defendant's" and little weight was given to this mitigator (Vol. VIII, R 1217).

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert A. Norgard, Esquire, P.O. Box 811, Bartow, Florida 33831-0811, this _____ day of December, 2000.

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

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