

IN THE FLORIDA SUPREME COURT

DARRYL MOODY,)
)
 Appellant,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

APPEAL NO. 94, 435

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

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The record on appeal consists of 43 volumes, numbered I through XLIII and one supplemental volume. Volumes I through IX contain documents supplied by the Clerk and pretrial hearings. They will be referred to in the Brief as "C". Volumes IX through XLIII contain the trial transcripts. They will be referred to as "R". The supplemental volume will be referred to as "SR". The Appellant, Darryl Moody, will be referred to as Appellant or Mr. Moody.

The type font used in this brief is 14 point Times Roman.

STATEMENT OF THE CASE

The Appellant, Darryl Moody, was charged by Indictment on August 18, 1994. (V.I,C1-6) Mr. Moody was accused of the First Degree Murder of Scott Mitchell on May 16, 1994. (V.I,C1-6) In addition to the murder charge, Mr. Moody was also charged with three counts of Possession of a Firearm by a Convicted Felon (Counts 3,6,and 7); Burglary (Count 1); Grand Theft (Count 2); Shooting at an Occupied Vehicle (Count 4), and Dealing in Stolen Property (Count 8). (V.I,C1-6) The defense filed a Motion to Suppress Evidence and Statements and a Supplemental Motion to Suppress Evidence and Statements. (V.I,C30-33,V.III,C467-471) Testimony was taken on December 21, 1995 and on April 26, 1996. (V.III,C342-38;V.V,C639-658) The motion to suppress were denied by a written Order on June 25, 1996. (V.V,C778-784)

Additional motions to suppress evidence were filed on February 20, 1998. (VV,C805-808) These included a motion to suppress evidence seized from the search of an apartment on Lisa Lane (V.V,C805); a motion to suppress evidence seized from a Ford station wagon (V.VI,C809-814); and a motion to suppress evidence seized at the house of Mr. Moody's mother. (V.VI,C815-819). A hearing on these motions was held on February 26, 1998. (V.VI,C820-896) The motions were denied. (V.VI,C852-55)

Mr. Moody also filed a Motion in Limine to exclude testimony about a prior incident in which he was alleged to have pointed a gun at someone at a nightclub. (V.I,C48-50) The trial court excluded any testimony in the case in chief that Mr. Moody pointed the gun at someone, but allowed testimony that he had the gun in his possession. (V.III,C389-462)

Counts 3, 6, and 7, the charges of Possession of a Firearm by a Convicted Felon, were severed from the other counts for trial. (V.I,C46-47;83) A Motion to Sever the charge of Burglary was filed on April 12, 1996, and was denied on June 5, 1996. (V.IV,C595-596;V.V,C777)

The State filed a Notice of Intent to Rely on Evidence of Other Crimes on March 2, 1998.(V.VI,C899) The defense filed a Motion in Limine on March 10, 1998, seeking the exclusion of the evidence listed in the Notice of Intent. (V.VI,C962-3) A Motion in Limine regarding another event was also filed. (V.VI,C965)

Mr. Moody was tried by jury from March 23 through May 7, 1998, before the Honorable Susan Roberts, Circuit Judge. (V.X - V.XLIII) The jury returned a verdict of guilty as charged on Counts 1,2,4,5, and 8 on May 7, 1998.(V.VII,C1034)

A Motion for New Trial was filed on May 15, 1998. (V.VII,C1035-1040) The State's Response to the Motion for New Trial was filed on May 19, 1998. (V.VII,C1060-1092) The motion was argued on October 5 and 14,

1998.(V.VIII,C1124-1181). The motion was denied. (V.VIII,C1188)

The penalty phase was conducted on May 28, 1998. (V.XLI-III) The jury returned an advisory recommendation of death by a 9-3 vote on May 28, 1998. (V.VII,C1095)

The court conducted a Spencer hearing on October 5, 1998, where it was agreed that written memorandums would be submitted in lieu of argument or testimony. (V.VIII,C1109-1192) Mr. Moody's memorandum in support of a life sentence, the State's sentencing memorandum in support of a death sentence, a letter from Mr. Moody, and examples of Mr. Moody's artwork were also submitted. (V.VIII,C1221-1269;V.IX,C1270-1337)

Following the Spencer hearing, a Motion to Interview a Juror was filed by the defense. (V.VIII,C1155-1158) A hearing on that motion was held on October 9, 1998 and October 14, 1998. The motion was denied. (V.VIII,C1159- 1195)

Mr. Moody was sentenced on October 20, 1998. (V.VIII,C1196-1204). The State and the defense agreed that the scoresheet points totalled 84.2. (V.VIII,C1201) The court imposed a sentence of death on Count 3 for the First Degree Murder. (V.VIII,C1202;1206;1220) The court also sentenced Mr. Moody to five years in prison on Count 1 for Burglary; fifteen years in prison on Count 4 for Shooting at an Occupied Vehicle; fifteen years on Count 8 for Dealing in Stolen Property. Each

sentence was to run consecutively to the prior sentence. (V.VIII,C1203;1207-1214)
The sentence was a guidelines departure based upon the conviction for First Degree Murder. (V.VIII,C1203,1220).

A written sentencing order was filed contemporaneously with the oral pronouncement of sentence on October 20, 1998. (V.VIII,C1215) The trial court found three aggravating factors: (1) the capital felony was committed while the defendant was under sentence of imprisonment; given some weight; (2) the capital felony was committed while the defendant was engaged in the commission of a burglary; given some weight; and (3) the crime was committed to avoid or prevent a lawful arrest; given great weight. (V.VIII,R1215-1216) The trial court found the statutory mitigating factor that the defendant was an accomplice to the crime and not responsible as the primary motivating person. This mitigating factor was given little weight. Also considered as statutory mitigating factors in Mr. Moody's background were (1) the defendant was raised in relative poverty (little weight); (2) the defendant suffered a seizure disorder from birth that included grand mal seizures (some weight); (3) the defendant made no effort to avoid the police prior to his arrest (some weight); (4) the defendant suffered from a learning disability (some weight); (5) the defendant's educational experience was impaired (some weight); (6) positive courtroom behavior (little weight); (7) the defendant was a good worker despite few

job skills (little weight), (8) the defendant has no history of violent crime (some weight); (9) the defendant is capable of forming positive and loyal relationships (some weight); (10) the defendant lost his father at an early age (little weight). (Vol.VIII,R1217-1218) With respect to non-statutory mitigating factors the court found: (1) the defendant has used his life as an example to his family in how not to lead your life (some weight); (2) the instant offense was not premeditated (not established); (3) no evidence the defendant initiated the shooting (little weight); (4) the defendant is being held solely responsible for the death although others were involved (little weight); (5) excellent behavior while incarcerated (not sufficiently established); (6) the defendant has exhibited the ability to be rehabilitated (little weight); (7) the defendant is a talented artist (little weight). (V.VIII,C1219)

Mr. Moody later entered a plea of no contest to the three counts of possession of a firearm by a convicted felon. (Counts 3,6,and 7). (SR13-14) Mr. Moody was sentenced to 60 months in prison on each charge with each sentence to run concurrent. (SR16-17) Mr. Moody specifically reserved his right to appeal the rulings of the trial court on the motion to suppress and motion in limine. (SR.11-12)

A timely Notice of Appeal was filed on November 12, 1998.(V.IX,C1342)

STATEMENT OF THE FACTS

The body of Christopher Scott Mitchell was found in his truck in an orange grove located near the intersection of 80 Foot Road and Mud Lake Road on May 16, 1994. (V.XX,R1849-1853;V.XXIII2288-2293) The truck was parked on a dirt road leading into the grove, and a green Buick was parked in front of it. (Vol.XX,R1856-59) The driver's side window of the truck was open, and the passenger window closed. (V.XXI,R1891) The brake lights of the truck were on.(V.XXVI,R2859) The glove box was open. (V.XXI,R1899) Mr. Mitchell was deceased at the time the paramedics arrived at 2:23 p.m.. (V.XXVI,R2826)

A shotgun was found behind the seat of the truck. (V.XXI,R1899) Also collected from the truck were divorce papers and a cellular phone. (V.XXI,R1904)

Swabbings for possible gunshot residue were taken from Mr. Mitchell's hands. (V.XXI,R1894) An autopsy found that Mr. Mitchell had two gunshot wounds to the head, one on the the right side of his forehead and one on the left temple. (V.XXVII,R2934) The wound on the right forehead had gunshot residue around it, indicating close-range firing. (V.XXVII,R2935) The wound on the left temple had no soot, stippling, or residue. (V.XXVII,R2940) Two projectiles were removed from the body. (V.XXII,R2144) Exhibit 8 was the bullet recovered from the right forehead, and Exhibit 9 was the bullet recovered from the wound to the left temple.

(V.XXVII,R2948-9) The wound tract for Exhibit 8 was from front to back and left to right. (V.XXVII,R2949) There was no way to determine which shot was fired first. (V.XXVII,R2950) Either wound, in and of itself, would cause death. (V.XXVII,R2951)

Mr. Mitchell was leaning over against the driver's door. (V.XX,R1863) A cellular phone was on his lap. (V.XX,R1863) Mr. Mitchell's right foot was on the brake pedal. (V.XX,R1864)

A bullet struck the left front fender of the truck, ricocheted off the fender and struck the windshield. (Vol.XX,R1861-62) A second bullet hole was found just below the handle of the driver's door. (V.XX,R1862) A bullet was found in between the outside of the door and the inside of the door. (V.XXI,R1904) No bullets or casings were found in the grove.(V.XXI,R1896)

Tire impressions and shoe impressions were made from various prints found around both vehicles. (V.XX,R1859-60;V.XXI,R1876-81;1958-1982) Several tire impressions appeared to show that the truck had backed away from the Buick. (V.XX,R1866) Comparisons between the plaster casts of the shoe impressions were compared with photographs of the impressions. (VXXI,R1982-1994)

The tires from the Buick were missing. (V.XX,R1867) The trunk lock had been removed. (V.XX,R1866) The interior of the car was also damaged, including a broken

steering column, dangling wires, and the glove box was opened. (V.XX,R1868) The stereo and speakers were missing from the car. (V.XXI,R1902) The interior and exterior of the Buick were dusted for latent prints. (V.XXI,R1908-12) Three items removed from the Buick (a bottle of brake fluid, a green light, and a cassette tape box) were processed for latent prints. (V.XXI,R1926) Twenty-two rounds of .380 caliber ammunition were found in a paper bag on the right front floorboard of the Buick. (V.XXI,R2012) A piece of yellow paper with a phone number and the name "JDAWG" was found in the car as well. (V.XXI,R2013) No latent prints were found on any of these items. (V.XXI,R2012-2020)

Hubert Hurley was living with Scott Mitchell in 1994. (V.XXIII,R2214) On May 16, Scott left the house early to check on a picking crew, then came back to the house around 10:00a.m.. (V.XXIII,R2216) Close to noon Mr. Mitchell left to return to the grove and check on the crew. (V.XXIII,R2216)

Eraclio Martinez and his crew harvested fruit for Preacher Mitchell. (V.XXIII,R2328) On May 16, 1994, he and his crew were harvesting fruit at the grove on Mud Lake Road. (V.XXIII,R2329) They had been picking fruit since around six a.m. and had seen Scott Mitchell around 8 a.m. (V.XIII,R2331) Mr. Martinez saw Scott Mitchell a second time around 11 a.m. (V.XXIII,R2332) Scott Mitchell drove into the grove and asked if Mr. Martinez had seen his father, Preacher Mitchell.

(V.XXIII,R2332)

Mr. Martinez remembered seeing two vehicles enter the grove from Mud Lake Road around 11 to 11:30 a.m., after Scott Mitchell had been there the second time.

(V.XXIII 2333) One of the cars was long. Both cars appeared to be four-doors.

(V.XXIII,R2334;2349) Neither vehicle belonged to the Mitchells. (V.XXIII,R2335)

Mr. Martinez did not see the occupants and could not say how many people were in the cars. (V.XXIII,R2337;2349)

Michael Stenger operates a grove service and did some work for Mr. Mitchell's father, Preacher Mitchell. (V.XXIII,R2229) On May 16, Mr. Stenger knew that a grove belonging to the Mitchell's located on Mud Lake Road was being picked.

(V.XXIII,R2230) Between 1:30 and 2:00 p.m. on May 16, Mr. Stenger received a radio call from Preacher Mitchell, telling him that Scott had been shot.

(V.XXIII,R2236) Mr. Stenger rushed to the grove at Mud Lake Road.

(V.XXIII,R2241) He found Scott Mitchell's truck, in the grove. The truck was running. (V.XXIII,R2241) Mr. Stenger turned off the truck, but touched nothing else.

(V.XXIII,R2242)

Retha and Johnny Cotton lived on 80 Foot Road in 1994. (V.XXI,R2426) Mrs. Cotton was outside by her mailbox between 10:30 a.m. and noon when she saw a silver Cadillac and a green car pass by her. (V.XXIV,R2430) The cars were traveling

south.

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(V.XXIV,R2430) The green car looked like a Buick the Cottons used to own and the Cadillac looked like an antique. (V.XXIV,R2431-32) Each car was being driven by a black male. (V.XXIV,R2434) Mrs. Cotton believed there was another person in one of the cars, but she could not say for sure. (V.XXIV,R2457) Mr. Cotton remembered seeing a Cadillac with gold wheels, but no other cars. (V.XXIV,R2484)

Later in the day Mrs. Cotton heard a single gunshot. (V.XXIV,R2437) She heard the shot around 1 p.m. It sounded like it came from a shotgun. (V.XXIV,R2477)

Mr. and Mrs. Cotton later identified a Cadillac in a salvage yard as being the Cadillac they saw that day on 80 Foot Road. (V.XXIV,R2430;2490) They recognized the gold rims and the up and down taillights. (V.XXIV,R2445,2490)

Terry Stevens got stuck in the sand just off Sand Lake Road on May 16. (V.XXIV,R2501) As he was walking back to 80 Foot Road he remembered passing a picking crew in an adjacent grove. (V.XXIV,R2504) Two cars passed him as he walked along 80 Foot Road. (V.XXIV,R2506) One was a large four-door GM product and the other was like a Monte Carlo or a Riviera. (V.XXIV,R2507) The larger car was green, but Stevens could not recall the color of the other car. (V.XXIV,R2508) The smaller car was being driven by a black male. Stevens did not

notice the other driver. (V.XXIV,R2509)

Janet Stinson was taking lunch to her husband in the groves in May 1994.

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(V.XXIX,R3358) She saw a gray Cadillac parked at the intersection of Mud Lake Road and 80 Foot Road. The passenger door was open and she saw a black man with his shirt off sitting on the passenger side. (V.XXIX,R3359;3366) She saw only a profile. The right side of the man's ear looked big. (V.XXIX,R3369) She saw a green Monte Carlo in the grove. (V.XXIX,R3363) When Mrs. Stinson, turned around to try and find her husband in the groves, she again briefly saw the Cadillac, the man, and the left side of his face. (V.XXIX,R3371) She remembered short braids and a large ear. (V.XXIX,R3371-3) Mrs. Stinson could not describe jewelry, clothing, or facial hair because she did not get that good of a look. (V.XXX,R3406) When Mrs. Stinson drove back by after dropping off the lunch with her husband, the car was gone. (V.XXIX,R3376)

Mrs. Stinson did see a black Bronco, and a man flagged her to stop. (V.XXIX,R3377) It was Preacher Mitchell. (V.XXIX,R3378) Mrs. Stinson then saw Scott Mitchell in his truck. (V.XXIX,R3379) He was deceased. Mrs. Stinson had seen Scott Mitchell earlier in the day, around noon, driving and talking on his car phone. (V.XXIX,R3385) He was headed toward 80 Foot Road at the time. (V.XXIX,R3385)

Mrs. Stinson was asked to look at a photograph book. (V.XXVII,R3012) She selected one photograph based upon hairstyle, but told the officer that she had not seen

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the man's face. (V.XXIX,R3391) Mrs. Stinson told the police she was not real sure that it was the same man. (V.XXIX,R3391) Mrs. Stinson went to an impound lot and did identify the Cadillac as the one she had seen on the road. (V.XXIX,R3388)

During the ride to the impound lot Mrs. Stinson was shown a photopak by Detective Paul Schail. (V.XXIX,R3323) Mrs. Stinson did not recognize anyone. Dexter Moody's photo was in the photopak. (V.XXIX,R3324) Mrs. Stinson was then shown a second photopak, which contained Mr. Moody's photo. (V,XXIX,R3324) She selected Mr. Moody's photo as being that which most resembled the individual she saw in the car on 80 Foot Road. (V.XXIX,R3324) Mrs. Stinson based this on the hair style and large ears. (V.XXIX,R3324) Detective Schail did not consider this a positive identification and it was not based upon the face of the individual. (V.XXIX,R3333)

Mrs. Stinson admitted that the day before her testimony she was shown the same photopaks again. (V.XXX,R3412) At this time she selected Dexter Moody's photograph as being the one that most resembled the man she saw in the grove and not

Mr. Moody's. (V.XXX,R3412) Mrs. Stinson also admitted that the black man she saw coming in and out of court testifying (Bruce Foster) also resembled the man in the grove. (V.XXX,R3413)

Teresa Carmichael was living in Bartow in April, 1994. (V.XXII,R2181) At that time she owned a Cadillac that was red or rose colored with a white top.

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(V.XXII,R2182) On the morning of April 10th, she discovered that her car had been stolen from her home. (V.XXII,R2182) Inside the car were baseball cards, cassette tapes, a tennis bracelet, and a handgun. (V.XXII,R2184) The car was recovered a week later near a grove off Lake Bella Road. It was taken to a salvage yard because it was totalled. (V.XXII,R2190;2197) A Buick station wagon was found about 100 feet from Mrs. Carmichael's car.. (V.XXII,R2199) Lake Bella Road is close to Freidlander and Lisa Lane. (V.XXXV,R4359-60)

Mrs. Carmichael testified that her handgun was a Rossi .38 Special that was purchased in 1990. (V.XXII,R2185) Its serial number was Z826832. (V.XXII,R2186) Exhibit 236 was identified as being Mrs. Carmichael's gun. (V.XXII,R2187)

In May 1994, Bryant Upshaw had a 1981 green Buick Regal with a black half-top mag, wheels, BF Goodrich tires, and white spray paint on the hood. (V.XXVII,R3033) The car was stolen from his home in Orlando on May 15th or 16th, 1994. (V.XXVII,R3034; V.XXVIII,R3063-3069) A UNLV hat, a hat from his

employer, a piece of paper with "JDAWG" written on it, numerous .380 ammunition rounds, and photographs of himself and his children were in the car when it was stolen. (V.XXVII,R3038-9) Mr. Upshaw's tool box was also taken. (V.XXVII,R3049) Many of the items missing from Mr. Upshaw's Buick were later found in a Ford station wagon being driven by Mr. Moody. Mr. Upshaw's Buick was

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found in the grove near Scott Mitchell's truck. (V.XXXV,R4321;XXVII,R3035)

Mr. Upshaw identified Exhibit 254, a Davis P-380 handgun, as being his gun. (V.XXVII,R3041) The gun had been in the Buick the night it was stolen. (V.XXVII,R3041;V.XXVIII,R3069)

On Monday, May 23, 1994, Officers Terry Dowdy and Eugene Bly were on patrol in an unmarked vehicle in the north section of Lake Wales. (V.XXIII,R2357) Around 4 p.m. they saw the Appellant, Darryl Moody, driving a faded yellow, older model Ford station wagon. (V.XXIII,R2359;V.XXIV,R2387) Officer Dowdy stopped Mr. Moody. (V.XXIII,R2360) Mr. Moody was given a citation for driving with a suspended license and the yellow station wagon was impounded. (V.XXIII,R23661) The station wagon was registered to an Emanuel Coleman and Jerome Leeks, but was being purchased by Mr. Moody. (V.XXIII,R2372;V.XXVII,R2900)

Prior to towing the car an inventory search of the car was done. (V.XXIII,R2361) Officer Dowdy found a zippered bag which contained a handgun

and clip (Exhibit 254) in between the seat and running board. (V.XXIII,R2363;V.XXIV,R2392) The serial number on the handgun was run and it came back that the gun was stolen. (V.XXIII,R2370) Several .380 caliber live rounds were also found in the car. (V.XXIV,R2412)

Officer Eugene Bly arrested Mr. Moody at the home of Alwyn Leeks on May

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24, 1994. (V.XXXIV,R4203) Mr. Moody was near the station wagon when he was arrested. (V.XXXIV,R4205) .

Alwyn Leeks rented an apartment at 305 North First Street in 1994. (V.XXX,R3467-72) It had two bedrooms. The first bedroom was hers. (V.XXX,R3473) Alwyn's sister, Sherita, began staying in the second bedroom, which had a set of bunkbeds in it. (V.XXX,R3474) Alwyn knew Mr. Moody because Sherita dated him. He began to spend four or five nights a week at the apartment with Sherita. (V.XXX,R3485) Mr. Moody was slender and had a short haircut that he wore in twists. (V.XXX,R3518) Dexter Moody would also sleep at Alwyn's apartment .(V.XXX,R3487) Dexter was a little bigger and had a low haircut without twists. (V.XXX,R3520)

Sherita Leeks started staying with her sister Alwyn when she started school at PCOC around April 1994. (V.XXI,R3646) Sherita dated Mr. Moody for several months in 1994. (V.XXXI,R3654) She and Mr. Moody would stay in the second

bedroom. (V.XXXI,R3656) Dexter also stayed at the apartment several times. (V.XXI,R3664) Dexter and Mr. Moody would swap shoes and clothes. (V.XXXII,R3796) Dexter would change clothes and shoes at the apartment. (V.XXXII,R3796)

Sherita remembered when Mr. Moody's car was impounded. (V.XXXI,R3671)

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Mr. Moody had dropped her off at her probation appointment and then did not come back. (V.XXXI,R3671) He came back to the apartment later and told her that his car had been impounded. (V.XXXI,R3672)

Sherita never saw Mr. Moody with a handgun. (V.XXXI,R3679-80) During a deposition, Sherita had testified that she had seen him with a gun once. (V.XXXI,R3691) Sherita did not recall that testimony. She also did not recall her prior testimony that she was aware that Mr. Moody had sold a gun to Bruce Foster. (V.XXXI,R3694-3701;3703-3709) Sherita did not remember her deposition testimony about a gun being under the seat in the station wagon. (V.XXXI,R3717)

On May 24, 1994, the Sheriff's department, pursuant to a search warrant, searched a residence at 2430 Lisa Lane. (V.XXIV,R2414) This residence had three bedrooms. (V.XXV,R2721) In the northwest bedroom, which belonged to Mr. Moody and Darryl Moody, Appellant's brother, there were two beds and two dressers. (V.XXVI,R2732) A zippered pouch containing assorted bullets and car emblems was

found in a dresser drawer. (VXXIV,R2417) Identification was also found in that same drawer, which included a piece of mail addressed to Darryl Moody, a car title in the name of Dexter Moody, and several pieces of mail addressed to Dexter Moody .(V.XXIV,R2424;V.XXVI,R2782) Photographs of both Dexter and Mr. Moody were in the room. (V.XXVI,R2783) In the second drawer of a dresser, a box of .32 Smith

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and Wesson ammunition was found. (V.XXV,R2554) A sawed-off shotgun (Ex. 206) was found behind one of the beds. (V.XXVI,R2733) Between the mattress and box spring of one of the beds a semi-automatic handgun and clip were found. (Exhibits 200-202). (V.XXVI,R2734;2740) Several car stereo speakers were found under the bed. (V.XXVI,R2752) A sign on the west side of the room, where the guns and the dresser containing the ammunition were found, indicated that the west side of the room belonged to Dexter Moody .(V.XXVI,R2813) The guns were determined to belong to Dexter Moody. He was charged and convicted of offenses related to the guns. (V.XXVI,R2817) A grey Cadillac was parked outside in the carport of the Lisa Lane residence. (V.XXV,R2573)

The apartment located at 305 North First Street rented to Alwyn Leeks was also searched. (VXXV,R2554) The southwest bedroom contained a set of bunkbeds. In this bedroom the following items were found: three pairs of shoes (two pairs of sneakers and a pair of brown Sierra hiking boots), and a set of speakers under the bed,

a set of keys on the top bunkbed, and a pair of black boots behind the door. (V.XXV,R2557) In the left boot a small piece of metal was found. (V.XXV,R2561) A 1980 Ford station wagon was parked outside the apartment. It was impounded. (V.XXV,R2569) Mr. Moody was the registered owner of the station wagon. (V.XXV,R2576)

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Alwyn Leeks could not say who owned the shoes that were found in the southwest bedroom. (V.XXX,R3492) She had no idea what kind of shoes Mr. Moody wore. (V.XXX,R3493) Alwyn may have told the police that the shoes belonged to Mr. Moody, but she just assumed this since they were in that room. (V.XXX,R3509) She did not know who owned the keys that were found in the room and she had never seen the speakers before. (V.XXX,R3495;3503)

Sherita Leeks thought that the tool box and speakers belonged to Mr. Moody because she had seen them in the Ford station wagon. (V.XXXI,R3735) She thought the shoes that were found behind the door had been in front of the bed. (V.XXXI,R3735) Sherita did not know who owned the two pair of tennis shoes or the Sierra hiking boots. (V.XXXI,R3736) She remembered them being under the bed, but she did not know who had worn them. (V.XXXI,R3737) Sherita did not recall telling one of the police officers that the shoes belonged to Mr. Moody. (V.XXXI,R3739) Sherita wears a mens size 9.5 shoe. (V.XXXIII,R4072) Sherita had never seen the

keys or the speaker before. (V.XXXII,3740)

On June 20, 1994, Crime Scene Technician Laurie Ward processed a 1988 Cadillac that was at a salvage yard for latent prints. (V.XXI,R1927) A mirror and baseball card, that were in the glove box, were also processed for prints. (V.XXI,R1927)

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Laurie Ward also processed a 1980 Ford station wagon and a 1977 gray Cadillac. (V.XXI,R1913) She collected items of evidence from both cars, but did not process them for latent prints or obtain vacummings. (V.XXI,R1914)

Over objection, Ward stated that in the station wagon she found stereo equipment, including a Pioneer cassette player, an Optimist equalizer, a noise suppressor, a tweeter, and a radio lying on the right front floorboard. (V.XXI,R1930;2081;2030) A Kenwood stereo amplifier was found under the left front seat. (V.XXI,R2029) An L.A. Sound amplifier was found under the right front seat. (V.XXI,R2029) Two .38 caliber bullets were found on the floorboard. (V.XXI,R1932;XXI,R2021) A Rockford amplifier was found behind the passenger seat. (V.XXI,R2028) A box containing speakers was found on the back seat. (V.XXI,R1933) A tool box and another box containing speakers were found in the hatch area. (V.XXI,R1934) A pair of wire cutters and tin shears were in the tool box. (V.XXI,R1934-5) Numerous tire irons were also found. (V.XXI,R2027-2028) An

Orlando Magic cap and a University of Nevada-Las Vegas hat were also found. (V.XXIV,R2786)

A black gun holster, six tire irons, a bumper jack base, and a two-ton floor jack were found in the Cadillac. (V.XXII,R2041-2043) Twenty-seven live .22 caliber rounds were found in the glove box of the Cadillac. (V.XXII,R2044) Several pieces

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of stereo equipment and a cellular phone were also found in the Cadillac. (V.XXII,R2045-2050)

Officer Tim Ellis was on routine patrol in Lake Wales on May 25, 1994, when he was stopped by a young man. (V.XXV,R2581) The boy told Ellis that "they had the wrong men" and that Dexter had been "framed up". (V.XXXVI,R4558-9) The boy said he had a gun that was used in a homicide, and he wanted to turn it in. (V.XXXVI,R4560) At a later point in time, Officer Ellis was paged by the boy. Officer Ellis drove to the parking lot of a convenience store where he talked with the boy again. (V.XXV,R2585;2616) The boy told him that a white man with red hair, who drove a rust colored Oldsmobile, and a short Mexican had killed the guy in Alturas. (V.XXXVI,R4562) The kid told him that two guns were involved. One of the guns, a .380, had already been recovered. The boy told Ellis he would give him the second gun. (V.XXXVI,R4563) Ellis then met the boy a third time. (V.XXV,R2616) Ellis found a black handgun (Exhibit 236) in a zippered pouch in the bed of a green

pick-up truck. (V.XXV,R2588) Shortly after finding the gun, the boy was taken into custody. (V.XXV,R2591)

Bruce Foster, age 20 at the time of trial, testified that has known Dexter Moody and Mr. Moody since he was 16. (V.XXVIII,R3085) Foster often rode around with both Dexter Moody and Mr. Moody in the spring of 1994. (V.XXVIII,R3096)

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In April 1994, Foster went to the Conversation Club, a nightclub, with Mr. Moody . They stayed outside in the parking lot. (V.XXVIII,R3101) Foster testified that he saw a .38 revolver handgun inside a brown pouch in Mr. Moody's car that night. (V.XXVIII,R3102) Foster could tell what type of gun it was because he considered himself to be a gun collector. Foster owned numerous guns, including an Uzi, a Tech 9, a .32 ,a .357, a .22, a .380, and a sawed off shotgun. He bought the guns on the street with money he had made from selling drugs. (V.XXVIII,R3107-3111) Foster stated he saw Mr. Moody take the gun out of the pouch, stick it in his pants, and then go with it through the parking lot of the club. (V.XXVIII,R3105) Twenty minutes later, Mr. Moody put the gun back in the pouch, and then put the pouch under the driver's seat. (V.XXVIII,R3106)

Over defense objection, Vincent Crawford testified that he was at the Conversation Club around the second weekend in April. He was with a brother named Roddis and a friend, who is an albino. (V.XXX,R3545-7) Crawford dated Mr.

Moody's niece, Hillary Brinson. (V.XXX,R3545) Crawford stated he saw Mr. Moody with a black, revolver handgun. (V.XXX,R3548) It was not a .38 caliber. (V.XXX,R3551) Roddis Dewdney remembered that they were at the club the week after Black Beach Week in Daytona. (V.XXXI,R3595) Roddis saw a black, .32 or .38, revolver handgun in Mr. Moody's possession. (V.XXXI,R3597-99)

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Hillary Brinson testified that she was at the Conversation Club and saw Mr. Moody, her uncle, there. (V.XXXI,R3623) She did not recall what date. (V.XXXI,R3623) Hillary saw one of Mr. Moody's friends with a gun, and she saw him give it to Mr. Moody. (V.XXXI,R3625-6)

Tyrone Seege remembered that in early 1994 he went to the Conversation Club with Mr. Moody and Bruce Foster. (V.XXX,R3452) He remembered seeing Mr. Moody's niece there and an albino. (V.XXX,R3452)

Officer James Bowen testified that Foster told to him that he saw Mr. Moody with the gun at the Conversation Club on the second Saturday in April. (V.XXXVI,R4458) According to Bowen, the club was only open on Sunday. (V.XXXVI,R4461) In April, the second Saturday was the 9th, and Sunday was the 10th. (V.XXXVI,R4461) Foster apparently claimed to see the gun before it was stolen from Mrs. Carmichael.

Foster next saw the .38 handgun when he bought it from Mr. Moody.

(V.XXVIII,R3112) Foster could not remember exactly when this was, but it happened when he was at Sherita Leek's house. (V.XXVIII,R3116) According to Foster, Mr. Moody said that he had been stopped earlier by the police, and he had a gun for sale. (V.XXVIII,R3117) Mr. Moody got a .38 handgun from his car. Foster offered him \$60.00 for it. (V.XXVIII,R3118) Foster went to get the money, and then returned

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(V.XXVIII,R3135) Mr. Moody then got the gun from inside the house. (V.XXVIII,R3135) Mr. Moody gave Foster the gun and a pouch. (V.XXVIII,R3137) It was the same gun that Foster had seen at the Conversation Club. (V.XXVIII,R3137) Mr. Moody told Foster to be careful with the gun because it had been through a lot. (V.XXVIII,R3137) Foster gave the gun to Carlos Allen to hold for him. Foster then got it back from Allen at a later date. (V.XXVIII,R3167)

Tyrone Seege was friends with Mr. Moody and Dexter Moody. (V.XXX,R3440) Back in 1994 Seege remembered giving Mr. Moody a ride in his car. (V.XXX,R3440) Mr. Moody told him that his car had been impounded, and he was worried that a gun might still be in the car. (V.XXX,R3442) This was on May 24, 1994. (V.XXX,R3456-7)

On May 16 or 17, 1994, Mr. Seege was with Mr. Moody around noon. (V.XXX,R3454) Mr. Moody was washing his car and Seege was trying to convince him to give him a ride to a girl's house. (V.XXX,R3453)

Johnny Harris is friends with Bruce Foster. (V.XXX,R3426) In 1994, Bruce was buying an old car from Harris' father. (V.XXX,R3427) Harris was keeping Foster's money so that Foster did not spend it. (V.XXX,R3427) He remembered Foster coming to him and asking for \$60. (V.XXX,R3428)

Foster testified that several days after he bought the gun he learned from a guy

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named "Duck" that the gun had been involved in some trouble. He heard that it had been used to kill someone. Foster talked to Sherita Leeks and told her that he was going to throw the gun in the Everglades. (V.XXVIII,R3149) Foster then decided to turn the gun into the police, and concoct a story to get his "homeboy" out of jail. (V.XXVIII,R3149)

Foster said that he learned about Mr. Mitchell's murder "on the street" while he was going to get the money to pay for the gun. He did not learn about the murder from the newspaper. (V.XXVIII,R3157;3225) Foster asked Mr. Moody if he had heard about someone being killed in Bartow. Mr. Moody said that it was Alturas, not Bartow. (V.XXVIII,R3158)

According to Foster, he and Mr. Moody were like brothers. (V.XXVIII,R3152) Foster did not want Mr. Moody to be in jail. (V.XXVIII,R3152) Foster decided to tell the police that he got the gun from two Puerto Rican guys or a white guy in the course of a drug deal. (V.XXVIII,R3154)

Foster was the boy who stopped Officer Ellis. (V.XXVIII,R3154) Foster told Ellis his name was Leroy Jones. He also told Ellis the story about the two Puerto Rican guys. (V.XXVIII,R3155) Foster wiped his prints off the gun and put it in a truck. (V.XXVIII,R3156-3164)

Foster was apprehended and taken in for questioning. (V.XXVIII,R3164) He

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initially tried to stick to his story about the two Puerto Ricans. (V.XXVIII,R3164) After several hours, Foster told the police that he had gotten the gun from Mr. Moody. (V.XXVIII,R3166)

On May 16th, 1994, Foster was in juvenile court in Bartow. (V.XXVIII,R3171; V.XXX,R3559-3562) Mr. Foster was finished with court around 11:45 a.m.. (V.XXX,R3562) Mr. Foster's mother took him to his grandmother's house in Lake Wales. She left him there around 12:30p.m.. (V.XXX,R3566) Foster did not stay at his grandmother's house. He claimed that he walked to Lincoln Ave., caught a bus to the Lake Wales Junior High, and then rode a school bus home. (V.XXVIII,R3175)

Officer Bowen testified that Foster and his mother told him that they did not leave court until 1:00 p.m, an hour and a half later than what actually happened. (V.XXXVI,R4465) Mr. Mitchell was killed sometime after 12:30 p.m. but before 2:05 p.m., and the alleged gunshot was heard around 1:30 p.m. (V.XXXVI,R4465) Bowen admitted that the police did not attempt to verify what time Foster got to his

grandmother's house, or if Foster left his grandmother's house in Lake Wales, or if he returned to school as he claimed. (V.XXXVI,R4469) Bowen admitted that with the discrepancy between the time he left court, that Foster would have had time to be at the crime scene at the time of the murder. (V.XXXVI,R4470) The location of Foster's grandmother's house is closer to the crime scene than Foster's home.

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(V.XXXVI,R4470) Foster also admitted that he had sex with a fourteen year old girl, and was charged in 1997 with offenses that could have gotten him fifteen years in prison. (V.XXIX,R3263-4) Foster got a plea bargain for two years community control and eight years probation. (V.XXIX,R3266)

Assistant State Attorney Angela Cowden was assigned to prosecute a case involving Bruce Foster on April 25, 1997. (V.XXXV,R4278) A charge of lewd act on a child was filed, even though the child claimed that she was raped. (V.XXXV,R4281;4296-300) After consultation with the victim and her mother, a disposition of community control with probation was approved. (V.XXXV,R4282)

Exhibit 254, a Davis Industries Model .380 Semi-automatic handgun, was sent to the Florida Department of Law Enforcement crime laboratory for testing. (V.XXII,R2167-2168) No latent prints of value for comparison purposes were found on the gun, holster or ammunition. (VXXV,R2620-2623) Exhibit 236, a Rossi .38 revolver, had no usable latent prints on it. (V.XXV,R2639) Exhibit 200, a 9mm

handgun, had one latent print, but it could not be identified. (V.XXV,R2649) Mr. Moody's latent prints were not found on any of the evidence submitted for testing. (V.XXV,R2649;2707-2716) Bruce Foster's known prints were never compared to the latent prints at the scene. Officer Bowen admitted this was an oversight. (V.XXXVI,R4482)

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The .38 Rossi revolver was test fired in the lab and worked properly. (V.XXV,R2659) It had a trigger pull of 14 pounds.. (V.XXV,R2662) The shotgun (Ex.206) did not function properly. The 9mm handgun fired properly and had a trigger pull of 12 pounds. (V.XXV,R2666) According to the FDLE firearms examiner, the bullet in Exhibit 8, which was recovered during Mr. Mitchell's autopsy, was fired by the Rossi. (V.XXV,R2674;2687) Exhibit 203, a casing, did not come from the Rossi. Exhibit 9, the other bullet that was recovered from during Mr. Mitchell's autopsy, was not fired from the Rossi. (V.XXV,R2685;2687) Exhibit 18, the bullet found in the door panel of Mr. Mitchell's truck, could not have been fired by the Rossi. (V.XXV,R2686) Exhibit 9 and 18 were fired by the same gun. (V.XXV,R2688)

Shoe impressions taken from the crime scene were compared with the shoes recovered from the Lisa Lane and First Street residences. (V.XXVII,R2970-2975,V.XXIX,R3279-3280) A right, Sierra, brown shoe, size 9 (Ex. 213) was

compared to shoe impressions left at the crime scene. (V.XXVII,R2976;V.XXIX,R3281) The physical size and shape of the design elements were the same. (V.XXVII,R2977) The wear patterns were consistent with that shoe making the impression. (V.XXVII,R2978) It was highly probable that the Sierra shoe made the impression. (V.XXVII,R2980) A different examiner also found two shoe impressions from the crime scene that were consistent with the Sierra shoe.

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(V.XXIX,R3280-91)

George Parsley is a pedorthotist. (V.XXXIII,R4074) In 1998, he took a pedograph of Mr. Moody's feet. (V.XXXIII,R4079) Mr. Moody's feet measured a size 8.5 and some 9 for weightbearing. (V.XXXIV,R4081) The foot width was "C". (V.XXXIV,R4082) Six pairs of shoes were tried on Mr. Moody's foot. (V.XXXIV,R4084) All the shoes fit, including Exhibit 213, the Sierra hiking boots. (V.XXXIV,R4086;4090) Mr. Parsley remembered trying on all the shoes on another man several weeks prior to the trial. (V.XXXIV,R4161) The man had on jail clothes, and the shoes fit him as well. (V.XXXIV,R4161)

John Parsley, George Parsley's son, was present when all six pair of shoes were tried on Mr. Moody. (V.XXXIV,R4165-66) John remembered putting the Sierra hiking boots on Mr. Moody. (V.XXXIV,R4166) John Parsley recalled his father stating that the person wearing the Sierra shoes had a prominent metatarsal head.

(V.XXXIV,R4174) John palpatated Mr. Moody's rights metatarsal and found that it was normal size. (V.XXXIV,R4175) Dexter Moody's feet were measured and found to be a size 8 1/2 E. (V.XXXIV,R4176)

The shoes were never fitted on Bruce Foster. (V.XXXVI,R4477) Foster said he wore a size 12, but that was never checked. (V.XXXVI,R4477)

The tires of the Ford station wagon were compared with tire impressions at the

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crime scene. (V.XXVII,R2991) None of the crime scene impressions were from the station wagon. (V.XXVII,R2991)

Hillary Brinson testified that she did not recall telling the police that Mr. Moody had told her that he stole the green car in the grove, but that he did not hurt anyone. (V.XXXI,R3629-3632)

Sherita Leeks did not recall testifying before the grand jury that she saw Mr. Moody driving a tan and rose Cadillac and Dexter Moody driving a green Buick on the morning of May 16th. (V.XXXII,R3740-49) She did not recall testifying previously that Mr. Moody told her to drive his station wagon home. (V.XXXII,R3748) Sherita testified that on the morning of the 16th she did not go to school. (V.XXXII,R3751) She woke up around 6:00 a.m. and moved the station wagon. She then went back to bed. (V.XXXI,R3751) Mr. Moody was at the apartment and asleep with her.(V.XXXII,R3752) She remembered Dexter Moody

coming in at some point. She woke up Mr. Moody and he went and talked to Dexter. (V.XXXII,R3758) She heard them talk about washing cars. (V.XXXII,R3829) Sherita went back to bed, and got up around noon. (V.XXXII,R3759) Sherita took a bath, and then she, Mr. Moody, and her sister went to the store. (V.XXXII,R3763) Sherita knew that it was around 2:30 p.m. because they had to get home before her nephew got off the bus. (V.XXXII,R3831) Sherita later went to Mr. Moody's mother's house, where Mr.

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Moody, Dexter, and some other men were washing cars. (V.XXXII,R3833)

Sherita remembered seeing Bruce Foster with a gun at her friend's house. (V.XXXII,R3764) Foster told her the gun had been used in a murder. (V.XXXII,R3764) Sherita did not remember her grand jury testimony about how Foster told her he was going to get rid of the gun. (V.XXXII,R3766)

On cross examination, Sherita stated that her testimony before the Grand Jury and in her deposition were done out of fear, because she had been threatened by the police that she would go away a long time. (V.XXXII,R3779; V.XXXIII) She was told that if she changed her testimony she could be charged with perjury and sent away to prison for five years for each lie. (V.XXXII,R3780)

Sherita testified that during her statements to the police that they would tell her the statement of someone else and based on this it was easy for her to figure out what

they wanted her to say. (V.XXXII,R3782) When Sherita began to back away from that testimony, she was threatened by the police and prosecutor. They told her that she would be put away. She was called a "lying bitch". (V.XXXII,R3784) When she was trying to change her statement in the prosecutor's office, someone came in with a warrant and put handcuffs on her. (V.XXXII,R3784) She was taken to jail and stayed there for three weeks. (V.XXXII,R3785) She was arrested for perjury.

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(V.XXXII,R3785) Sherita was frightened, so she changed her story back to telling police what they wanted to hear. (V.XXXII,R3786) On August 17, she was taken back to the prosecutor's office and told that if she testified truthfully, she would be let out of jail. Testifying truthfully meant to her that she had to say what the police wanted her to say. (V.XXXII,R3788) She testified that way to the Grand Jury. (V.XXXII,R3787;V.XXXIII)

Officer James Bowen spoke with Sherita sometime before June 1st. (V.XXXV,R4349) Sherita said she had never seen Mr. Moody or Dexter Moody with guns. She also said she had not seen any guns in their cars. (V.XXXV,R4350) Sherita said Foster was going to get rid of the gun in order to help Darryl and Dexter. (V.XXXV,R4350) She knew the story that Foster was going to tell the police. (V.XXXV,R4350) Sherita was not asked if she was driving the station wagon on the

day of the homicide. (V.XXXV,R4350) She was not asked if she was present when a gun was sold to Foster by Mr. Moody. (V.XXXV,R4350)

On June 9th, Officer Bowen interviewed Foster again. (V.XXXV,R4353) At that time Foster told Brown for the first time that Sherita was present when he bought the gun from Mr. Moody. (V.XXXV,R4354) Bowen then contacted Sherita. (V.XXXV,R4355) Bowen put Sherita and Foster in the same room (a confrontational interview), which he admitted was not the normal way to do things. (V.XXXV,R4356)

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After Sherita was confronted with the fact that Bruce Foster had stated that she was present when Foster bought the gun, she said that she had seen the transaction.

Bowen interviewed Sherita again on July 28. (V.XXXV,R4368) At that time Sherita said she knew about the gun, but denied being present during the sale. (V.XXXV,R4368) Because Sherita gave contradictory statements, she was arrested. (V.XXXV,R4369) Bowen personally obtained the warrant and requested a high bond. (V.XXXV,R4370)

Officer James Bowen confirmed that he yelled at Sherita during his interviews with her. He confirmed that he told her that if she continued to give contradictory statements she would be charged with perjury and would go to jail. (V.XXXVI,R4498)

Sherita testified that she lied to the Grand Jury. (V.XXXII,R3791) She said she did this because she was scared and wanted to go free. (V.XXXII,R3791) She got out of jail the day after her grand jury testimony. (V.XXXII,R3792) The perjury charges were dropped. (V.XXXII,R3792)

Attorney Richard Mars testified that he represented Sherita Leeks on the perjury charges. (V.XXXIV,R4102) He spoke to her alone prior to her interview with the prosecutor on August 17, 1995. (V.XXXIV,R4103) He told her to tell the truth and sat in on the interview. (V.XXXIV,R4104) Mr. Mars could not be present during her grand jury testimony. (V.XXXIV,R4125)

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Mary Ann Zinder testified that Sherita Leeks applied to be in a PCOC program on May 13, 1994. She was admitted to the program on May 16, 1994. (V.XXXIV,R4183) Sherita did not come on Monday the 16th, but did come on Tuesday, May 17th. (V.XXXIV,R4184) Sherita left the program on July 22. (V.XXXIV,R4185)

Darron Moore had dated Sherita Leeks in 1994. He knew Mr. Moody and Dexter Moody. (V.XXXIV,R4237-4247) Moore was in jail on July 1, 1994. (V.XXXIV,R4249) He remembered talking the police about Bruce Foster and a gun, and Bruce Foster, but did not remember what he said. (V.XXXIV,R4249) Moore admitted that he had used drugs for 12 years, and that the drugs really messed him up.

(V.XXXV,R4256)

Officer Lori Rappold testified that on April 13, 1994, she was on routine patrol in Lake Wales around 8:30 p.m.. (V.XXXV,R4263) She responded to a call at the Sunrise Apartments, where she was approached by Darron Moore. (VoXXXV,R4264) Moore told her that he had seen Mr. Moody and Dexter Moody in two separate cars, and that a gun was involved. (V.XXXV,R4265) Rappold did not see Dexter Moody or Mr. Moody. (V.XXXV,R4266)

Rappold admitted that her report did not state that Mr. Moore had seen a gun. (V.XXXV,R4268) Moore had only reported that he heard a shot. (V.XXXV,R4268)

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Sherita Leeks was not listed as being a witness to this. (V.XXXV,R4270)

Officer Bowen testified that he interviewed Darron Moore on July 1, 1994. (V.XXXV,R4363) Moore told him that he had seen the gun that Foster bought from Mr. Moody and that Mr. Moody had sold it "to get the heat off him". (V.XXXV,R4363) Moore stated he had seen the same gun on April 13. (V.XXXV,R4365) Moore also said that on the day of the homicide in the early morning hours that he had seen Mr. Moody driving a stolen Cadillac and Dexter driving a stolen Buick.

(V.XXXV,R4365) Both were wearing gloves. (V.XXXV,R4366) Moore told Foster

that he realized the gun was involved in the murder after "he put it all together".
(V.XXXV,R4366)

Bill Wedge was hired by the victim's family to assist the police in the investigation. (V.XXXV,R4392) On June 2, Wade interviewed Bruce Foster. (V.XXXV,R4396) Foster stated that he bought the gun from a man named Carlos for \$60. (V.XXXV,R4397) Wedge interviewed Darron Moore on July 13. (V.XXXV,R4392) Moore told him that he figured that the gun Foster bought was involved in the murder after he read about the murder in the newspapers. (V.XXXV,R43934,4400) Moore claimed to have seen this gun in Mr. Moody's possession in a place he described as "drug heaven". (V.XXXV,R4395) Moore claimed to have seen Mr. Moody driving a stolen Cadillac and Dexter driving a Buick

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on the morning of the murder. (V.XXXV,R4395) Moore believed the Buick was stolen from the Conversation Club. (V.XXXV,R4398)

Officer James Bowen testified that Mr. Moody did not flee the area and that his car was not implicated at the murder scene. (V.XXXVI,R4424) Dexter Moody's car was identified as having been at the murder scene and he ran from the police. (V.XXXVI,R4425) Mr. Moody was charged primarily based the testimony of Bruce Foster. (V.XXXVI,R4426) Without Foster's testimony there would not have been enough evidence to charge Mr. Moody. (V.XXXVI,R4433) Foster was never asked

how he knew that two guns were involved in the murder. (V.XXXVI,R4443) That fact had not been publicized. (V.XXXVI,R4443)

Officer Bowen testified that Foster told him that Mr. Moody and Dexter Moody taught him how to jack a car and get the wheels off of it. (V.XXXV,R4334) Foster maintained that he was treated by Mr. Moody and Dexter Moody like he was their little brother. (V.XXXV,R4334)

Officer Bowen admitted that there were had inconsistencies in what Foster had said. Also, it appeared that Mr. Foster knew that two guns were used in the murder even before the police were able to confirm this. (V.XXXVI,R4492)

Dexter Moody was arrested in August in Seaford, Delaware. (V.XXXV,R4373;4382) Bowen interviewed Mr. Moody and he denied any

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involvement in the car thefts or the murder. (V.XXXVI,R4428) Several months later, Dexter was interviewed and as a result of this interview he was charged with possession of a firearm by a convicted felon.

The defense presented the following testimony:

In 1994, Officer Bernie Hayes was asked by Officer Jay Bowen and Detective Paul Schaille to help them find Darron Moore, Sherita Leeks, Darryl Moody, Dexter Moody, and Katrina Mangle. (V.XXXVII,R4599) Officer Hayes, was also given a description of a person that sounded to him like a description of Bruce Foster.

(V.XXXVII,R4600)

Hays testified that Foster was timid and had reservations about answering police questions. He told Hayes that he had been expecting to be questioned. (V.XXXVII,R4602) Foster was in a hyper-state after being interrogated by the police. (V.XXXVII,R4603) Foster had some type of anxiety attack and he seemed to be hyperventilating. (V.XXXVII,R4603) Foster acted very unusual. He was jumping around, talking like a baby, babbling, and at times, sobbing profusely. (V.XXXVII,R4604-5) Hayes described it as being like a person who was awake but having a nightmare. (V.XXXVII,R4604)

Officer Hayes believed Foster told him that he had purchased the gun that was used in the murder from Carlos Allen for \$25. (V.XXXVII,R4607) According to

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Hayes, Foster appeared to have found out that the gun was involved in a murder for the first time from the police. (V.XXXVII,R4611)

Bruce Hall, an FBI special agent, is an expert in the forensic examination of soil, glass, and building materials. (V.XXXII,R3848) Hall received soil samples taken from the Buick and the area surrounding it in the grove. (V.XXXII,R3850-54) He examined the Sierra boots (Ex. 213) and scraped the bottoms of the boots to obtain a soil sample. (V.XXXII,R3854,3862) A small amount of sand was recovered from the soles of the boots. (V.XXXII,R3860) The sand in the boots had subtle differences

from the sand surrounding the Buick. (V.XXXII,R3861) The two could not be associated. (V.XXXII,R3862) Soil samples can vary in a given area. (V.XXXII,R3868)

Brenda Stinson lives off 80 Foot Road, and she is the sister-in-law of Janet Stinson. (V.XXXVII,R4690) On May 16th, 1994, Brenda went with Janet into the grove to look for Janet's husband. (V.XXXVII,R4691) They went into the grove around 11 a.m.. (V.XXXVII,R4694)

Brenda saw a dull blue or gray Cadillac parked on the right-hand side of Mud Lake Road facing 80 Foot Road. (V.XXXVII,R4694) The car was on the side closest to Brenda. (V.XXXVII,R4695) Brenda saw a black male with short hair, which was shaved fairly close, sitting in the car with all the doors closed. (V.XXXVII,R4696) The person did not have dreadlocks. (V.XXXVII,R4697)

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According to Brenda, they drove into the grove, gave the lunch to James Stinson, talked to him for a little bit, and then left .(V.XXXVII,R4697) They were there around 20 minutes. (V.XXXVII,R4698) When they left the grove, Brenda saw the Cadillac again. (V.XXXVII,R4698) Brenda Stinson was never shown a photopak. (V.XXXVII,R4701)

Harold Weeks was incarcerated at the time of the trial. (V.XXXVII,R4710) Mr. Weeks either lived by or knew all of the persons involved in this case.

(V.XXXVII,R4711) Darron Moore is his brother. (V.XXXVII,R4712) On May 23, 1994, Bruce Foster came to his house with a .38, snub-nosed, black handgun. (V.XXXVII,R4712) Foster said that he had bought the gun from a white man and a Mexican man in a red pick-up truck. (V.XXXVII,R4713) Foster never mentioned Mr. Moody, and never said that Mr. Moody had sold him the gun. (V.XXXVII,R4716) A week later, Foster had the gun out in the yard. Mr. Weaks told Foster that he should turn it into the police. (V.XXXVII,R4722)

Carlos Allen was also in jail at the time of the trial. (V.XXXVII,R4727) In 1994, he was living with Darron Moore and Harold Weaks' mother. (V.XXXVII,R4729) Allen denied ever selling Bruce Foster a gun. (V.XXXVII,R4731) He denied ever holding money for Foster. (V.XXXVII,R4732)

Linda Leeks is Sherita Leeks' mother. (V.XXXIX,R5005) She knew that

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Sherita was some kind of a witness in this case. (V.XXXIX,R5006) Sherita was arrested on July 28, 1994. (V.XXXIX,R5007) Sherita told her mother that she had come to Bartow to answer questions and that they got angry with her and were yelling at her and calling her names. (V.XXXIX,R5008) They got upset when Sherita maintained she knew nothing about the sale of a gun. (V.XXXIX,R5009)

In rebuttal Officer James Bowen testified that he spoke with Carlos Allen on June 3, 1994. (V.XXXIX,R5019) At that time Allen told Bowen that Bruce Foster

had asked him to hold a gun that might have been involved in the murder of the grove man. (V.XXXIX,R5019) Foster told Allen that he had purchased the gun from Mr. Moody for \$60. (V.XXXIX,R5020) It was possible that Allen never saw the gun.(V.XXXIX,R5023)

PENALTY PHASE

Eston Hunter is a probation and parole officer with the Department of Corrections. (V.XLII,R5574) He supervises persons on controlled release. (V.XLII,R5575) On May 16, 1994, Mr. Moody was on controlled release. (V.XLII,R5578) Mr. Moody was on controlled release as a result of a prison sentence that arose when he stole four bottles of hair care products from Wal Mart.

(V.XLII,R5579) Mr. Moody had no prior convictions for any violent crimes.

(V.XLII,R5580)

The State presented the following testimony as victim impact evidence:

Christopher Scott Mitchell, age 14, was Scott Mitchell's nephew.

(V.XLII,R5585) Mr. Mitchell had taken the role of Christopher's father after

Christopher's father died. (V.XLII,R5586) Christopher was overwhelmed with

sadness at his uncle's death, and he went to a children's grieving group.

(V.XLII,R5587)

Beverly Mitchell is Christopher's mother and a sister to the deceased.

(V.XLII,R5588) She described Mr. Mitchell as intelligent, caring, and a devoted

brother. (V.XLII,R5589) She had a special relationship with him and his death

changed her life forever. (V.XLII,R5589)

Roy Daniel Mitchell is the deceased's older brother. (V.XLII,R5590) Two

photos of Mr. Mitchell were introduced. (V.XLII,R5592) Roy Mitchell described Mr.

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Mitchell as the family peacemaker, comedian, and practical joker. (V.XLII,R5592)

He affected people positively and brought happiness and joy. Mr. Mitchell's father

(now deceased) was affected very much by the death of his son, and felt that a part

of him died with his son. (V.XLII,R5592) Roy knew that marijunana was found in

Mr. Mitchell's blood and urine samples that were collected at the autopsy.

(V.XLII,R5594)

The following evidence was presented by the defense:

Barbara Moody is Mr. Moody's sister. (V.XLII,R5605) Both of Mr. Moody's parents are deceased. (V.XLII,R5505) The family of nine was not well-off, but the children were provided for. (V.XLII,R5606) Both parents worked.

Mr. Moody's father died when he was a teenager. (V.XLII,R5607) Mr. Moody was devastated by his father's death, because they had been very close. (V.XLII,R5607) It was difficult for Mr. Moody's mother to raise him and his brothers after the death of the father. (V.XLII,R5616) Due to their mother's health problems, the older children mostly raised the four youngest children, including Mr. Moody. (V.XLII,R5608)

Barbara Moody recalled that almost from birth Mr. Moody had grand mal seizures. (V.XLII,R5610) The frequency of the seizures increased as he got older. (V.XLII,R5610)

Mr. Moody had behavioral and academic problems in school. (V.XLII,R5611)

Barbara would hear her parents discuss this. (V.XLII,R5611) Barbara knew that Mr. Moody had a learning disability. (V.XLII,R5612) He could not concentrate, and had difficulty reading. (V.XLII,R5612) The problems were serious enough that Mr.

Moody could not progress in school, and he left school before graduating high school. (V.XLII,R5614) Mr. Moody attempted a vocational school, but he did not finish it. (V.XLII,R5614)

Barbara Moody loves her brother. He is respectful to her. (V.XLII,R5616)

Myron Moody is Mr. Moody's older brother. (V.XLIII,R5625) He is a landscaper and a minister. (V.XLII,R5626) Myron recalled that Mr. Moody had a very close relationship with his father, that was much closer than the other children. (V.XLII,R5637-8) After the death of his father, Mr. Moody began to drift. (V.XLII,R5629) Mr. Moody did not seem to get over the death of his father. (V.XLII,R5629)

Myron remembered Mr. Moody's seizures as a child. (V.XLIII,R5629) The family would use popsicle sticks to keep him from swallowing his tongue. (V.XLIII,R5629) Mr. Moody had seizures for a long time. Myron believed that he still had them occasionally. (V.XLIII,R5630)

Mr. Moody did not finish high school. At one point Myron got Mr. Moody a job where Myron worked. (V.XLIII,R5631) The sub did not last. (V.XLIII,R56332)

Myron and Mr. Moody had a very close relationship. (V.XLIII,R5632) Myron would take Mr. Moody to church with him after Mr. Moody was released from prison. (V.XLIII,R5633) Mr. Moody was very discouraged because he could not find a job

due to his prison record. (V.XLIII,R5634)

Myron had a fifteen year old son, Myron, Jr.. (V.XLIII,R5634) Mr. Moody is very close to his nephew and tells him not to turn out like he did. (V.XLIII,R5635)

Teresa Moody is married to Myron, and works with the Florida Department of Corrections Probation and Parole Office. (V.XLIII,R5644) Mr. Moody and her have a close relationship that has lasted for 19 years. (V.XLIII,R5646) Mr. Moody has been good to her and to her children. (V.XLIII,R5647)

SUMMARY OF THE ARGUMENT

The trial court erred in denying the defense motions to suppress evidence and statements. The stop of Appellant by law enforcement was based on information

that was up to three or four years old, and thus the information was too stale to provide a reasonable suspicion of criminal activity upon which a legal stop could be made. As such, any information obtained as a result of that stop, including the gun and the evidence seized pursuant to searches predicated upon the finding of that gun, should have been suppressed.

The circumstantial evidence in this case is insufficient to support the convictions. The circumstantial evidence did not exclude a reasonable hypothesis that Mr. Moody had nothing to do with the crime and that they were committed by someone else.

The trial court committed reversible error when it permitted an alternate juror to be substituted for a juror who could not continue once deliberations had begun. Due process considerations and an absence of any procedural or statutory authorization for this practice preclude the trial court from doing this. The reasoning of the United States Ninth Circuit Court of Appeals, which found that the substitution of an alternate juror during deliberations is per se reversible error even if agreed to by the defendant, should be adopted by this Court.

The trial court erred in finding the aggravating factor that the murder was committed to avoid or prevent a lawful arrest. The State's evidence failed to establish that avoid or prevent a lawful arrest was the dominant motive where the victim was

not a law enforcement officer. The trial court based its findings of fact on speculation and erroneous conclusions that were not supported by the evidence. The aggravating circumstance must be stricken.

The sentence of death is disproportionate in this case. This is not the most aggravated and least mitigated cases. The death penalty should be reversed and the case remanded for the imposition of a life sentence.

ISSUE I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO

SUPPRESS WHERE THE LAW ENFORCEMENT OFFICER'S HAD NO REASONABLE SUSPICION OF CRIMINAL ACTIVITY TO PROVIDE A BASIS FOR A LEGAL STOP AND THUS VIOLATED THE FOURTH AMENDMENT.

Defense counsel filed a number of motions to suppress. The following testimony was taken at the hearings on these suppression motions:

On May 23, 1994, Officers Terry Dowdy and Eugene Bly were working special investigations in Lake Wales.(V.III,C344) They were in an unmarked car and wearing civilian clothes.(V.III,C344) They were on patrol on Lincoln Ave., a high crime and high drug area.(V.III,C344)

Dowdy has known Mr. Moody since 1987 or 1989. (V.III,C344) In May 1994, Dowdy believed that he had not seen Mr. Moody for a year or up to two years.(V.III,C345) Dowdy knew that Mr. Moody had gone to prison, but he did not know when he had gone or when he had been released.(V.III,C345) Dowdy was not sure when he had last seen Mr. Moody. (V.III,R358)

Around 4:00 p.m., Dowdy saw Mr. Moody driving a yellow Ford station wagon.(V.III,C345) Dowdy stated that ever since he has known Mr. Moody that Mr. Moody has had a suspended driver's license.(V.III,C346) In the past he has checked

records on this. (V.III,C346) On this day, however, Dowdy did not even attempt to run a records check to see if Mr. Moody's license had been reinstated, because he did

not know Mr. Moody's birth date.(V.III,C347,361)

At a second hearing held on May 30, 1996, Dowdy again testified.(V.V,C668) At this time Dowdy testified that he had not seen Mr. Moody for a year or two before he stopped him, and that he did not know where he had been during that time period.(V.V,C670) When Dowdy saw Mr. Moody driving, Dowdy intended to stop and arrest him for driving with a suspended, license.(V.V,C671) Dowdy did not know for sure that Mr. Moody's license was suspended and he could not run a check for this on the computer without a birth date.(V.V,C671) Dowdy had not checked on Mr. Moody's license for at least two years, and it could have been as much as three or four years.(V.V,C684;697-98) Mr. Moody had not committed any traffic offense at the time he was stopped.(V.V,C683)

Officer Eugene Bly did not know Mr. Moody before May 23.(V.V,C705) A records check after Mr. Moody was arrested confirmed that his license was suspended.(V.V,C707)

When Dowdy saw Mr. Moody driving, he told Bly that they needed to get someone to stop him.(V.III,C347) Dowdy and Bly followed Mr. Moody, and called for a marked unit to stop him.(V.III,C347) Patrolman Cooper stopped Mr. Moody .

(V.III,C347)

Dowdy was not looking for Mr. Moody, and at the time of the stop he had no

information about any outstanding warrants.(V.III,C357) The only reason Mr. Moody was stopped was because Dowdy believed that he had a suspended drivers license.(V.III,C360)

Dowdy went to Mr. Moody's car and asked him for his drivers license.(V.III,C348) Mr. Moody said that his license was suspended.(V.III,C348) Bly then arrested Mr. Moody, and he was placed in the patrol car.(V.III,C349)

A wrecker was called to tow Mr. Moody's car.(V.III,C349) An inventory search was done on the car.(V.III,C349) A gun and some stereo speakers were found.(V.III,C350) A check was made on the serial number of the gun was, and it came back that the gun was stolen.(V.III,C351)

Mr. Moody was taken to the police station. He was booked and released after being given a Notice to Appear.(V.III,C353)

Records from the Department of Corrections reflected that Mr. Moody had been in custody from November 4, 1992 until December, 1993.(V.III,C363) He had been out of custody for roughly five months at the time of this stop.(V.III,C363)

On June 26, 1996, Judge Robert Young entered an Order denying the motions to suppress.(V.V,C778-784)

In Februray 1998, defense counsel moved to suppress evidence seized from the Lisa Lane house, the First Street apartment, and Mr.Moody's station

wagon.(V.V,C805-808;V.VI,R809-819) The motions asserted that any evidence seized from these locations was the result of the improper stop of Mr. Moody on May 23. At the hearing on these motions Counsel asserted the position that the illegal police activity (Dowdy's stop of Mr. Moody on May 23, 1994) was the starting point for all of the remaining police investigation, and was therefore subject to suppression as fruit of the poisonous tree.(V.VI,C841-843;851) Judge Susan Roberts, who was now the trial judge, chose not to revisit Judge Young.(V.VI,C852-856)

Throughout the trial, defense counsel repeatedly objected to any testimony relating to the evidence seized as a result of these searches, thus preserving the issue for appellate review. The issue before this Court is whether or not the stop of Mr. Moody's car violated the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution. An analysis of the law in this area demonstrates that the stop clearly violated Mr. Moody's constitutional rights.

This Court has very recently addressed this specific issue in State v. Perkins, 25 Fla. L. Weekly S321 (Fla. April 27, 2000). In Perkins this Court reviewed the decision of the Fourth District Court of Appeals in Perkins v. State, 734 So. 2d 480

(Fla. 4th DCA 1999). According to this Court's opinion, the defendant, Perkins, was

"stopped by a Palm Beach county police officer on July 13, 1997, for the sole purpose of checking the status of his driver's license. After Perkins was stopped, the officer obtained Perkins' driver's license and discovered that it was suspended." Id at 321. The State conceded that the officer did not see Perkins commit any traffic violations, or observe any other activity justifying a stop. According to footnote 1, another officer had radioed the stop officer and advised him to stop Perkins, because the officer did not believe he had a license. Based on these facts, the Court wrote... "we hold that when, as in the instant case, an officer unlawfully stops a defendant solely to determine whether he or she is driving with a suspended license, that officer's post-stop observation of the defendant behind the wheel must be suppressed." Id at 32 .

The case at bar is factually indistinguishable from Perkins. As in Perkins, Dowdy did not believe that Mr. Moody had a license. As in Perkins, Dowdy radioed this information to a stop officer. As in Perkins, Dowdy unequivocally testified that Mr. Moody had not committed any traffic violations or engaged in any other activity justifying a stop. So, as in Perkins, the stop of Mr. Moody must be held to be illegal, and all of the officer's post-stop observations must be suppressed.

Any evidence that was the "fruit of this poisonous tree" must also be suppressed.

In Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the United States Supreme Court established the "fruit of the poisonous tree" doctrine that requires the suppression of evidence that results from the exploitation of a Fourth Amendment violation. In the case at bar, it is clear that the evidence seized from Mr. Moody's station wagon (the gun, speakers, bullets, and all other items listed in the motion to suppress) was found as a direct result of the exploitation of the unlawful stop. The evidence seized in this case was clearly the "fruit of the poisonous tree". It is equally clear that all of the evidence seized from the execution of the search warrant at the house on Lisa Lane and the search of the apartment on First Street was a direct result of the illegal stop of Mr. Moody, thus it must also be suppressed as the "fruit of the poisonous tree".

In the case at bar, the trial court based its denial of the suppression motions on the mistaken finding that the stop of Mr. Moody was legal because it was based upon a reasonable suspicion of criminal activity. (V.V,C781) The trial court relied on several cases that dealt with the question of whether or not the information was too old, or stale, to constitute a reasonable suspicion. Even under this method of analysis, the result should be the same- the stop was illegal and the trial court's ruling was incorrect.

In the case at bar, Dowdy testified that he did not believe that Mr. Moody had a valid license because during the time he had known him, he had not known Mr.

Moody to have a valid license. Dowdy acknowledged that the last time he would have verified this knowledge would have been the last time he had stopped Mr. Moody for the purpose of arresting him. Dowdy admitted that it had been at least two years since he had seen Mr. Moody, and could have been as much as three or four year. He did not know Mr. Moody's exact whereabouts during this period, although he knew that Mr. Moody had been in prison. Dowdy did not verify his belief that Mr. Moody had a suspended driver's license prior to haveing Mr. Moody stopped.

None of the cases relied upon by the trial court involved a period of two years, let alone an indefinite period of time, as being able to support a reasonable suspicion. For example, in State v. Levya, 599 So. 2d 691 (Fla. 3DCA 1992), the Third District Court of Appeals held that the officer's knowledge of the defendant's suspended license was not stale and provided a reasonable suspicion upon which to make a stop where the officer had personal knowledge of numerous suspensions including the knowledge that the license had been suspended for five years. In Levya the officer had four-to-five week old knowledge that the license had been suspended. The officer also stopped Mr. Levya for a traffic infraction of speeding.

In State v. Wade, 673 So. 2d 906 (Fla. 3rd DCA 1996), the facts were that Wade was a suspect in several robberies. The police officer had run a check on Wade 2 to 8 weeks before the stop, and at that time his license was suspended. The Third

District, relying on Levy, held that the information was not stale and the stop was based upon a reasonable suspicion.

In Carr v. State, 568 So. 2d 120 (Fla. 5th DCA 1990), the facts were that the officer had arrested Carr for driving on an expired license. When the officer saw Carr driving two days to one week later, he suspected that Carr had no license and therefore stopped him. The Fifth District Court of Appeals found that the information was not stale.

In the case at bar, the time period is at least two years. The time period may have been as much as three or four years. A time period of this length does not provide a basis for a reasonable suspicion. The information is stale and cannot justify the stop.

Based on this Court's decision in Perkins, an analysis of the cases cited by the trial court, the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution, the order denying the motions to suppress must be reversed and a new trial ordered.

ISSUE IITHE STATE'S CIRCUMSTANTIAL EVIDENCE
WAS INSUFFICIENT TO ESTABLISH APPELLANT'S GUILT.

The due process clause of the United States and Florida Constitutions require that the State prove Darryl Moody's guilt beyond a reasonable doubt. See, United States Constitution Amendments V and XIV; Florida Constitution Art. I, Sec. 9. "The State bears the responsibility of proving a defendant's guilt beyond and to the exclusion of a reasonable doubt." Long v. State, 689 So. 2d 1055, 1057 (Fla. 1997). In the case at bar, the defense moved for a judgment of acquittal. The denial of this motion was error where the circumstantial evidence was legally insufficient to support the convictions.

A special standard of review regarding the sufficiency of the evidence applies where the convictions are wholly based on circumstantial evidence. Jaramillo v. State, 417 So. 2d 257 (Fla. 1954). In numerous cases this Court has taken great pains to explain how circumstantial evidence is to be evaluated. For example, in State v. Law, 559 So. 2d 187, 189 (Fla. 1989), the standard was described as follows: "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any

reasonable hypothesis of innocence." In Law, this Court also firmly established that
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judgment of acquittal should be granted in a circumstantial evidence case if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. This Court has affirmed its continued support of this standard in Barwick v. State , 660 So. 2d 685 (Fla. 1995) and Woods v. State, 733 So. 2d 980 (Fla. 1999).

In analyzing the circumstantial evidence in the case at bar against the standard of review governing circumstantial evidence, it is clear that the State failed to meet its burden. While some of the State's evidence is consistent with its theory that Mr. Moody was involved in the crimes, the State's evidence fails to exclude a reasonable hypothesis that the crimes were committed by someone other than Mr. Moody.

The State's theory was that Mr. Moody and someone else (possibly Dexter Moody, although he was never charged in connection with this murder) were in the orange grove stripping a car they had stolen when Mr. Mitchell came upon them. The State then theorized that Mr. Mitchell was killed in order to prevent him from reporting the crime.

In order to prove its theory, the State presented evidence that one of guns that was used to kill Mr. Mitchell had been in Mr. Moody's possession approximately one

month before the murder at a place called the Conversation Club. Mr. Moody allegedly sold the gun to Bruce Foster after the murder, telling him that the gun had

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been through alot.

Other testimony presented by the State's own witnesses, however, negated the inference of guilt that could be drawn from this circumstance. According to several State witnessess (Bruce Foster, Roddis Dewdney, and Hillary Brinson) the incident where Mr. Moody was alleged to have been in possession of the murder weapon at the Conversation Club was the second week of April, coinciding with a special event, Black Beach Week, in Daytona Beach. Black Beach Week was the weekend of April 8th. The gun was supposedly seen on April 9, yet it was not stolen from Mrs. Carmichael's car until April 10th. Under these facts, the gun that Mr. Moody was seen with was not the murder weapon. (V.XXX,R3545-7;XXXVI,R4458-61)

Only Foster claimed that the gun at the Conversation Club was the same gun that he later bought from Mr. Moody. Foster could not identify the gun he saw at the Conversation Club except in general terms. Foster testified that the color of the pouch was brown and that the gun was a .38. (V.XXVIII,R3102) Foster did not identify the manufacturer. Vincent Crawford, who also saw the gun, stated that the gun at the Conversation Club was not a .38. Roddis Dewdney testified the gun he saw could have been a .32 or a .38. (V.XXX,R3551;XXXI,R3597-99) According to Hillary

Brinson someone else who was with Mr. Moody handed the gun to him in the parking lot of the Conversation Club. (V.XXXI,R3625-6) The State's evidence did not establish that the

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gun at the Conversation Club was the same gun that was used to kill Mr. Mitchell. Foster said the gun at the Conversation Club was in a brown pouch. The pouch for the gun from the murder was black. (V.XXVIII,R3222) A reasonable hypothesis is that the gun at the Club and the murder weapon were two different guns. Even assuming they were the same gun, there was no evidence that Mr. Moody continued to maintain possession of the gun during the interim time period, or that someone else, such as Dexter Moody, had access to this gun.

Bruce Foster testified that when Mr. Moody sold him the gun after the murder that Mr. Moody told him to be careful with the gun, as it had been through alot. (V.XXVIII,R3137) Foster's testimony was that Mr. Moody did not elaborate on what "alot" was. This equivocal statement by Mr. Moody is susceptible to numerous reasonable hypotheses of innocence. The statement that the gun had been through alot could reasonably mean that Mr. Moody knew it was a stolen gun, or that it had been involved in other crimes besides the crimes in this case. Further, this statement is susceptible to the reasonable hypothesis that although the gun had been through alot that it could reasonably have been through alot with someone other than Mr. Moody,

such as Dexter Moody.

The State also presented evidence that various items that had been taken from a stolen Buick found in the grove next to the victim's car were found in Mr. Moody's

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car. Other items of stolen property were found in a bedroom that Mr. Moody was known to occupy.

The fact that property that had been removed from the stolen Buick was found in Mr. Moody's car does not negate a reasonable hypothesis of innocence- that someone other than Mr. Moody committed the crimes. Obviously the State did not believe this evidence was a sufficient confirmation of guilt since similar stolen items were also found Dexter Moody's car and he was not charged with these offenses. (V.XXII,R2041-2050) The evidence presented by the State fails to establish how, when, where etc. Mr. Moody came into possession of these items.

The State also presented evidence that Mrs. Stinson at one point selected Mr. Moody's photo as being the closest resemblance to that of the man she saw seated in the Cadillac parked on 80 Foot Road. However, this identification was not considered to be a positive identification by the police (V.XXXIX,R3333), and was an inconclusive identification based only upon the hair style and ears, since she was unable to see a face. More importantly, this identification also supports a reasonable hypothesis of innocence- that Dexter Moody and/or Bruce Foster committed the

crimes. During the trial Mrs. Stinson selected Dexter's photo as being the photo which most resembled the man in the Cadillac. Mrs. Stinson also testified that Bruce Foster resembled the man after she saw Foster during the trial. (V.XXX,R3412-3413)

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The State also presented evidence that a pair of Sierra shoes or hiking boots likely left an impression at the crime scene. (V. XXVII,R2978;XXIX,R3280-91) A pair Sierra shoes were found in the bedroom of Alwyn Leek's apartment. Mr. Moody slept in this bedroom with Sherita Leeks. (V.XXV,R2561) The Sierra shoes were a size 9E. Although the shoes fit Mr. Moody, Mr. Moody is a C width. The shoes also fit Dexter Moody, who is a size 8.5E. (V.XXVII,R2976;XXXIV,R4176) It should also be noted that Dexter Moody had stayed at the Leek's apartment, and that he and Mr. Moody traded shoes and clothing. The shoes were also the same size that Sherita Leeks wore. The evidence also showed that the person who wore the Sierra hiking boots had an enlarged right metatarsal. Mr. Moody did not have an enlarged right metatarsal. (V.XXXIV,R4174-5) Scrapings of soil taken from the bottoms of the Sierra hiking boots did not match the soil samples collected at the crime scene. (V.XXXII,R3862) The evidence of this shoe impression did not negate a reasonable hypothesis of innocence that someone other than Mr. Moody had worn the shoes in the grove.

The State also presented evidence that items of stolen property, such as guns

and ammunition, were found in a bedroom in the house on Lisa Lane that was occasionally occupied by Mr. Moody. These items, however, were all found on a side of the room that contained a sign which identified that side of the room as Dexter's being side of the room. Identification documents belonging to Dexter were found in the room, and

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Dexter pled guilty to several charges arising from the weapons found in the room. (V.XXVI,R2813,2817)

In addition to the above, it is noteworthy that no latent prints were found which linked Mr. Moody to the crime scene. Foster cannot be eliminated since no comparison was made between his known fingerprints and the latent prints of comparison value that were obtained from the Buick and other items connected with the crime. (V.XXXVI,R4482)

It was undisputed that Dexter's Cadillac was seen on 80 Foot Road around the time of the murder. It was undisputed that Mr. Moody's car was not in the area at the time of the murder.

Mr. Moody did not leave the Polk County area after he was stopped by the police, even though he believed that he would be in trouble because the driving charge or the finding of the gun would affect his controlled release. (V.XXXVI,R4424)
Dexter Moody fled the State of Florida and was arrested three months later in

Delaware. (V.XXXV,R4373;4382)

The evidence was conclusive that two different guns were used to kill Mr. Mitchell. The second gun was never found, and the gun found in Mr. Moody's car was eliminated as being one of the murder weapons. The State's evidence did establish that at least one person had an extensive collection of guns- Bruce Foster. Dexter Moody

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also appeared to have a number of guns. None of Foster's guns were examined to determine if they were the murder weapon. There was no evidence that established that Mr. Moody had access to other guns or owned other guns.

It was undisputed that Bruce Foster did not tell the police the truth about what time he was finished in court on the day of the murder. Foster claimed he walked and took a series of buses back to Lake Wales, but could offer no corroboration for his activities. No attempt was made by law enforcement to verify Foster's whereabouts once it was discovered that he had lied about the time frames with respect to his court appearance. As Officer Bowen acknowledged, Bruce Foster could have left court and gotten to the area of Mud Lake Road and 80 Foot Road by the time of the murder. (V.KKKVI,R4465-4470) Thus, Foster has no verifiable alibi for the time of the murder. In contrast, Sherita testified that she heard Mr. Moody talking about washing his car on the morning of the murder and Seege believed that it was on that day that

he was with Mr. Moody around noon while Mr. Moody was washing cars. (V.XXX,R3453-4;XXXII,R3829)

The evidence was consistent with someone other than Mr. Moody committing the crimes. The State's evidence was legally insufficient to establish Mr. Moody's guilt. The trial court erred in denying the motion for judgment of acquittal.

ISSUE III

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

After the jury had been instructed and retired to begin their deliberations the one remaining alternate, Juror #181, Mrs. Martin, was kept in the courtroom. The trial court told Mrs. Martin not to read the newspaper and not to talk about this case until she heard from the judge or the judge's office. (V.XLI,R5307) Mrs. Martin was not permitted to enter the jury room to retrieve her personal belongings. The bailiff got her personal belongings and gave them to her. (V.XLI,R5308) Mrs. Martin then left the courthouse.

The jury began deliberations at 10:12 a.m. on May 7, 1998. (V.XLI,R5306) The jury submitted two questions at 2:32 p.m.. (V.XLI,R5308) The second question

came from Juror #274, Mrs. Fagan. (V.XLI,R5309) Mrs. Fagan notified the court that she did not feel that she was physically or mentally able to continue.(V.XLI,R5309) The trial judge advised the attorneys for both sides that she had seen Mrs. Fagan, and that Mrs. Fagan seemed very ill and tired. The trial judge had asked the bailiff to find some Tums for Mrs. Fagan. (V.XLI,R531) Defense counsel noted that he thought that Mrs. Fagan had appeared ill during closing arguments the previous day. (V.XLI,R5310) Defense counsel asked that she be excused, and that Mrs. Martin, the alternate, be

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called in. (V.XLI,R5310) The court then told everyone that she had checked on Mrs. Martin, and that Mrs. Martin said she could come back. (V.XLI,R5311)

After a fifteen minute recess, Mrs. Fagan came into the court room and said she would like to be relieved. (V.XLI,R5315) Mrs. Fagan said it was her nerves and only rest would help. She left the courtroom crying. (V.XLI,R5317) Defense counsel again requested that she be excused. (V.XLI,R5321) Mrs. Fagan returned to the courtroom, and the decision was made to find someone to check her blood pressure. (V.XLI,R5324) The jury was not deliberating and the court gave the State thirty minutes to research the issue. (V.XLI,R5324)

After the recess, the court advised all of the attorneys that the EMT's did not believe that Mrs. Fagan should continue to deliberate. (V.XLI,R5325) Mrs. Fagan

was excused with no objection from defense counsel or the State. (V.XLI,R5325)

The court then asked whether it was appropriate to put Mrs. Martin in with the already deliberating jury, and if it was appropriate should Mrs. Martin be given any instructions. (V.XLI,R5326) Defense counsel said that he was comfortable with Mrs. Martin, if court was adjourned for the night and the jurors went to the motel. (V.XLI,R5326) The court decided to ask the jurors what they wanted to do. (V.XLI,R5326-7) The State asked that the jury be told that they were to begin their deliberations anew, since they were a new jury, and the court agreed. (V.XLI,R5328)

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The jury was brought into the courtroom and told that Mrs. Martin would be serving with them instead of Mrs. Fagan. (V.XLI,R5329) The court gave the jury the choice of continuing with deliberations or going to the motel and starting over in the morning. (V.XLI,R5329) The jury retired to consider this. They returned shortly and said that they wanted to continue and catch Mrs. Martin up. (V.XLI,R5330)

The jury returned with a verdict convicting Mr. Moody at 8:45 p.m.. (V.XLI,R5330)

Florida Rule of Criminal Procedure 3.280 (1999) governs alternate jurors. Pursuant to section (a), an alternate juror "...shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties." Pursuant to section (b), which only applies in capital cases, "At the

conclusion of the guilt or innocence phase of the trial , each alternate juror will be excused with instructions to remain in the courtroom. The jury will then retire to consider its verdict, and each alternate will be excused with appropriate instructions that the alternate juror may have to return for an additional hearing should the defendant be convicted of a capital offense."

It is Appellant's position that the substitution of the alternate juror after deliberations had begun was fundamental error in this case. The Fifth District Court of Appeal appears to be the only court in Florida which has rendered an opinion on this

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issue, although the Third District Court of Appeal has discussed this issue in an opinion.

The Fifth District Court of Appeal addressed this issue in Sotola v. State, 436 So. 2d 1001 (Fla. 5th DCA 1983) and reached a result contrary to that requested in the case at bar. In Sotola the jury retired to deliberate at 8:15 p.m. The alternates were discharged. At midnight, testimony was played back at the jury's request. At 1:22 a.m., the jury returned and told the court that a member of the jury had read the newspaper during the course of the trial. The court, with defense counsel's agreement, decided to send the jury home and took the necessary steps to substitute an alternate for the one juror who read the newspaper. An alternate was called, and told not to

read the paper, and to be in court the next day. The next morning the alternate was placed on the jury, and the jury was told to start deliberating the case again. The jury deliberated from 10:16 a.m. until 5:17 p.m. before returning a verdict.

The Fifth District found that it was not fundamental error to substitute the alternate juror after deliberations had begun. The Fifth District found no statutory or procedural authorization for this practice. The Fifth District also noted that it should not be done if there was an objection. The Fifth District noted that other out of state jurisdictions require in such cases that it be emphasized to the jury that they are to begin their deliberations anew. The district court found that the trial court's instruction

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in Sotola's case that the jury ought to "... go back now and start deliberating the case again" was not a sufficient instruction. Because the instruction was not objected to, however, relief was not granted on appeal, since this was not deemed to be fundamental error.

The Third District was confronted with the propriety of permitting an alternate juror to be substituted after deliberations had begun in McGill v. State, 468 So. 2d 356 (Fla. 3rd DCA 1985). In McGill, the jury was instructed and the alternate juror was discharged. The alternate juror told the court before leaving the courtroom that he would have found the defendant guilty. Forty minutes into deliberations an interpreter

was requested to assist one of the jurors. After further investigation it was determined that the juror was unfit to serve due to a language barrier. That juror was discharged. Two and one half hours after the juror's discharge, the alternate juror was returned to the courtroom, placed on the jury, and deliberations continued. A guilty verdict was returned shortly thereafter.

The Third District first considered Fla. R. Crim. P. 3.280 and concluded that it makes no provision for the recall of a juror who has been discharged after deliberations after commenced. The Third District also looked at Federal Rule of Criminal Procedure 24(c), which it found to be similar to Fla. R. Crim P. 3.280. Federal Rule of Criminal Procedure 24(c) (1999) provides that "... An alternate juror

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who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

In United States v. Lamb, 529 F.2d 153, 1156 (9th Cir. 1975), the United States Ninth Circuit Court of Appeals found that the unambiguous language of the Federal rule prohibited the substitution of an alternate juror once deliberations had begun. According to the Lamb court, Professor Curtis Wright, "one of the Nation's most prestigious legal commentators", had concluded that such an act was per se reversible error even if consented to by the defendant. The majority of the court concluded that the rule was mandatory for sound reasons.

As noted in McGill, appellate courts in Kentucky have also construed the Kentucky rule as absolute. The Kentucky court held that once discharged, the alternate was no longer a juror. The Kentucky rule is similar to the Florida rule.

According to McGill, California permits alternate juror substitution once deliberations have begun by statute. The United States Eleventh Circuit Court of Appeals finds reversible error only if the defendant is prejudiced by the substitution. United States v. Baker, 735 F.2d 1280 (11th Cir. 1984), cert. denied, 105 S. Ct. 329 (1984). This is a narrow exception, however, that is applied only in extraordinary circumstances and where extraordinary precautions are taken to avoid prejudice. See, United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982), cert. denied, 103 S. Ct. 3542

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(1983).

The McGill court did not to reach a decision on this issue. Instead the Third District reversed on the ground that it was error for the alternate to serve due to his having formed an opinion as to the defendant's guilt before joining deliberations.

Appellant submits that the Fifth District's holding is erroneous. This Court should adopt the position taken by the Ninth Circuit that the substitution of an alternate juror once deliberations has begun is fundamental error.

In Johnson v. State, 616 So. 2d 1,3 (Fla. 1993), this Court held..." for an error

to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." The substitution of an alternate juror once deliberations has started is an error that is basic to the judicial decision under review and is equivalent to a denial of due process

The integrity of a deliberating jury is sacrosanct. For example, it is fundamental error to allow an alternate juror or anyone, for that matter, to enter the jury room once deliberations have begun. See, Berry v. State, 298 So. 2d 491 (Fla. 4th DCA 1974). It is error for a judge or any party to engage in *ex parte* communications with a juror. Although these cases do not involve the same situation as the case at bar, their message that a deliberating jury is not to be disturbed is applicable. The principle that a deliberating jury is to be left alone clearly implies that it should be left intact, and

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where that is not possible, a mistrial declared.

To permit a person to enter into deliberations once deliberations have commenced affects the most basic components of due process and the right to a fair trial. It is an error which reaches into the very legality of the trial itself. Thus, the Fifth District was wrong in determining that error which alters the composition of a deliberating jury is not fundamental. The Ninth Circuit is correct in holding that it is

fundamental error.

Florida Rule of Criminal Procedure 3.280 does not authorize or permit the substitution of an alternate juror once deliberations have begun. Constitutional considerations require that criminal rules and statutes be strictly construed in favor of the accused. A strict construction of Fla. R. Crim. P. 3.280 leads to the inescapable conclusion that an alternate juror may not serve on the jury in the guilt or innocence phase of the trial once the jury has retired to deliberate.

Not only was the substitution of the alternate juror error in this case, but the trial court wholly failed to take the precautions that the Fifth District described as being necessary, let alone the extraordinary precautions that the 11th Circuit has required. The trial court telling the jury after Martin had joined them that they needed to start all over again was not a sufficient instruction. It did not emphasize to the jury that they

must somehow set aside all their previous discussions and conclusions. Even worse, the jury clearly did not understand what they were to do in this respect, since they chose to continue and catch Mrs. Martin up on where they left off, instead of starting over.

Even if this Court finds that the error was not fundamental error, defense counsel did sufficiently preserve the error for review. As a condition to their acceptance of Mrs. Martin as a juror, defense counsel wanted the jury sent to a motel for the night before resuming deliberations with the new juror. The trial court did not honor this condition. Instead the trial court asked the jury what they wanted to do. When the jury indicated that they wanted to catch Mrs. Martin up, and continue deliberations, the trial court allowed them to do so. (V.XLI,R5330) Even the Sotola Court has noted that if the defense objects, it is reversible error to substitute an alternate juror during deliberations. In light of defense counsel's conditional acceptance of the alternate juror, and the trial court not honoring this condition, reversible error occurred.

The substitution of the alternate juror after deliberations had begun was reversible error. The case must be reversed and remanded for a new trial.

ISSUE IV

THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT AVOID OR PREVENT LAWFUL ARREST WAS THE DOMINANT MOTIVE FOR THE MURDER TO SUPPORT

A FINDING OF THE AGGRAVATING FACTOR OF WITNESS
AVOID OR PREVENT LAWFUL ARREST.

The trial court found that the aggravating factor that the crime for which the defendant is to be sentenced was committed to avoid or prevent a lawful arrest.

(V.VIII,C1216) The trial court's findings are as follows:

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.

Trial counsel had objected to the applicability of this aggravating factor and

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argued that it had not been established in the Memorandum in Support of a Life Sentence. (V.VIII,R1229-1232)

The trial court's findings are not supported by the evidence and the state failed

to establish that avoid or prevent lawful arrest was the dominant motive behind the murder. The aggravating factor must be stricken.

Florida law requires that before this aggravating factor can apply to the killing of a person who is not a law enforcement officer, the evidence must prove that the dominant or only motive was to eliminate the victim as a witness. Hannon v. State, 638 So. 2d 39 (Fla. 1994). The State must prove by positive evidence (rather than by mere default or elimination) that the dominant motive was to eliminate a witness. Scull v. State, 533 So. 2d 1137 (Fla. 1988); Jackson v. State, 592 So. 2d 409 (Fla. 1986). "The trial court is not permitted to draw logical inferences when the State has not met its burden." Robertson v. State, 611 So. 2d 1228 (Fla. 1992).

Some factors which can be considered include: whether the body was buried White v. State, 403 So. 2d 331 (Fla. 1981), whether the victim was taken to a remote location Adams v. State, 412 So. 2d 850 (Fla. 1982), and whether the victim knew the defendant and could later identify him Geralds v. State, 601 So. 2d 1157 (Fla. 1992). Killings which are impulsive do not support this aggravator. Waterhouse v. State, 429

So. 2d 301 (Fla. 1983); Knowles v. State, 632 So. 2d 62 (Fla. 1993). Generally, the State carries their burden to of proving this aggravating factor by using testimony

from a surviving victim, a co-defendant, or a confession by the defendant.

The State failed to prove the existence of this aggravating factor. The evidence established that two people went into the grove, for the most likely reason of stripping a stolen Buick. At some point Mr. Mitchell came upon them. Absolutely no evidence was presented by the State about the nature of the contact between Mr. Mitchell and these individuals. There is no way to rule out a scenario in which Mr. Mitchell was shot due to a spontaneous reaction to an unanticipated confrontation. There is no way to know what type of confrontation occurred between Mr. Mitchell and the two people in the grove. A reasonable hypothesis is that there was a heated confrontation between the overseer of the groves and trespassers in the grove that resulted in Mr. Mitchell being shot out of anger. The absence of any evidence as to what the events were that immediately preceded the shooting precludes a finding that avoid or prevent lawful arrest was the dominant motive. See, Menendez v. State, 386 So. 2d 1278 (Fla. 1979); Riley v. State, 366 So. 2d 19 (Fla. 1978); Robertson, at 611 So. 2d 1228.

Because Mr. Mitchell appeared to be the sole eyewitness to the crime and because he might not have resisted, witness elimination may be a plausible inference,

but it is not the only inference. Griffen v. State, 474 So. 2d 777 (Fla. 1985).

The trial court's finding that the cell phone was in Mr. Mitchell's lap is not indicative of witness elimination. Mr. Mitchell could just as likely have been talking on the phone when he pulled into the grove and then put in on his lap instead of the base as he confronted the two men. There was no evidence presented by the State as to whom Mr. Mitchell might have last called. There was no evidence that he was attempting to call the police or otherwise report the situation, or even if he was doing so that the individuals knew this. Even if the State had been able to prove that Mr. Mitchell was calling the police, that is not enough to establish witness elimination as a dominant motive. See, Amazon v. State, 487 So. 2d 8 (Fla. 1986).

One plausible scenario regarding what happened is that Mr. Mitchell came upon the individuals in the grove, and began backing away. He then changed his mind and stopped backing up by putting his foot on the brake at which time an angry confrontation occurred. Another plausible explanation is that an angry confrontation happened, and when the two trespassers spontaneously pulled out guns and began firing in anger, Mr. Mitchell tried to back away.

There is absolutely no evidence to support the trial court's finding that the only threat Mr. Mitchell posed was one of identification. The evidence established that Mr. Mitchell was the overseer of the property and had a gun in his truck. There is no way

to exclude the reasonable hypothesis that he threatened physical violence to the

individuals trespassing in the grove, who then shot him to prevent themselves from being harmed. The evidence did not exclude the probability that the murder was an impulsive act after a vehement confrontation in which the prepertrators acted out of anger.

The State also presented no evidence that Mr. Mitchell would have been able to identify the individuals in the grove. There was no testimony regarding Mr. Mitchell's opportunity to observe the two individuals. There was no evidence to establish that Mr. Mitchell knew the individuals or that he would have been able to later identify them.

There is no evidence to establish which person fired which gun. While some evidence might establish that Mr. Moody had the weapon that fired the close-range bullet a month before and a week after the murder, there is absolutely no evidence which proves he was in possession of that gun at the time of the murder, if he fired the close range shot, or in what order and when any of the shots were fired. The conclusions by the trial court are mere speculation.

The evidence fails to prove that avoid or prevent lawful arrest was the dominant or sole motivation for the murder. The aggravating factor must be stricken. Since it was the only aggravating factor that was given great weight by the trial court, a death

sentence cannot be sustained on the weight of the remaining aggravating factors.

Reversal for a life sentence is required.

ISSUE V

THE SENTENCE OF DEATH IS DISPROPORTIONATE BECAUSE THIS IS NOT THE MOST AGGRAVATED AND LEAST MITIGATED CASES.

Under Florida law the death penalty is reserved for only the most aggravated and least mitigated homicides. State v. Dixon, 283 So. 2d 1,7 (Fla. 1973); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1988); Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993). The Eighth and Fourteenth Amendments to the United States Constitution require that capital punishment be imposed fairly and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104 (1982). The independent review that this Court conducts in capital cases is crucial to ensure that the death penalty is not imposed arbitrarily or irrationally. Parker v. Dugger, 498 U.S. 308 (1991). This review requires an individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

To meet these constitutional requirements, this Court conducts proportionality review of every death sentence to prevent the imposition of cruel and unusual punishment, which is also prohibited by Article I, Sections 9 and 17 of the Florida Constitution. Kramer, 619 So. 2d at 277; Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991) "A high degree of certainty in procedural fairness as well as substantive

proportionality must be maintained in order to insure that the death penalty is administered evenhandedly." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Because death is a uniquely irrevocable penalty, death sentences require more intensive judicial scrutiny than lesser penalties. Tillman, 591 So. 2d at 169. "While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional," this Court "is required to weigh the nature and quality of those factors as compared with other similar reported death appeals." Kramer, 610 So. 2d at 277.

Proportionality review is not simply a tallying of the aggravating and mitigating factors. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) It is a two prong analysis-- the crime being analyzed must fall in to two categories -- (1) the most aggravated and (2) the least mitigated of murders. Almedia v. State, 24 Fla. L. Weekly S336 (Fla. July 8, 1999).

This case is certainly not among the most aggravated murder cases in Florida. The trial court found three aggravating circumstances (1) the defendant was on controlled release (some weight); (2) the crime was committed while the defendant was engaged in the commission of a felony (some weight); and (3) the murder was committed to avoid lawful arrest or detection (great weight). An analysis of the the

circumstances behind each of these aggravating factors demonstrates that the first prong, that of "most aggravated of cases" has not been satisfied.

The first aggravating factor, that the defendant was on controlled release was properly accorded lesser weight by the the trial court. Mr. Moody had been incarcerated for the crime of felony petit theft after he took some hair care products from Wal Mart. (V.VIII,C1228) Mr. Moody had no record of violent crimes. He had not been released from prison for a crime against a person, but rather a property crime. The facts behind this aggravating factor require that it be given less importance than in instances where the defendant has been released from prison sentence for a violent crime.

The second factor, that the crime was committed while the defendant was engaged in the commission of a felony should also be afforded less weight. The felony in question arose from the act of stripping the Buick. This is a far less egregious felony than those that are typically present in capital cases. For example, the underlying felony was not a robbery, a sexual battery, or a kidnapping. Again, the underlying felony did not involve injury to a person, it was a property crime.

The facts suggest that this was not a premeditated killing, and instead involved spontaneous acts. The case at bar has all the hallmarks of a botched burglary, with a murder that arose out of surprise, confusion, and unexpected confrontation. See, Terry

v. State, 668 So. 2d 954, 965-66 (Fla. 1996), where a death sentence was reduced to life with the observations that the circumstances surrounding the shooting were unclear. Also, see Menendez v. State, 419 So. 2d 312 (Fla. 1982).

The remaining aggravating factor, that the murder was committed to avoid arrest, has been challenged in the previous issue. Appellant again asserts that the evidence failed to establish that avoid arrest was the sole or dominant motive for the murder and it is error to rely upon this aggravating factor to support a death sentence. Mr. Moody's actions after the murder also negate a finding of this aggravator. Mr. Moody did not flee the area even after he was concerned that he was going to be arrested. This action is inconsistent with a murder being committed to prevent or avoid arrest.

Equally important are the absence of what this Court has recognized as being among the most weighty aggravators and those most capable of sustaining a death sentence. The heinous, atrocious, and cruel aggravating circumstance nor the cold, calculated, and premeditated aggravating factor were not applicable to this case.

Two statutory mitigators were found. The first statutory mitigating factor was that the defendant was an accomplice to the crime and he was not the motivating person responsible for the death (little weight). Mr. Moody's background was also determined to be a statutory mitigating factor. Under this mitigating factor the trial

court found ten individual factors. Numbers 2, 3, 4, 5,8, and 9 were assigned some weight and numbers 1, 6, 7, and 10 were assigned little weight. The trial court also found five non-statutory mitigating factors, giving little weight to four factors and some weight to one factor. (V.VIII,R1217-1219)

The mitigation in the case at bar was of enough significance to preclude the imposition of a death sentence. The mitigation established that Mr. Moody was a child raised in poverty with a mother who was often absent while supporting the family. Mr. Moody's father, to whom Mr. Moody was very close, died when he was in his early teens. Mr. Moody suffered from seizures from infancy on. He suffered learning disabilities which led him to have difficulties in school. Mr. Moody eventually dropped out of school. Mr. Moody attempted to work, but the fact he had been previously arrested foreclosed employment opportunities to him.

Since his arrest Mr. Moody has endeavored to be a good role model for his nephews, exhorting them to not make the same mistakes that he had made. His art makes a positive impact. He had the fortitude to successfully battle a drug addiction. He has positive and loyal relationships with his family.

Mr. Moody had no evidence of violence in his background. He had no history of convictions for violent crimes. Mr. Moody did not try to avoid arrest in these crimes.

Presuming that the avoid arrest aggravating factor is stricken, a death sentence is clearly disproportionate. For example, a death sentence was reduced to life in Farinas v. State, 569 So. 2d 425 (Fla. 1990), where there were two aggravating circumstances, including HAC, and only one mitigating factor.

Mr. Moody's case differs from those cases wherein this Court has affirmed a death sentence in a botched robbery or burglary. In Armstrong v. State, 642 So. 2d 730 (Fla. 1994), the defendant killed a deputy responding to a robbery at a Church's Chicken. Four aggravating factors were found, including a prior violent felony conviction. A death sentence was affirmed in Brown v. State, 644 So. 2d 52 (Fla. 1994), where the defendant had been previously convicted of a violent felony and there was no mitigation.

A review of Florida death cases establishes that it is not uncommon to find cases with four or more aggravating factors or with multiple murders. See, Henyard v. State, 689 So. 2d 239 (Fla. 1996); Jones v. State, 690 So. 2d 568 (Fla. 1996); Franqui v. State, 699 So. 2d 1312 (Fla. 1997). Obviously, when compared to cases such as these, the case at bar fails to meet the criteria of one of the most aggravated murders.

A sentence of death is disproportionate in this case and violates the Eighth Amendment of the United States Constitution and Article I, Section 17 of the Florida

Constitution which prohibit cruel and unusual punishment. The sentence of death must be reversed and a sentence of life imposed.

CONCLUSION

Appellant submits that the conviction for first degree murder be set aside. The evidence fails to support the conviction. In the alternative, a conviction for second degree murder should be affirmed.

The sentence of death should be reversed and the case remanded for a new sentencing proceeding. In the alternative, a life sentence should be imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, 2002 North Lois Ave, 7th Floor, Tampa, Florida 33607, this ____ day of July, 2000.

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