IN THE SUPREME COURT OF FLORIDA

ROSALYN ANN SANDERS,	:	
Petitioner,	:	
v.	:	CASE NO. SC00-1688
STATE OF FLORIDA,	:	
Respondent.	:	
_____	:	

PETITIONER'S INITIAL BRIEF ON THE MERITS

_____

On Review from the District Court
of Appeal, First District,
State of Florida

_____

STEVEN A. BEEN
Public Defender's Office
Leon County Courthouse
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2436 ext. 114
Florida Bar No. 335142
steveb@mail.co.leon.fl.us
Attorney for Petitioner

TABLE OF CONTENTS[1]

[1]Certificate of Font Size. Petitioner hereby certifies that this brief was printed in 12 point Courier New, a font that is not proportionately spaced.

TABLE OF AUTHORITIES

Cases

IN THE SUPREME COURT OF FLORIDA

ROSALYN ANN SANDERS, :

Petitioner, :

v. : CASE NO. SC00-1688

STATE OF FLORIDA, :

Respondent. :

_____ :

PETITIONER'S INITIAL BRIEF ON THE MERITS

PRELIMINARY STATEMENT ON SCOPE OF REVIEW

This Court has jurisdiction based on the district court's certification of conflict with decisions of other district courts. That conflict is on the question of whether the state's failure to prove an element of the crime constitutes fundamental error, the question briefed in Issue I. This Court has jurisdiction to review the entire decision of the district court, however, not just the part giving rise to jurisdiction. Tillman v. State, 471 So.2d 32 (Fla. 1985); Reed v. State, 470 So.2d 1382 (Fla. 1985). The district court also ruled on petitioner's argument that forcing her to go to trial in a first degree murder case represented by a patently unprepared lawyer was an abuse of discretion and a denial of the right to counsel. This issue is one of great public importance because of the importance of seeing that criminal defendants have diligent, competent counsel when tried for serious crimes, not just capital crimes.

Petitioner urges this Court to review Issue II as well.

STATEMENT OF THE CASE

On a retrial ordered due to juror misconduct, Rosalyn Sanders was convicted of first degree murder and shooting into an occupied vehicle, and sentenced to life in prison. (1R1,10,40, 62,67;1R3T445,448). Appeal was taken to the First District Court of Appeal, which affirmed and certified conflict with T.E.J. v. State, 749 So. 2d 557 (Fla. 2d DCA 2000), Stanton v. State, 746 So. 2d 1229 (Fla. 3d DCA 1999), and Brown v. State, 652 So. 2d 877 (Fla. 5th DCA 1995), on the question of whether the state's failure to prove an element of the crime (premeditation) constitutes fundamental error that may be raised for the first time on appeal. Sanders v. State, 25 Fla. L. Weekly D1660 (Fla. 1st DCA, July 12, 2000).

STATEMENT OF THE FACTS

Felix Parker was found on February 1, 1997, lying in the intersection of Berwick and Park streets in Pensacola, bleeding from a single gunshot wound to the head. (1T130-131,180-182). A bullet had entered Parker's left cheek, just behind the mouth, and exited below his right ear, in the neck, damaging the carotid artery, and causing death from blood loss. (1T180-182).

The state's version of events, asserted in opening and closing, was that Larry Moore drove Felix Parker and Iris Crenshaw to the corner of Berwick and Baars in order to purchase

crack cocaine from Rosalyn Sanders and Myron Davis; after an inspection of the cocaine, however, there was no purchase; then, as Moore, with Parker and Crenshaw, was pulling away in his truck, Rosalyn Sanders realized, correctly or not, that the would be customers had stolen some of her cocaine; she and Davis shouted at Moore to stop, and Sanders pulled out a gun and fired five shots at Moore's departing truck; one of those shots struck and killed Felix Parker. (1T122-124;3T380-382,384).

The state presented three eyewitnesses, Iris Crenshaw, Larry Moore, and Myron Davis. Crenshaw testified that she was with Parker when Parker flagged down Larry Moore's pickup truck and paid Moore five dollars to drive Parker and Crenshaw to Sixth Avenue, to Parker's aunt's house. (1T146-147). Moore, without saying why, took them instead to Berwick Street, parked the truck, and tried to get Parker to buy some crack cocaine. (1T150-151). Moore left the truck, and kept coming back, asking Parker to buy. (1T151). Then Moore jumped into the truck, and pulled off, and Crenshaw heard shots firing. (1T151-152). She and Parker both turned around and she saw Rosalyn Sanders standing there shooting. (1T151-152). Crenshaw saw that Parker had been shot, and told Moore, who stopped the truck, pushed Parker and Crenshaw out, and drove off. (1T153).

According to Larry Moore, he took Crenshaw and Parker to Berwick Street because they wanted to buy crack cocaine. (2T202-

203,210). Moore got out of the truck, got fifty dollars worth of crack from Rosalyn Sanders, and took it back to the truck. (2T203). Parker said he did not want it, so Moore took the crack back to Sanders. (2T203). Sanders then sent Myron Davis to the truck with some other crack, but Parker said it was not what he wanted. (2T203). As Moore drove off, he heard gunshots, looked back, and saw Sanders holding a gun pointed at the truck. (2T203-204). Moore was not asked, and did not testify, whether he had returned all of the crack cocaine to Sanders.

Myron Davis testified that he showed Moore some crack cocaine he had obtained from Sanders, but Moore did not want it. (2T243-244). Davis denied having gone up to the truck at all, and said he did not realize there had been anyone in the truck besides Moore. (2T243-244).

The main evidence relating to premeditation was Davis's testimony that: when Moore drove off, Sanders said that was not "all her stuff," "that ain't all of it, that ain't it;" Davis said, "that's all you gave me, and that's all he gave me;" Davis and Sanders both shouted at Moore, and Sanders pulled out a revolver and started shooting at the truck. (2T244-246). Davis figured that Moore had taken some of Sanders's cocaine. (2T258). Davis testified he did not remember Sanders doing anything that suggested she thought about what she was doing; there was no discussion, it was just bang bang, and it was done. (2T259).

From when the truck drove off to when Sanders fired the gun was a very short time, just a few seconds; the truck had only traveled ten or fifteen feet. (2T258-259).[2] After the shooting, Sanders ran around the house, and came back without the gun. (2T246-247). She asked Davis to tell the police that someone else had done the shooting. (2T247-248). Then Davis and Sanders ran to the place where Parker lay in the street. (2T245).

On the night of the shooting, Davis directed the police to the area by the house where he said Sanders had gone after the shooting. (2T248). The police found a revolver there, and the revolver contained five spent shells. (2T271-272,275). When the police found the truck that night, it had five bullet holes in the rear of the truck or the cab. (2T297-298). A firearms expert testified that pulling the trigger of the revolver from a cocked position would have taken three pounds of pressure; pulling the trigger from the uncocked position would have taken 13.25 pounds. (2T286-287).

Defense counsel did not move for judgment of acquittal. He did assert, in closing argument, that the evidence did not prove premeditation. (3T391-392).

---

[2]At one point, Davis testified that there were four or five minutes between Sanders's discovery that cocaine was missing and the shooting, but this was inconsistent with Davis's testimony that the truck was driving away when Sanders discovered that cocaine was missing, and the truck only got ten or fifteen feet away before the shooting. (2T257-259). Also, Davis corrected himself to say that only a few seconds had elapsed. (2T258-259).

Choice of Counsel – Issue II Facts

The following additional facts are pertinent to Issue II.

The jury reached a verdict in the first trial on May 13, 1998. (1R10). On September 14, 1998, the trial judge ordered a new trial based due to juror misconduct, over the state's objection. (1R22,29,35,40). The state appealed from the new trial order, but, on December 22, 1998, voluntarily dismissed its appeal. (Sanders v. State, Fla. 1st DCA, Case No. 98-3647). At the first trial, Sanders was represented by Elizabeth Broome, whose motion for new trial was granted by the trial judge. (1R12-21,40). A different attorney, Earl Overby, represented Sanders at the second trial. (1T1). There is no finding of insolvency in the record other than the order appointing the Public Defender for the purposes of appeal; both Broome and Overby were retained by Sanders, not appointed.

The prosecutor and Overby appeared before the trial judge on Wednesday, June 2, 1999, without Sanders present. (1T42-45). At that time, jury selection was scheduled for Monday, June 7, 1999, and the trial for Thursday, June 10, 1999. (1T42-45). Overby did not object to these dates. (1T42-45). The prosecutor also announced that two of the state's key witnesses from the first trial, Iris Crenshaw and Myron Davis, had disappeared, warrants had been issued for their arrest, and the state would seek to introduce their testimony from the first trial. (1T44).

On Monday, June 7, 1999, Overby moved for a continuance, stating that he had just been notified on the preceding Friday, June 4, 1999, that Myron Davis, had been located, and that another state witness was now unavailable. (1T3). Overby stated that the defense was not prepared. (1T3). The prosecutor asserted that the witness who was newly unavailable had merely examined a firearm for fingerprints, and was not needed as a witness. (1T4). He said that the only significant witness who was not available was Iris Crenshaw, and this was not a surprise to the defense. (1T4). The prosecutor also said:

> The state's ready. The victim's family is all here. They had to make travel arrangements to come from out of town and everything. It would be a great inconvenience and hardship for them to continue the case. The state's ready to go to trial.

(1T5). The judge denied the continuance. (1T5).

Sanders then told the judge her witnesses had not been subpoenaed. (1T5). The judge asked, "Mr. Overby, I recall there were witnesses who testified on Ms. Sanders behalf at the last trial, are they under subpoena?" (1T5). Overby replied, "No, sir, they are not. I neglected to do that." (1T5). Asked why he had neglected to do that, Overby said, "I wasn't fully aware of all of the witnesses that testified, Your Honor." (1T6). The judge ruled that jury selection would nonetheless go forward that morning, and he directed Overby to subpoena the witnesses who

testified for the defense at the first trial. (1T6). Sanders told the judge that there were additional defense witnesses who had not testified at the first trial. (1T6-8). The judge directed Overby to subpoena any witnesses he felt should be called, and the jury was then selected and sworn. (1T8,9,84).

The trial resumed three days later, on Thursday, June 10, 1999. (1T86). At that time, Overby advised the court that he had requested and not received a transcript of the testimony of witnesses other than Iris Crenshaw. (1T86-89). Sanders was then allowed to address the court:

> THE DEFENDANT: Yes, Your Honor. I don't feel that my attorney is ready to represent me as far as this trial right now. I haven't had time to read over anything and – as far as the transcripts of what the witnesses say for this time. And not only that, he – well this is my life on the line as far as this trial, and he's not prepared.
> THE COURT: Okay. Mr. Overby, do you want to –
> THE DEFENDANT: I asked for a continuance last –
> THE COURT: Ma'am, you're not the one trying the case, your attorney is going to be the one trying the case. I already have denied his request for continuance on your behalf. The witnesses that were referred to on Monday, the three – I guess it was three witnesses that testified in the first trial, have been served, it's my understanding.
> MR. OVERBY: That's correct, Your Honor.
> THE COURT: And Mr. Overby, are you prepared to represent Ms. Sanders at this trial? Ma'am, I'm not talking to you right now.
> MR. OVERBY: Your Honor, in one respect Ms. Sanders is correct in that I did not receive this transcript and could not provide her a copy of it until Monday morning. As you

know, we selected a jury on Monday that was sworn. Monday I was able to provide copies to Ms. Sanders so that she would go over them. We have not – it is true. She and I have not had the opportunity to go over the transcript together. I have gone over it thoroughly, but due to my absence from the state, I was not able to meet with her prior to that. Another factor, Your Honor –
THE COURT: Let me address that individually though. You have had a chance to review that transcript?
MR. OVERBY: Yes, sir.
THE COURT: Depositions were taken in the original case and you have had the opportunity to receive those?
MR. OVERBY: Those I received well in advance.
THE COURT: Okay. Ms. Sanders was present in the original trial and therefore heard the testimony that's reflected in the transcript and therefore has heard the testimony that you've read. So next point.
MR. OVERBY: Next point, Your Honor, is that the discovery materials that was requested, I received those Monday afternoon at approximately 1:30. Those contained additional – the statements from the police officers, the recorded statements of those witnesses.
THE COURT: Well, that information was earlier provided to Ms. Broome who was original trial counsel, were they not?
MR. OVERBY: Yes, sir. And we mentioned that at a pretrial conference on one occasion. You asked me had I obtained them from her, and I indicated that she was unable to provide me with them. She said they were scattered to the four winds and she couldn't put her hands on them.
THE COURT: But subsequently you have received them.
MR. OVERBY: I received them Monday afternoon at 1:30 p.m., Your Honor.
THE COURT: So you've had the opportunity to review those.
MR. OVERBY: I have. I have not had the opportunity to review them with Ms. Sanders.
THE COURT: I'm more concerned about what

you've done in order to represent Ms. Sanders because she's not going to be conducting the trial of this case.
MR. OVERBY: That's correct, Your Honor.
THE COURT: Next point.
MR. OVERBY: In relation to that point, part of my preparation would normally include my going over both the transcript and those recorded statements of the witnesses with Ms. Sanders to see if there are any matters that I could delve into. I must point out, Your Honor, that in reading this transcript at least five times there are numerous, numerous instances where Ms. Broom's questioning of witnesses made no sense to me. I was hoping to get with Ms. Sanders to have her assist me in determining what – what evidence she was trying to elicit.
THE COURT: Well, Ms. Sanders, anything else you want to say, ma'am?
THE DEFENDANT: Yes, Your Honor. On several occasions the State was able to have a continuance and this was my – as far as on the 7th, that was my first time asking for a continuance in this case, which everything was refused. You said some of the victim's family would be here, they're coming from out of town in which – this is my life on the line as far as this decision made today.
THE COURT: Okay. I'm not going to go through on the record the various court hearings that have taken place since the inception of this case, because as a matter of record – it's a matter of record and it's contained in the court file and the court docket records. I'll not go through all that. But this case has been pending since 1997. It's been tried once and you were found guilty. I granted a new trial because of juror misconduct. Now it's on for trial. I'll deny your motion for continuance, and let's move on and take a –
THE DEFENDANT: Can I dismiss my attorney?
THE COURT: Are you prepared to represent yourself at trial?
THE DEFENDANT: No, I'm not.
THE COURT: That's your choice. You want to represent yourself at trial?
THE DEFENDANT: If I can have more time to

hire another attorney.
THE COURT: No, ma'am. I'm not going to grant you that time.

(1T90-95)(Emphasis added). Following this colloquy, there was discussion of the state's plea offer, and there was testimony from a transcriber that convinced Overby he had received the entire transcript of the first trial. (1T95-98). Next, the judge returned to petitioner's request to dismiss her lawyer:

THE COURT: Ms. Sanders – or Ms. Sanders, come on back up here. Mr. Rimmer [prosecutor], Mr. Overby, I want to make sure the record is protected on this and I think maybe in responding to Ms. Sanders – step back a little bit, ma'am. I want to make sure I was careful enough in terms of certain inquiries because it may well be that the Court should conduct a formal Nelson inquiry or conduct it to some degree. But Ms. Sanders, raise your right hand to be sworn.
(Defendant sworn.)
THE COURT: Ma'am, I'll just have you affirm that everything you said to me up at the bench in our bench conference about ten minutes ago was true and accurate?
THE DEFENDANT: Yes, sir.
THE COURT: Now, you've expressed concerns about Mr. Overby and he has responded to that. And based upon his responses, particularly as it relates to the – his studies of the transcripts and depositions and discovery, it appears to the Court he's prepared to go forward with the trial. You expressed concerns because he has not gone over those with you; and is that the only concern that you have regarding Mr. Overby's representation of you at this point?
THE DEFENDANT: Yes, sir.
THE COURT: All right. And I find that Mr. Overby has prepared himself for the trial and has not acted ineffectively and is representing Ms. Sanders up to this point in time competently and effectively. Ma'am, I

> can advise you that you have the right to discharge Mr. Overby, if you wish. If you discharge Mr. Overby, you have the right to represent yourself in this matter. If there were an attorney present who is willing to go forward and represent you at this time, then they could take over the case. But that does not appear to be the case. And it's my understanding that you do not wish to go forward today representing yourself; is that correct?
> THE DEFENDANT: Yes, sir.
> THE COURT: So with that understanding, then, are you prepared to have Mr. Overby represent you for trial today?
> THE DEFENDANT: Yes, I am.

(1T98-100)(Emphasis added).

The trial began the same day as this discussion, and all testimony was received in one day. (1T117-2T371). Closing argument, instructions to the jury, deliberation, verdict, and imposition of sentence all occurred the next morning. (3T378-450).

The defense did present witnesses, who tended to show that it was Larry Moore, not Rosalyn Sanders, who killed Felix Parker. Three teenage boys, speaking to the police immediately after the crime and testifying at trial, implicated Moore rather than Sanders. (2T317,320-322,325-326,328). They were impeached by conflicting statements made to the police several days after the shooting, and by testimony questioning whether they were in a position to see the shooting. (2T365-367,369). The defense also called a friend of Iris Crenshaw's, who testified that as she left the crime scene, Crenshaw said she did not see who fired the

shots. (2T341). Moore and Crenshaw were both impeached with their extensive criminal records. (1T157-160,171-172;2T199-200, 209,212).

SUMMARY OF ARGUMENT

Issue I. The evidence of premeditation was insufficient because the facts as testified to by the state's witnesses show that this was an unplanned shooting that happened over the course of a few seconds, prompted by a perceived theft that occurred immediately before the shooting. Thus the state's evidence demonstrated that this was not a premeditated killing. The defense never raised this insufficiency in a motion for judgment of acquittal to the trial court, and the case law leaves some doubt as to whether conviction of a crime not proved is fundamental error. This Court should reaffirm its decisions finding insufficient evidence to be fundamental error and hold that the failure to prove all the elements of a crime may be raised for the first time on appeal.

Issue II. Petitioner's complaint that her lawyer was not prepared, and her request for a continuance to hire different counsel, were rejected by the trial judge, despite overwhelming evidence confirming the accuracy of her concern. On the day of jury selection, the lawyer said he was not prepared. He did not subpoena witnesses until ordered to do so by the judge on the day of jury selection. He failed to obtain the transcript of the

first trial until the morning of jury selection and he failed to obtain police reports containing statements of witnesses to the police until the afternoon of the day of jury selection. He was absent from the state for the three days between jury selection and the trial, so he was unable to meet with petitioner, despite his not understanding the intent of the defense questions of witnesses in the first trial, which he was reading for the first time. The prosecutor did not claim that the state's ability to present its case would be prejudiced by a delay of the trial. Forcing the defendant to trial with unprepared counsel in a first degree murder case under these circumstances was an abuse of discretion that violated petitioner's constitutional right to counsel.

ARGUMENT

ISSUE I. CONVICTION OF PREMEDITATED MURDER WITHOUT PROOF OF PREMEDITATION IS FUNDAMENTAL ERROR.

The first degree murder charge was submitted to the jury only on a premeditation theory; no felony murder instruction was given. (3T423-425). Hence, premeditation was an essential element of the crime for which Sanders was convicted. The state's evidence failed to prove premeditation, and in fact proved the opposite, an unpremeditated shooting provoked by events immediately preceding the shooting.

The shooting was prompted by Sanders's discovery, correct or

not, that Larry Moore was driving off with some of her cocaine. According to the state's evidence, upon making this discovery, Sanders shouted at the departing truck, which did not stop, and then pulled out a gun and shot five times. State witness Davis described this as a quick, bang bang and it's over, event, with no indication that Sanders thought about what she was doing. All five shots fired struck the truck, but only one hit a person. There was no evidence of a decision to kill prior to the shooting, and no evidence of a decision to kill during the shooting. Sanders could have intended all five shots to hit the truck without striking any person, and she could have been seeking to frighten the occupants, or simply venting her anger at being robbed, without ever forming an intent to kill.

This case is comparable with Cummings v. State, 715 So.2d 944 (Fla. 1998). In Cummings, the defendant heard that Dap Johnson had hit Cummings's uncle with a beer bottle. Cummings got a ride to get a gun, was driven to a house where Johnson stayed and where his car was parked, and Cummings and his companions fired at least thirty-five times at the house. One bullet traveled through the kitchen to the living room, where it struck a sleeping child. This Court reduced Cummings's first degree murder conviction to second degree because there was no proof of intent to kill. Cummings could have intended only to frighten Johnson. There was plenty of time to premeditate, after

Cummings learned of the earlier fight and left to get a gun, but with no proof that Cummings ever decided to kill, the evidence of premeditation was insufficient. The principle is the same in this case. It is true that a truck is a smaller target than a house, but it is quite possible to shoot at a truck without hitting the occupants, as four of five shots fired by Sanders did, and shooting at a truck can be intended to frighten the occupants rather than kill them, just as can shooting at a house.

At trial the prosecutor argued that the five shots proved premeditation because there was an opportunity to reflect with each shot. (3T383-384). This was wrong, because there was no evidence that Sanders did in fact decide to kill, and no evidence of a reflected, deliberated decision. To prove premeditation, the state must prove more than an opportunity to premeditate. The state must prove "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide." McCutchen v. State, 96 So.2d 152, 153 (Fla.1957). The evidence here of five gunshots did not prove any such conscious purpose.

In Kirkland v. State, 684 So.2d 732 (Fla. 1996), the defendant attacked his girlfriend's daughter, stabbing her many times in the neck, creating a deep, complex, irregular wound. This Court held the evidence insufficient to prove premeditation because: (1) there was no evidence of any intent to kill prior to

the homicide, (2) there were no witnesses to the events immediately preceding the homicide, (3) there was no evidence that the defendant obtained a weapon in order to commit the homicide, and (4) there was no evidence of a preconceived plan.[3] Here, as in Kirkland, there was no evidence of intent to kill prior to the homicide, there was no evidence that the defendant obtained a weapon in order to commit the homicide, and there was no evidence of a preconceived plan. Unlike Kirkland, here there was a witness, Myron Davis, to the events immediately preceding the homicide, and that witness established that the shooting was provoked by the events immediately before the shooting, thus refuting the possibility of a preconceived plan. Thus, per Kirkland, the evidence here did not prove premeditation. Kirkland involved a continuing attack with repeated lethal acts that, unlike this case, were virtually certain to cause death. Kirkland shows that repeated lethal acts are not enough to prove premeditation. See also, Coolen v. State, 696 So.2d 738 (Fla. 1997), where six stab wounds were held insufficient to prove premeditation.

The reason repeated lethal acts do not alone prove premeditation is that unthinking, unpremeditated violence can come in spurts; it need not come in a single act. A person who

[3]Kirkland's low IQ was also mentioned, but specifically held to be non-controlling.

makes a lethal attack without a conscious decision to kill may continue to attack, to pull the knife out and stick it in, or to pull the trigger again and again, as a result of one unthinking impulse. Firing five quick shots is just as consistent with an unpremeditated killing as is one shot. One shot, even a close range shot to the head, does not prove premeditation. See Mungin v. State, 689 So.2d 1026 (Fla. 1995), cert.den., 522 U.S. 833 (1997), Rivera v. State, 761 So.2d 423 (Fla. 2d DCA 2000), Norton v. State, 709 So.2d 87 (Fla. 1997), Kormondy v. State, 703 So.2d 454 (Fla. 1997), and Terry v. State, 668 So.2d 954 (Fla.1996).

Some recent cases involving strangulation also show that duration of the homicidal attack for some appreciable time, certainly longer than the time it takes to fire a revolver five times, does not prove premeditation. In Hoefert v. State, 617 So.2d 1046 (Fla. 1993), the victim was found in the defendant's apartment, dead from asphyxiation, the defendant had dug a hole to hide the body but fled instead, the defendant had a history of choking women during sexual assaults, and, while in jail for a previous attack, the defendant had expressed regret that he had not killed his last victim. Hoefert held this evidence insufficient to prove premeditation.

In Green v. State, 715 So.2d 940 (Fla. 1998), the intoxicated victim was stabbed three times, struck with a blunt instrument, and strangled, with death caused by strangulation.

The defendant was heard earlier in the day angrily threatening to kill the victim. Later he told a jailhouse informant that the victim "got crazy on us" and he and his friend had killed her. The prosecutor argued that murder by strangulation itself proved premeditation and that the defendant's earlier threat showed premeditation. Green noted that there was no evidence of the events immediately preceding the homicide, and little or no evidence of a preconceived plan, and held the evidence insufficient to prove premeditation.[4]

In light of Cummings, and of the stabbing and strangulation cases cited, the evidence failed to prove that Rosalyn Sanders shot with a premeditated intent to kill. The First District affirmed, however, because petitioner's trial counsel failed to move for judgment of acquittal. In the view of the district court, failure to prove all the elements of the offense is not fundamental error, and thus reversal based on the failure of proof is barred. Petitioner contends that conviction of a crime that was not proved is fundamental error that can be asserted on appeal even if not first raised in the trial court.

Considered in light of the general principles of fundamental error, insufficient evidence is certainly fundamental. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970), holds error fundamental if

[4]The earlier threat did not prove a preconceived plan to kill.

it "goes to the foundation of the case or goes to the merits of the cause of action." 237 So.2d 137. It is hard to imagine any error going more to the foundation or the merits of the case than the lack of evidence to prove the crime. Hamilton v. State, 88 So.2d 606 (Fla. 1956), and State v. Delva, 575 So.2d 643 (Fla. 1991), say that error is fundamental if the guilty verdict could not have been obtained without the error. This is the case with insufficient evidence. If the trial judge had realized the evidence was insufficient, judgment of acquittal would have been granted at trial. Castor v. State, 365 So.2d 701 (Fla. 1978), says fundamental error is error that amounts to a deprivation of due process. Insufficient evidence is a due process issue, because the due process clause requires proof beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979), In Re Winship, 397 U.S. 358 (1970). As the district court stated in Dydek v. State, 400 So.2d 1255 (Fla. 2d DCA 1981), in the context of the lack of a factual basis for a plea:

> We can think of no error more fundamental than the conviction of a defendant in the absence of a prima facie showing of the essential elements of the crime charged.

400 So.2d 1258. Convicting an accused not proved guilty goes against the very purpose of our justice system. In Williams v. State, 516 So.2d 975 (Fla. 5th DCA 1987), rev.den. 525 So.2d 881 (Fla. 1988), the district court, *en banc*, in holding fundamental error a conviction for robbery with no proof of force in the

taking, stated:

> Elementary justice in criminal cases is for a defendant to be found guilty of crimes he committed and not guilty of crimes he did not commit. Regardless of the procedural technicalities that the criminal justice system imposes upon itself, that system has but one product – justice – and it is unjust for a defendant to be in prison for a crime that never occurred.

516 So.2d 978.

As Williams also noted, the purpose of the contemporaneous objection rule does not apply to the error of insufficient evidence, which is remedied by discharge rather than a new trial:

> [T]he real purpose of the contemporaneous objection rule applies during a jury trial to assure correct rulings by the trial court on questions relating to the admissibility of evidence and instructions of law to the jury because judicial errors in those instances cannot be effectively corrected after the jury renders a verdict and is discharged and dissolved. There is no need to apply the rule strictly to pure rulings of law which can be corrected independent of a jury verdict, such as in this case.

516 So.2d 976. In State v. Rhoden, 448 So. 2d 1013 (Fla. 1984), this Court held sentencing errors correctable on appeal without contemporaneous objection, stating:

> The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge.

448 So. 2d 1016. A reversal for insufficient evidence, like a sentencing error, is corrected with a simple remand to the judge.

The state might suggest that if a proper motion for judgment of acquittal had been made at the close of the state's case, the state could have been allowed to present further evidence to cure the insufficiency. This argument is refuted, however, by Fla. Rule of Crim. Proc. 3.380, which allows the defense to move for judgment of acquittal up to ten days after receipt of the verdict and discharge of the jury. State v.Stevens, 694 So.2d 731 (Fla. 1997), confirms that rule 3.380 does allow the motion to be made for the first time after trial. There is no way to reopen the state's case after a verdict is given and the jury discharged. Thus, a timely motion for judgment of acquittal does not imply an opportunity for the state to present more evidence, and treating insufficient evidence as fundamental error does not deprive the state of any right it otherwise had. Moreover, in this case, the insufficiency was not based on some oversight by the prosecutor that could have been cured by calling another witness. The prosecutor knew he had to prove premeditation, and argued that the facts proved premeditation, but he was wrong. The facts showed the opposite.

This Court has been presented with unpreserved sufficiency issues on a number of occasions. In State v. Barber, 301 So.2d 7 (Fla.1974), the First District had found the evidence insufficient and ordered a new trial despite the defendant's failure to preserve the issue. This Court reversed, stating:

> [U]nless the issue of sufficiency of the evidence to sustain a verdict in a criminal case is first presented to the trial court by way of an appropriate motion, the issue is not reviewable on direct appeal from an adverse judgment.

301 So.2d 9. Barber, however, preceded the 1978 United States Supreme Court decisions holding that double jeopardy bars retrial when a conviction is reversed for insufficient evidence. Burks v. United States, 437 U.S. 1 (1978), Greene v. Massey, 437 U.S. 19 (1978). Before Burks and Massey, an appellate court's reversal based on insufficiency, like a reversal based on weight of the evidence, resulted in a new trial, not a discharge. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affd., 457 U.S. 31 (1982). Thus, at the time Barber was decided, barring reversal for unpreserved sufficiency issues did save the courts from the necessity of trying the case again. In petitioner's view, the interest in preventing retrials would not justify denying review of an error so fundamental as the state's failure to prove the crime, but in any event, after Burks and Massey, there is not even the judicial economy argument against treating insufficient evidence as fundamental error.

The same year as Barber, in Negron v. State, 306 So.2d 104 (Fla. 1974), this Court reversed a larceny conviction based on an unpreserved sufficiency issue. The Court was certainly aware that the issue was not preserved, as the opinion stated:

> We reviewed the transcript because of the

> claim of Petitioners that there was fundamental error committed as to them in that they were convicted of grand larceny when the State's evidence did not support a conviction of grand larceny.

306 So.2d 107. The insufficiency was the state's failure to prove that the market value of the stolen items exceeded one hundred dollars. Negron held the state's evidence of the cost of the stolen items to the victim insufficient to prove market value at the time of the theft, and reversed. The opinion did not cite Barber and did not discuss the issue of whether or not the lack of preservation barred review, but accepted Negron's view that the error was fundamental. Negron was recently cited by T.E.J. v. State, 749 So.2d 557 (Fla. 2d DCA 2000), which also held the failure to prove value in a theft case to be fundamental error.

In Troedel v. State, 462 So.2d 392 (Fla. 1984), this Court again addressed insufficiency as fundamental error. The evidence in Troedel showed that the defendant had unlawfully entered a structure, and that during this one intrusion he had carried a weapon and he had committed an assault. He was convicted of two crimes, burglary while armed and burglary with an assault. Troedel observed that the evidence only established one burglary, so a second conviction was not supported by the evidence. The defendant had not made this argument either at the trial or on appeal. Troedel held:

> [W]e reach the issue anyway because we believe that a conviction imposed upon a

> crime totally unsupported by evidence constitutes fundamental error.

462 So.2d 399. Vance v. State, 472 So.2d 734 (Fla. 1985), followed Troedel on similar facts. Neither Troedel nor Vance cited either Barber or Negron.

Since Troedel, this Court has continued to recite the preservation rule, but to nonetheless review unpreserved sufficiency issues on the merits. In Archer v. State, 613 So.2d 446 (Fla.1993), for example, the opinion says, "Archer did not make the instant argument in the trial court, and, therefore, this issue has not been preserved for appellate review." 613 So.2d 448. Archer goes on to discuss the sufficiency issue, however, and concludes that the evidence was sufficient. The opinions in Woods v. State, 733 So.2d 980 (Fla.1999), and Brooks v. State, 762 So.2d 879 (Fla.2000), also state that the sufficiency issue was not preserved, but then address sufficiency on the merits.

The trend in the district courts has been to hold at least some sufficiency issues to be fundamental error.[5] In the Williams case, discussed above, witnesses testified that the defendant's accomplice grabbed money from a cash register and ran to a car, which the defendant drove away. In order to get into

[5]There are exceptions to the trend. See Johnson v. State, 478 So.2d 885 (Fla. 3d DCA 1985), app. dism. 488 So.2d 830 (Fla. 1986); Stanley v. State, 626 So.2d 1004 (Fla. 2d DCA 1993), rev. den., 634 So.2d 627 (Fla. 1994).

the car, the thief knocked down a pursuing security guard. At trial, the defense argued for judgment of acquittal based on the defendant's lack of knowledge that the crime was going to occur. On appeal, the argument was that no force was used in the taking, only in flight. The law at the time was that in order to be robbery, force had to be used in the taking. Thus, the meritorious sufficiency argument had not been raised at trial. Although, as discussed above, Williams pointed out that the reason for the contemporaneous objection rule does not apply to sufficiency issues, the opinion also maintained that the insufficiency there was somehow different from normal insufficiency:

> The problem in this case does not really involve the sufficiency of the evidence. The facts are totally insufficient to support a conviction of robbery because without question, under the law and the uncontested facts, no robbery occurred.

516 So.2d 977.

Although Williams says this is not really a sufficiency issue, it is not clear why that is so. The evidence showed the taking element of robbery, but not the force element. If another witness had testified that the thief knocked down a guard or clerk in order to get to the cash register, robbery would have been proved. Perhaps what is meant is that the state witnesses themselves refuted the element of force in the taking, by testifying that no force was used. If so, the holding of

Williams would seem to be that insufficient evidence is fundamental error if the state not only presented no evidence to prove an element of the crime, but also presented some evidence that tended to refute the unproved element.

Nelson v. State, 543 So.2d 1308 (Fla. 2d DCA 1989), is similar. The convictions were for resisting an officer and petit theft. The evidence of resisting was that the defendant, who was carrying the fruits of a theft, ran upon sight of the police, and hid. The evidence of resisting was insufficient because when the defendant ran, he was not obstructing any lawful act of the officer, though his intent was clearly to prevent the officer from arresting him for theft. The court found the insufficient evidence fundamental error, but, like Williams, suggested that the insufficiency in that case was somehow different from normal insufficiency:

> Generally, a defendant must articulate the correct grounds in a motion for judgment of acquittal in order for an appellate court to review the issue. ... This case, however, is not the usual failure of proof case. Instead, this is a situation where Nelson's conduct did not constitute the crime of resisting an officer. Even though this issue was not raised in the trial court, it would be fundamental error not to correct on appeal a situation where Nelson stands convicted of a crime that never occurred.

543 So.2d 1309. See also, Hornesby v. State, 680 So.2d 598 (Fla. 2d DCA 1996), which says that in a typical failure of proof, the error must be preserved, but when the defendant's conduct does

not constitute the crime, the error is fundamental.

Some district court opinions, however, have concluded that a failure to establish a prima facie case of guilt, i.e., insufficient evidence, is fundamental error, without any attempt to suggest that the insufficiency is different from the normal failure of proof. In K.A.N. v. State, 582 So.2d 57 (Fla. 1st DCA 1991), the defendant was charged with escape from a juvenile detention facility. The evidence showed escape from a detention facility, but failed to show that the facility was of restrictiveness level seven or higher, an element of the offense. The motion for judgment of acquittal had asserted that the evidence was insufficient to prove all the elements of the crime, and in the course of argument, defense counsel had referred to a lack of rules. The district court chose to hold this argument broad enough to encompass the missing element of restrictiveness level, but also held:

> [E]ven if that were not so, nevertheless we would be compelled to consider this argument under the doctrine of fundamental error. The courts of this state have consistently held that a conviction in the absence of a prima facie showing of the crime charged is fundamental error that may be addressed by the appellate court even though not urged below.

582 So.2d 59. K.A.N. cited Troedel as authority for the proposition that insufficient evidence is fundamental error.

In O'Connor v. State, 590 So.2d 1018 (Fla. 5th DCA 1991),

the insufficiency of the evidence to prove conspiracy to traffic in cocaine was not raised by the defense at trial or on appeal. The appellate court noted, however, that there was no evidence that O'Connor had conspired with anyone other than a police agent. Neither that agreement nor evidence suggesting that the cocaine the defendant delivered to the agent had come from someone else was sufficient to prove a conspiracy. Insufficient evidence is fundamental error, the court held:

> Although this defect was neither argued to the trial judge below, nor to us on appeal, we are compelled to reverse the adjudication on the conspiracy count because the lack of any proof to support the charge constitutes fundamental error.

590 So.2d 1019.

In Valdez v. State, 621 So.2d 567 (Fla. 3d DCA 1993), the conviction was for violation of a Marine Fisheries rule pertaining to a particular species of crustacean. The state neglected to put on any evidence of the species, however. Valdez held the evidence insufficient, and the error fundamental:

> [T]his court may consider this point under the doctrine of fundamental error. "[C]onviction in the absence of a prima facie showing of the crime charged is fundamental error that may be addressed by the appellate court even though not urged below."

621 So.2d 568, citing K.A.N., Troedel, and other cases.

In Brown v. State, 652 So.2d 877 (Fla. 5th DCA 1995), the charge was racketeering by a scheme to pass stolen checks. The

evidence was insufficient because the state failed to prove the enterprise element of racketeering. Brown held:

> *Sub judice*, because there was no evidence of an enterprise, an essential element of the offense of racketeering, the State failed to make a prima facie case and fundamental fairness has required this court to address the appeal even absent specific objection below.

652 So.2d 881.

In Patel v. State, 679 So.2d 850 (Fla. 1st DCA 1996), the charge was soliciting to commit a lewd assault. The evidence did not prove soliciting, but did prove an attempt to commit a lewd assault. Patel held:

> We believe that appellant is, again, correct when he asserts that a conviction for an offense as to which no evidence has been presented constitutes fundamental error.

679 So.2d 852.

In Griffin v. State, 705 So.2d 572 (Fla. 4th DCA 1998), the evidence of kidnaping of a robbery victim's child was insufficient because, although the child was put in a closet, there was no evidence the child was tied up or locked up or otherwise restricted other than incidentally to the robbery. This insufficiency was the basis for reversal as fundamental error:

> A conviction is fundamentally erroneous when the facts affirmatively proven by the State simply do not constitute the charged offense as a matter of law.

705 So.2d 574.

In Johnson v. State, 737 So.2d 555 (Fla. 1st DCA 1999), rev.granted, 744 So.2d 454 (Fla. 1999), the defense asserted for the first time on appeal that the evidence for the crime of wearing a mask during a burglary was insufficient because the state failed to prove burglary, as the premises were open to the public. The district court accepted that this argument raised an issue of fundamental error, and thus had to be addressed on the merits, though on the merits, the court found the evidence sufficient:

> The state is correct that this specific claim was not preserved for appeal, but as appellant points out, a conviction is fundamentally erroneous when the facts affirmatively proven by the state do not constitute the charged offense as a matter of law.

737 So.2d 556.

In Stanton v. State, 746 So.2d 1229 (Fla. 3d DCA 1999), the evidence showed that the defendant had turned cocaine over to the police, and no evidence refuted his claim that he possessed the cocaine only in order to give it to the proper authorities. Thus, even though the defendant physically possessed cocaine, the evidence was insufficient to prove the intent element of the crime of possession of cocaine. This error was fundamental:

> The State also points out that this challenge to the sufficiency of the evidence was not properly raised in the trial court. That is so. However, Florida authority supports the

> proposition that "a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error."

746 So.2d 1230, citing Troedel and Vance.

The T.E.J. case, cited above, found the failure to prove value in a theft case to be fundamental error:

> [F]ollowing Negron, we conclude that this failure of proof on the essential element of value was fundamental error.

749 So.2d 558.

In Burke v. State, 672 So.2d 829 (Fla. 1st DCA 1995), the evidence of possession of burglary tools was insufficient because when the defendant attempted to enter a structure, his tools were in his car, parked some distance away, so the element of intent to use the tools for burglary was not proved. The state argued that insufficiency may not be reviewed in the absence of a motion for judgment of acquittal raising the issue at trial, and asserted that Troedel should not be followed. The district court made clear its view that under Troedel insufficient evidence is fundamental error:

> [T]he state recognizes the existence of a supreme court authority that holds that the failure to prove each element of the crime charged constitutes fundamental error that may be addressed by an appellate court, even though it was not addressed in the lower tribunal. ... As support for the contention that this court ought not view the state's failure to prove an essential element of the crime charged as fundamental error, the state maintains the supreme court's decision in Troedel "was an aberration." This court is

> not at liberty to disregard an applicable rule of law pronounced by the Florida Supreme Court.

672 So.2d 831.

In James v. State, 745 So.2d 1141 (Fla. 1st DCA 1999), the First District abruptly changed course, overruling its own precedent, and holding that insufficient evidence is not fundamental error. The district court's affirmance in this case cited James for the proposition that "the state's failure to prove all elements of a charged offense does not constitute 'fundamental error' which may be raised for the first time on appeal." 25 Fla. L. Weekly D1660. James reasoned that reversing a conviction based on the state's failure to prove the elements of the crime is inconsistent with this Court's decisions in Barber and Woods, cited above. The brief opinion in James did not make any reference to Negron, Troedel, or Vance.

It is certainly arguable that reviewing insufficient evidence as fundamental error is inconsistent with Barber. Negron, Troedel and Vance were also inconsistent with Barber. Indeed, the problem with Barber was recognized by Justice Ervin, concurring in that case:

> It appears to me that the long-followed construction given the rule ... that unless the question of sufficiency of the evidence is first presented to the trial court it is not reviewable on direct appeal, operates to deny a convicted defendant the direct and complete appeal that is guaranteed by the Constitutions. Our cases' construction of

> the rule is overly technical and places procedure and form over substance and fundamental rights.

301 So.2d 11. This Court should recognize that Negron, Troedel and Vance have undermined the authority of Barber, and established that the state's failure to present prima facie evidence of the elements of the crime is fundamental error.

Recent opinions of this Court, like Woods, do not refute this conclusion; they support it. By reciting the rule that says unpreserved issues cannot be reviewed on appeal, and reviewing the sufficiency claims on the merits anyway, Woods, Archer and Brooks show that regardless of preservation, this Court is not going to allow the error of convicting a person of a crime not proved to go uncorrected. Due process, basic fairness, and common sense all dictate that a conviction for a crime not proved cannot stand.

If this Court should choose instead to make a distinction such as some of the district courts have made, between the state's failure to prove a crime and the state's presentation of evidence that itself refutes the crime, it should be clear that in this case, the state did present evidence refuting premeditation. It was the state's witnesses who established that this was a sudden shooting, prompted by events immediately preceding the shooting, that the shooting happened quickly, and that Sanders did nothing to indicate she thought about what she

was doing. This is a case in which the evidence presented by the state shows that Sanders did not commit the crime she was convicted of. Petitioner's conviction for first degree murder is fundamental error.

ISSUE II. THE TRIAL JUDGE ABUSED HIS DISCRETION IN FORCING PETITIONER TO TRIAL WITH PATENTLY UNPREPARED COUNSEL RATHER THAN ALLOWING A CONTINUANCE SO PETITIONER COULD RETAIN DIFFERENT COUNSEL.

Petitioner's retained counsel for the second trial, Earl Overby, on Wednesday, June 2, 1999, agreed to a Monday, June 7, jury selection and a Thursday, June 10, trial of this first degree murder case although Overby had not yet received the transcript of the first trial or the police reports containing statements made to the police by state witnesses. On the morning of jury selection, Monday, June 7, he asked for a continuance, on the grounds that a state witness who had been thought unavailable had recently been found. He admitted that he had neglected to subpoena any witnesses, even the ones who had testified for the defense at the first trial, and the reason he gave for neglecting to subpoena the witnesses from the first trial was that he was not fully aware of who had testified. Overby received the transcript of the first trial that morning, Monday, June 7, and received the police reports that afternoon. He read this material between the June 7 jury selection and the June 10 trial, but the first trial had been conducted by a different defense

lawyer, and Overby admitted he did not understand the purpose of former counsel's questions, and he would have liked to go over the transcript with his client in order to get her to explain the intent of the defense examination. He was unable to do this because between jury selection and trial he was absent from the state. Though asked directly by the judge if he was prepared to go to trial, defense counsel never said that he was prepared. Despite all this information demonstrating the accuracy of petitioner's perception that her lawyer was not prepared, the judge ruled Overby ready for trial, and denied Sanders the opportunity to hire a different lawyer.

The trial judge's ruling was an abuse of discretion, and had the effect of denying petitioner's constitutional right to counsel. The leading case of Linton v. Perini, 656 F.2d 207 (6th Cir.1981), cert.den., 454 U.S. 1162 (1982), sets out the pertinent principles:

> It is axiomatic that in all criminal prosecutions the accused enjoys the right to have assistance of counsel for his defense, and implicit in this guarantee is the right to be represented by counsel of one's own choice. ... It is also true that a trial court, acting in the name of calendar control, cannot arbitrarily and unreasonably interfere with a client's right to be represented by the attorney he has selected. On the other hand, the right to counsel of choice may not be used to unreasonably delay trial.

656 F.2d 208-209. See also, U.S. v. Koblitz, 803 F.2d 1523 (11th

Cir. 1986). Foster v. State, 704 So.2d 169 (Fla. 4th DCA 1997), following Linton, noted that a criminal defendant who is able to hire counsel has the right to change lawyers without showing grounds to question the competence of current counsel, unlike defendants who must rely on court appointed counsel, though the right to choose counsel may not be abused with the purpose of causing delay. Thus, the defendant has a right to change lawyers, but the judge has discretion to deny a continuance even when this will prevent the defendant from obtaining counsel of his choice, if denying the continuance is necessary to prevent unreasonable delay.

In this case, there was no suggestion that the real reason for petitioner's request was a desire for delay, rather than concern about her lawyer's lack of diligence. Thirteen months had elapsed since the first trial, but seven of those months were taken up by the state's ultimately abandoned effort to prevent a new trial based on juror misconduct. The prosecutor asserted that the victim's family had come to the trial from out of town, and postponing the trial would cause hardship to them, but he did not specify the nature of that hardship, and he did not indicate how far they had traveled. In any event, no members of the victim's family testified, and the judge made no finding that delaying the trial would cause them substantial hardship. The prosecutor made no claim that a continuance would in any way

interfere with the state's ability to prove its case.

The judge found that Overby was prepared for trial, and was representing Sanders competently and effectively. The record provides no support for this finding. On the contrary, Overby's own statements to the judge make it clear that defense counsel was not prepared. Petitioner's desire to replace Overby with a lawyer who would diligently prepare for trial was eminently reasonable. Since Sanders was not seeking appointed counsel, only the opportunity to retain counsel who would prepare, it was not necessary to determine if Overby was providing competent assistance. Foster. Overby's lack of diligence, however, was powerful evidence demonstrating the reasonableness of petitioner's request.

The decision to grant or deny a continuance is discretionary, but, as stated in Linton, the judge may not in the name of calendar control arbitrarily deny a continuance and thereby prevent the defendant from exercising the right to choose counsel. Here, militating for a continuance were: (1) petitioner's constitutional right to choose her own counsel; (2) petitioner's reasonable grounds to want new counsel, based on her current lawyer's failure to diligently prepare for trial; (3) a complete lack of any suggestion or evidence that petitioner was seeking a continuance for improper reasons; (4) no assertion that the state's ability to prove its case would be prejudiced by a

continuance, and (5) the seriousness of the charge – Sanders faced conviction for first degree murder and a life sentence with no possibility of parole. The only factors militating against a continuance were inconvenience to non-witness members of the victim's family, the magnitude of which is unknown, and the fact that the case was two years old. Petitioner asserts that in a first degree murder prosecution, denying a continuance under these circumstances was an abuse of discretion, violating petitioner's Sixth Amendment right to counsel of her choice, and mandating a new trial.

The arbitrary denial of a continuance needed for a criminal defendant to hire counsel of his own choosing is *per se* prejudicial. As stated in Foster:

> We reject the State's claim that this case should be affirmed in any event because appellant has failed to demonstrate prejudicial error. The issue in this case was whether appellant was denied the right to be represented by the privately-retained lawyer of his choice – an error which may defy a demonstration of prejudice since the desired attorney is precluded from taking any action in the case. Accordingly, courts have held this error to be prejudicial *per se*.

704 So.2d 174.

CONCLUSION

Petitioner's conviction for first degree murder is fundamentally flawed by the state's failure to prove premeditation. Petitioner's right to counsel was violated by the trial court's insistence that she go to trial with a patently unprepared lawyer. Petitioner seeks reversal of her convictions and a new trial on the charges of second degree murder and shooting into an occupied dwelling.

_____
STEVEN A. BEEN
Public Defender's Office
Leon County Courthouse
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2436 ext. 114
Florida Bar No. 335142
steveb@mail.co.leon.fl.us
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Karen M. Holland, Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and by mail to Richard J. Sanders, Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, FL 33831, on this 3rd day of October, 2000.

_____
STEVEN A. BEEN