IN THE SUPREME COURT OF FLORIDA

SEP 18 1985

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CLARENCE EDWARD HILL,

Appellant,

v.

CASE NO. 68,706

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

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Appellant,	:	
v.	:	CASE NO. 68,706
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, CLARENCE EDWARD HILL, was the defendant in the trial court, and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The original record on appeal, which contains the transcripts of the guilt-or-innocence phase of the trial and the original penalty proceedings, will be referred to by use of the symbol "OR". The record on appeal with regard to the new penalty phase and resentencing proceeding will be referred to by use of the symbol "R". All emphasis is supplied unless the contrary is indicated.

II STATEMENT OF THE CASE

Clarence Edward Hill was charged by indictment returned November 2, 1982 with first degree murder of Pensacola police officer Stephen Taylor, attempted first degree murder of police officer L.D. Bailly, three counts of armed robbery (alleging the taking of money from the custody of three individuals at Freedom Savings and Loan Association), and possession of a firearm during the commission of a felony (OR 1440-41). On April 14, 1983, the defense filed a motion for change of venue (OR 1563-64, see OR 1565-1657). After a hearing on April 21, 1983, the

trial judge ruled that he would attempt to select a jury in Escambia County (OR 1723). Defense counsel renewed his motion for change of venue on several occasions during the jury selection proceeding (OR 27-28, 186, 347, 650). The trial court denied the motion (OR 650).

At the conclusion of the trial, the jury returned a verdict finding appellant guilty of first degree murder (premeditated and felony murder) and guilty as charged on all other counts (OR 1660-61). Following the penalty phase of the trial, the jury recommended that a death sentence be imposed (OR 1665). On May 27, 1983, the trial court sentenced appellant to death (OR 1668-69, 1673, 1690).

On appeal, appellant raised fifteen points on appeal. Nine of these (II through X) were interrelated issues concerning appellant's right to be tried by an impartial jury. These included contentions that the trial court erred in denying appellant's motion for change of venue (Issue II) and for individual and sequestered voir dire (Issue III), that several jurors challenged by the defense should have been excused for cause (Issue IV), and that additional peremptory challenges should have been granted (Issue V). As to each of the "jury selection" issues, appellant contended that he was entitled to a reversal of his conviction as well as reversal of his death sentence (see Initial Brief, p. 30, 50, 53, 68, 136). Among the other arguments made in the brief were that the prosecutor committed various and sundry acts of misconduct designed to prejudice the jury (Issues VI, VII, VIII, and IX), and that the trial court erred in allowing the state to introduce irrelevant "Williams rule" evidence (Issue XI).

At oral argument[1], due to the time limitation, undersigned counsel focused on only two issues; a Witherspoon/Witt issue involving two jurors who were opposed to the death penalty, and the change of venue issue. During the portion of the argument on the change of venue, it was suggested from the bench that the error may have been harmless as to the guilt-or-innocence phase, because appellant admitted

[1] The oral argument, which was held on March 4, 1985, was video-taped according to the now-standard procedure. The tape is available for viewing at the Florida State University law library.

his guilt of first degree murder, and that therefore it might not be necessary to reverse for a new trial, but only for a new penalty phase. Undersigned counsel replied that the error had a prejudicial impact upon the guilt phase as well, because the facts admitted by appellant established only that he was guilty of felony murder; while appellant firmly denied any premeditated intent to kill Officer Taylor or anyone else (see OR 1106). Since the jury by its verdict found appellant guilty of premeditated murder as well as felony murder, undersigned counsel argued, the errors which infringed appellant's right to an impartial jury required a whole new trial, and not merely a new penalty phase. Upon further questioning by the court, undersigned counsel agreed that reversal for a new penalty phase would suffice as an alternative remedy for the constitutional violations, but only if the jury in the new penalty proceeding was not informed of the original jury's finding of premeditation. During the state's argument, the Court shifted the focus of the argument to the issue regarding the denial of the defense's challenges for cause to jurors Larry Johnson and Ickes. On rebuttal, undersigned counsel addressed that issue, but made no further concession beyond the one referred to above.

On October 10, 1985, this Court reversed appellant's death sentence on the ground that the defense's challenge for cause to juror Larry Johnson was improperly denied. Hill v. State, 477 So.2d 553 (Fla. 1985). The error was held to have been harmful "because it abridged appellant's right to peremptory challenges by reducing the number of those challenges available him." Hill v. State, supra, at 556. It is stated in the opinion that "Appellant expressly recognizes that his argument on this issue is directed only to the penalty phase of the trial". Hill v. State, supra, at 554. With respect to the remaining issues raised by appellant, and his claim that the cumulative effect of the various errors asserted deprived him of a fair trial, the Court concluded "After a thorough review of the record, we find that none of the asserted errors effected appellant's conviction". Hill v. State, supra,

at 554. The Court affirmed appellant's convictions and sentences with the exception of the death sentence. The death sentence was vacated, and the case remanded for a new sentencing proceeding before a new jury. Hill v. State, supra, at 557.

The resentencing proceeding was held on March 24-27, 1986 before Circuit Judge William S. Rowley[2] and a jury. Prior to the penalty trial, defense counsel filed a motion in limine seeking to prevent the newly impaneled jury from being informed of the original jury's finding of premeditation (R 820). The motion was renewed immediately after the jury was selected and just before they were sworn (R 259-61). The trial court ruled, over defense objection, that the prior jury's finding of premeditation would be disclosed to the new penalty jury (R 260-261). Accordingly, the trial court began his preliminary instructions to the jury by stating that appellant "has been found guilty of first degree premeditated murder and felony murder" (R 262). The state's first witness, William Spence, a deputy clerk of the circuit court, referring to the verdict form from the original trial, testified over objection that the jury found appellant "[g]uilty of both first degree premeditated murder and a felony murder" (R 289).

After presentation of the evidence, closing arguments, and jury instructions, the jury returned a recommendation that appellant be sentenced to death (R 714, 834).

The sentencing hearing was held on April 2, 1986. Prior to the imposition of sentence, defense counsel once again argued, as grounds why sentence should not be imposed, that the jury should not have been informed of the prior jury's finding of premeditation (R 844-47). The trial court again overruled the objection (R 845-47). The court then, following the jury's recommendation, re-imposed the death penalty

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[2] The judge who presided over the trial and the initial penalty proceeding, Edward Barfield, was subsequently appointed to the First District Court of Appeal.

on appellant (R 835-42, 866-67, 872). The trial court found as aggravating circumstances that appellant had previously been convicted of a felony involving the use or threat of violence; that appellant knowingly created a great risk of death to many persons; that the homicide was committed in the course of a robbery; that the homicide was committed to avoid or prevent a lawful arrest or to effect an escape from custody; and that the homicide was committed in a cold, calculated, and premeditated manner (R 835-39). With regard to the mitigating factors proffered by appellant, the trial court rejected all but one (R 839-42). As to the mitigating circumstance regarding the age of the defendant at the time of the crime, the trial court was of the opinion that it "possibly could have been a factor but ... it would not be that significant" (R 840-41). The court concluded his sentencing order with the statement that "the age of the Defendant may have been a factor, but there has not been established sufficient mitigating factors to outweigh the aggravating factors"(R 842).

Notice of appeal was timely filed on May 2, 1986 (R 874).

III STATEMENT OF THE FACTS

The evidence presented in the guilt phase of the trial established that on the afternoon of October 19, 1982, Clarence Hill and Cliff Jackson, both of Mobile, Alabama, entered the Freedom Savings and Loan Association in downtown Pensacola and robbed it at gunpoint. Money was taken from the custody of tellers Tina Neese and Melanie Morris, and another teller, Patricia Devlin, was forced to open the vault. During the course of the robbery, either by the robbers' act of pulling the "bait money" out of the tellers' drawers or by the assistant manager Pat Prince's setting off the alarm, hidden cameras in the lobby were activated and the police were notified (OR 719, 723-24, 740-41, 797). Bank manager Alex Sparr was in his office on the second floor; when he saw squad cars arriving in front of the building, he phoned downstairs to find out what was going on (OR 805-06, 849-50). Sparr's call alerted the robbers that something had gone wrong (OR 717, 806). Jackson went out the front door and appellant went out the back (OR 717, 806, 1099). Jackson was immediately apprehended by Officer Larry Bailly, who had been positioned outside the door (OR 864-65). Bailly ordered Jackson to the ground, and then knelt down to handcuff him; Officer Stephen Taylor had come over to assist Bailly (OR 866-68). Meanwhile, appellant, who was on his way back to the car, turned around and saw that the police had caught Jackson (OR 1100-01). Appellant went back around the corner and came up behind the officers (OR 836, 351, 901-02, 1101-02).

[While the state's numerous witnesses gave a great deal of conflicting testimony as to the details of the robbery and shooting and as to the sequence of events, the state and the defense were pretty much in agreement as to the above-stated facts. It is at the point where the shooting began that the state and defense theories diverge].

Appellant testified that when he approached the officers, he did not intend to kill anyone (OR 1106). Rather, it was his intention to force the officer to drop

his gun and release Jackson (OR 1101-12, 1106). He came up behind the officer (Bailly) who was kneeling over Jackson and told him to halt (OR 1103). The officer froze for a second, then wheeled around and fired; at the same time appellant pulled the trigger but his gun misfired (OR 1103-04, 1119-23). Appellant was shot in the stomach (OR 1103-05). He and Officer Bailly both continued firing (OR 1103-05). When appellant heard Bailly's gun click, he began to run (OR 1105). Appellant was shot five times (OR 1104). He did not realize that the other officer, Taylor, had been shot and killed until he learned about it in the hospital that night (OR 1106).

Officer Bailly testified that he was kneeling over Cliff Jackson, getting ready to handcuff him, and Officer Taylor was standing behind him (OR 867-68). As he reached for his handcuffs, Bailly heard a bang and felt a sting on the left side of his neck (OR 868). That one bang was the only shot he heard (OR 869). He looked to his right and saw a black male standing seven or eight feet behind him and pointing a gun at him (OR 868-69). Bailly turned around and commenced firing (OR 869). He fired six rounds until his gun clicked (OR 869). After his gun clicked, the subject on the ground [Jackson] began struggling with him (OR 870). Appellant turned and ran toward the northeast (where he was apprehended near the Dainty Del Restaurant by Officer Paul Muller (OR 925-28)) (OR 870). Officer Bailly chased Cliff Jackson into an alley way beside the bank (where Jackson was apprehended by Officer Pat Adamson (OR 1022)) (OR 870). Bailly did not realize that Officer Taylor had been shot until he came back out of the alley and saw him lying in the street (OR 872-73).

Of the state's eyewitnesses, bank employees Tina Neese, Melanie Morris, and Patty Devlin did not see the shooting (OR 718, 746, 762). Bank employee Glenn Pugh, who saw the shooting when he went to help Pat Prince lock the front door, said appellant came within a foot or two of the officer who was kneeling over

the other suspect and shot him; the officer flinched and tried to get up (OR 784-87). Pugh was positive that the officer he saw kneeling over the suspect was the same officer he later saw stagger into the street and collapse by the curb (OR 787, 789-90). Pat Prince Mowery, who at the time was assistant manager of the bank and was known as Pat Prince, said appellant walked up behind the policeman who was standing and shot him three or four times in the back (OR 809-11, 814-15).

William Mark Cooey, a bank customer who was also helping to lock the front door, saw one of the robbers [Cooey was unable to identify appellant (OR 840)] shoot the one officer and then turn and shoot the other officer (OR 836-37). Cooey (unlike several of the other witnesses, including Officer Bailly, who had Jackson wearing an orange cap (OR 866)) was positive that the person he saw doing the shooting outside was the one with the orange cap on (OR 841, 844). Cooey also testified that the robber who approached him in the bank and pointed a gun at him was not theman who did the shooting (OR 825, 845), while the testimony of other witnesses showed that appellant was the robber who was rounding people up at gunpoint. Cooey had told the police that the man who approached him at the bank wore an orange cap, and that the only person he saw with a gun is the man with the orange cap (OR 844); yet, as he acknowledged on cross-examination, the photographs taken by the hidden camera showed that the man approaching him was not the person with the orange cap on (OR 841).

Alex Sparr, the bank manager, who observed the shooting from a second story window, saw only one officer, who was in a semi-crouched position over the suspect (OR 850-51). Sparr saw appellant walking briskly from the corner directly down the sidewalk with a pistol in his hand (OR 851). He walked up behind the officer and fired four shots in rapid succession (OR 852).

Donald Gratton, a bystander who was at the bus stop by the plasma center, saw appellant come from a different direction than what the other witnesses saw. Appellant, according to Gratton, had been talking to some people on the corner, came

up the sidewalk on the opposite side of the street from the bank, crossed the street at a casual gait, and when he got to the bank, pulled a gun and just started shooting (OR 887). He fired four or five times, shooting both officers (OR 887-888). Gratton described it, "... Actually, I don't believe in murder or anything but it was pretty slick the way he had done it. Almost like you would see on TV. He would come up the sidewalk, and as he crossed the street, and as he got toward the middle of the street he sort of slowed down like he was casually passing by and as he got up to the entrance of the door, he sort of reached down like this and slipped it out and started firing" (OR 893-94). Gratton testified that appellant was right up to the officers before he ever pulled the gun out, and the officers didn't even have time to shoot back - "I didn't believe they even had time to get their guns out of their holsters" (OR 894).

Hayward Norred, a bystander, saw appellant come around the corner and come up behind the officers at close range (OR 901-03). Appellant aimed his gun and fired four, five, or maybe six shots (OR 903). After hearing those shots, Norred heard four or five louder shots which he surmised were from a different kind of gun (OR 903-04).

Donna Haner, a city employee who (escorted by Officer Bailly) had just taken the city's deposits to another bank, said Bailly got the alarm regarding a robbery at Freedom Savings (OR 910). Ms. Haner was a fairly close friend of both Bailly and Steve Taylor (OR 913). Watching from the patrol car, she saw Taylor get down to frisk and handcuff the suspect, and Bailly backed off (OR 912-13). Ms. Haner did not notice appellant's presence until after she heard gunshots (OR 913); appellant was five or ten feet from the officers and firing his gun, and Larry Bailly was shooting back at him (OR 913). After the shooting, appellant ran toward the Dainty Del, Bailly and a newly arrived officer, Miller, were struggling with the other suspect, and Officer Taylor fell over in the street (OR 914).

The testimony of the associate medical examiner, Dr. Thomas Birdwell, established that Officer Taylor had been shot twice; one bullet entered in the lower back and traveled right to left at an upward angle, while the other bullet entered the chest and traveled left to right at a downward angle (OR 965-67, 975-76, 980). Officer Bailly received a bullet wound to the left side of his neck; he was treated and released the same day (OR 873-75).

Firearms examiner, Donald Champagne concluded that the .22 caliber bullet which caused Officer Taylor's death was fired from appellant's revolver (OR 1078-79). He found that four of the expended cartridge cases were fired in this revolver, and the other two had been misfired (OR 1077).

In the penalty proceeding before a new jury, held on March 24-27, 1986, both the state and the defense presented many of the same witnesses. In order to keep this brief from greatly exceeding the page limitations of Fla.R.App.P. 9.210(a)(5), the evidence presented at the new penalty phase will be discussed in the appropriate argument section of this brief.

SUMMARY OF ARGUMENT

The admission of the former testimony of Janet Pearce, concerning an uncharged robbery and car theft allegedly committed by appellant and Cliff Jackson in Mobile, Alabama several hours earlier on the day of the murder, was prejudicial error. This "collateral crime" testimony was not in any way relevant to the question of whether the killing of Officer Taylor was premeditated; was not relevant to any statutory aggravating circumstance, or to rebut any mitigating circumstance; and was not part of the "res gestae" of the charged crimes [Issue I].

The trial court improperly precluded defense counsel from going into certain lines of questioning concerning appellant's family background during his direct examination of appellant's mother and father. When defense counsel proffered the testimony he wished to elicit, the trial court excluded it because he believed it to be redundant,

since it all went to "character" and, in the court's opinion, the jury had already heard enough about appellant's character from other witnesses (R 561-64). It is appellant's position, as it was in the trial court, that the excluded testimony related to entirely different aspects of appellant's character and background than did the observations made by the five friends and neighbors who had testified (each very briefly) earlier. The trial court's ruling, which was the product of his denigration of the crucial role of character evidence in a capital sentencing proceeding, deprived appellant of his constitutional right to present evidence relevant to all aspects of his character or record or the circumstances of the offense. See Lockett v. Ohio, infra; Eddings v. Oklahoma, infra; Skipper v. South Carolina, infra [Issue II].

Similarly, the trial court was operating under a critical misapprehension of law when he refused to instruct the jury, as requested by the defense, that it could consider it as a mitigating circumstance if it found that the defendant acted under the substantial domination of another person. This is a statutory mitigating circumstance, as provided by Fla. State. §921.141(6)(e), and the defense introduced evidence to support it; i.e. the testimony of Cliff Jackson. The trial court refused to give the requested instruction because he did not believe that appellant was dominated, and because "... if you take the evidence from the side of the State, they completely refuted he [Jackson] was leading" (R 662). This was plain error. As with any other "theory of defense instruction", an instruction on a statutory mitigating circumstance must be given (if requested) if there is any evidence to support it. See Toole v. State, infra; Robinson v. State, infra. This is true even if the evidence relied on by the defense is "weak or improbable" and even if the trial court personally does not believe the evidence. See e.g. Gardner v. State, infra; Holley v. State, infra; Kilgore v. State, infra. Clearly, this means the evidence must be viewed in the light most favorable to the defense. To do otherwise, as the trial court did here, is to usurp the function of the jury and to precondition its penalty recommendation. See Cooper v. State,

supra. Moreover, the denial of the requested instruction under these circumstances violated the constitutional principles established in Lockett, Eddings, and Skipper [Issue III].

The prosecutor's misconduct in closing argument was so egregious as to deprive appellant of a fundamentally fair penalty proceeding. The prosecutor twice represented as a critical fact that the keys to the "getaway" car were in Cliff Jackson's pocket, and that that was appellant's real reason for returning to where the police officers had Jackson down on the ground. The prosecutor made this same unsupported statement of fact in his opening argument. Absolutely no evidence was presented in this proceeding (or, for that matter, in the original trial and penalty phase) that the keys were found in Jackson's pocket. [Absent the prosecutor's representations, the logical inference would have been that appellant had the keys, since he was driving]. The prosecutor used this purported "fact", which was entirely outside the evidence, to provide the jury with a cold-blooded, calculating motivation for appellant's actions, where (apart from the prosecutor's unsworn testimony about the keys) the evidence strongly suggested that the crime was committed in hot blood, in the fear and excitement of a bungled robbery interrupted by the police. In addition, the prosecutor blatantly argued that appellant should be sentenced to death because he exercised his right to a trial, in contrast to Cliff Jackson who entered a guilty plea. It is appellant's position that where the state puts before the jury, as a non-statutory aggravating factor, the defendant's exercise of his due process right to a jury trial, a death sentence imposed pursuant to such a proceeding violates the sixth, eighth, and fourteenth amendments to the U.S. Constitution [Issue IV].

Finally, it is appellant's position that the newly impaneled jury should not have been informed of the original jury's finding that the homicide was premeditated [Issue V], and that the trial court erred in finding as an aggravating circumstance that the homicide was committed in a "cold, calculated, and premeditated manner."

IV ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE CONCERNING AN IRRELEVANT COLLATERAL CRIME.

In the guilt phase of the trial, over defense objection and motion for mistrial (OR 1053-57, 1059), the state introduced the testimony of Janet Pearce. Mrs. Pearce testified that around noon on October 19, 1982, in downtown Mobile, Alabama, appellant, accompanied by another man, dragged her out of her car, placed a sharp object at her back, stole her purse, and drove off in the car (OR 1056-59). According to Pensacola police officer Gregory Moody, the car was recovered in downtown Pensacola, on the evening of the robbery of Freedom Savings, about a block away from the bank (OR 1047-51). The trial court overruled the defense's objection, apparently on the theory that the testimony would be relevant to the issue of premeditation; "that would indicate the possibility that he had to calculate his actions in order to go retrieve his buddy when he apparently had made a clean break" (OR 1055).

In the penalty proceeding on remand, the state sought to introduce the prior testimony of Janet Pearce before the newly impaneled penalty jury (R 300-01, 463-65). Defense counsel objected, contending once again that the robbery of Mrs. Pearce and the theft of her vehicle was irrelevant [3] (R 300, 463-65). The state again took the position that Mrs. Pearce's testimony was relevant to premeditation; specifically the "cold, calculated, and premeditated" aggravating circumstance (R 300-01, 464). At the beginning of the hearing, the issue was discussed as follows:

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[3] Mrs. Pearce was one of six witnesses (four for the state and two for the defense) who were unavailable to testify at the new penalty phase. Defense counsel made it clear that he was not objecting on any ground relating to her unavailability or the use of her former testimony as such (R 300). Rather, the basis of the objection was the same as in the guilt phase; i.e., the traditional "Williams rule" objection that the collateral crime evidence was prejudicial and irrelevant (R 300, 463-65, see OR 1046, 1053-57, 1059). See Jackson v. State, 451 So.2d 458, 461 (Fla. 1984).

MR. TERRELL (defense counsel); I ... object to the introduction of State's Exhibit 44, the testimony of Janet Pearce, because it goes to an alleged crime for which the defendant has not been convicted, that being the alleged robbery from her or theft from her of her car in Mobile on the date of the incident. She has no knowledge of the incident here.

MR. ALLRED (prosecutor): There's two reasons for its admissibility, that were already indicated and covered in the brief on appeal, that is, one, that it's admissible and notice was given of it to show Williams rule. Another is to show that the defendant's state of mind at the time is material to the issue. He's challenged -- made it an issue in opening statement as to the cold, calculated, premeditated things. He said they were on drugs; they are not these desperadoes. This shows -- her testimony shows they began planning things hours before by carefully planning to have a stolen car to use to come over to Pensacola. Not only that, but the witness will testify that some sharp instrument was put in her back, that the defendant was the one that did that, indicating that he had a weapon hours before; that the weapon wasn't obtained in any kind of happenstance, he had it when he came to Pensacola. He robbed her of the car. So it's relevant for both of those purposes. It was part of the facts and circumstances at the trial, should be part of the facts and circumstances for this jury today. And it also goes to the state of mind of the defendant for the cold, calculated, premeditated --

THE COURT: Anything further?

MR. TERRELL: No.

THE COURT: Overruled.

(R 300-01).

Immediately prior to the introduction of the challenged testimony, the following further discussion took place:

MR. TERRELL: Your Honor, I believe that this is, Miss Pearce's deposition, which is State Exhibit 45, I think. We're objecting to the reading of that deposition because it refers to collateral crimes that are not charged in the indictment in this case, but refers to an alleged theft and robbery of a vehicle from Miss Pearce in Mobile.

MR. ALLRED: This is the same objection we heard yesterday, which was overruled.

THE COURT: I know, but the materiality is the cause of the --

MR. ALLRED: Cold, calculated and premeditated.

THE COURT: It's also material to bolster the fact that the defendant has committed prior felonies.

MR. ALLRED: Well, this is not one in which he was tried and convicted. This is one that we're offering to prove the circumstances that the robbery, murder and all were done in a cold, calculated and premeditated manner. It was planned in advance; it began with the robbery of this automobile in Mobile, hours before the bank robbery. That's how it's tied up. It was admitted at the trial last time, and it was part of the sentencing consideration last time. It's properly so this time, too.

MR. TERRELL: Your Honor, that's irrelevant and improper characterization that it must be cold, calculated and premeditated. And it does not go to the question of a robbery. It goes to the question of a killing.

MR. ALLRED: State of mind for both.

THE COURT: Overruled.

(R 463-65).

Thereupon, Janet Pearce's former testimony was read to the jury (R 465).

Contrary to the state's purported justification, the evidence concerning the robbery of Mrs. Pearce in Mobile, Alabama was completely irrelevant to the issue of whether the murder of Officer Taylor was premeditated or not. Similarly, the robbery of Mrs. Pierce and theft of her vehicle were utterly without relevance to the question of whether the "homicide ... was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification". See Fla.Stat. §921.141(5)(i). Nor was the challenged evidence relevant to any other fact in issue in the trial. See Marion v. State, 287 So.2d 419, 421 (Fla. 4th DCA 1974). The state's presentation of Mrs. Pearce's testimony served no purpose other than to show appellant's bad character and propensity to commit crimes. It was, therefore, inadmissible under the Williams rule. See e.g., Williams v. State, 110 So.2d 654 (Fla. 1959); Drake v. State, 400 So.2d 1217 (Fla. 1981); Jackson v. State, 451 So.2d 458 (Fla. 1984); Peek v. State, 488 So.2d 52 (Fla. 1986); see also Robinson v. State, 487 So.2d 1040, 1042.

In the original trial and penalty proceeding, the state's theory of the case was that after the bank robbery was interrupted by the police, appellant had made a clean escape out the back door and was headed back to the car[4]. (See OR 1419). When appellant looked back and saw that an officer had his companion, Cliff Jackson, on the ground, he doubled back, came up behind the officers, and (according to the state) deliberately fired, killing Officer Taylor and wounding Officer Bailly. Appellant's version of the incident was the same, up to the point where the shots were fired. Only then did the state's theory and appellant's testimony diverge; appellant testified that his intention was to disarm the officers and free Jackson, but not to kill anyone (OR 1101-1106, R 614-17). According to Appellant, Officer Bailly wheeled around and fired at him; at the same time appellant pulled the trigger but his gun misfired (OR 1103-06, 1119-23, R 615-16). In the shooting which followed, Officer Taylor was killed, Bailly was wounded, and appellant was shot three times in the stomach and once in each arm (OR 1104, R 616).

Thus, it is apparent that appellant's identity as the person who committed the bank robbery and shot Officers Taylor and Bailly was not at issue. Similarly, there was no issue as to whether or not the robbery was premeditated, since appellant

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4 In the new penalty phase, in his opening argument, the prosecutor told the jury that the evidence would show that the keys to the automobile were found in Cliff Jackson's pocket (R 272-73). The prosecutor further suggested that appellant's motive for trying to free Jackson was because he needed the car keys to make good his escape (R 273). In the proceedings which followed, no evidence whatsoever was presented that the keys were found in Jackson's pocket. [Nor was any such evidence presented in the guilt phase or the earlier penalty proceeding]. The reasonable inference from the evidence which was presented was that appellant had the keys, since appellant was the one who was driving the car, and since (as the prosecutor made a point of on cross-examination) appellant was the one who parked it pointing toward the Interstate two blocks away (R 594, 596,97, 633). Nevertheless, in his closing argument, the prosecutor twice stated as a fact that the car keys were in the pants pocket of Clifford Jackson (R 672, 673), and argued that this was appellant's motivation for doubling back and shooting the police officers (R 672-73). It is appellant's position [see Issue IV, infra] that the prosecutor's improper argument as to motive and calculation, based on a "fact" entirely outside of the evidence, resulted in a fundamentally unfair penalty proceeding.

admitted that it was, and since premeditation of the robbery cannot be automatically transferred to a murder which occurs during the course of the robbery. Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984). As recognized in Hardwick, "the fact that a robbery may have been planned is irrelevant to [the] issue" of whether the homicide was committed in a cold, calculated, and premeditated manner. In the guilt phase of this trial, the only issue for the jury to decide was whether the murder of Officer Taylor was premeditated, which in turn depends on appellant's state of mind - whether he intended, as he testified, to free his companion without bloodshed, or whether he intended to kill the officers. The fact that the car used in the bank robbery was forcibly stolen from Janet Pearce hours earlier in Mobile has absolutely no bearing on this question. In both the original and the new penalty phase, the state's effort to prove the "cold, calculated, and premeditated" aggravating circumstance depended not only on whether the shooting was premeditated, but also on whether the killing of Officer Taylor was the product of a "heightened degree of premeditation, calculation, or planning". Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983); see also White v. State, 446 So.2d 1031, 1037 (Fla. 1984). In the present case, there wasn't any evidence - there was not even any reasonable inference - that appellant and Cliff Jackson had any idea, at the time they robbed Janet Pearce in Mobile and drove off in her car, of the events which would unfold later in the day. The state introduced no evidence to contradict the testimony of appellant and Jackson that they decided to rob a bank, more or less on the spur of the moment, after they arrived in Pensacola and decided they needed some money (R 574-75, 611-12). At Jackson's suggestion, they went across the street and bought some sunglasses for a disguise (R 575, 612). [This, of course, amounts to an admission that the robbery was premeditated, and it also indicates that appellant and Jackson intended to be long gone by the time the police arrived at the bank]. During the robbery, the tellers gave appellant and Jackson all the money in the

drawers, except for the "bait money" (OR 719, 740-41, R 310, 316-17). Removal of the bait money would activate the hidden cameras in the bank and set off the silent alarm (OR 719, 723-24, 740-41, R 310, 316-17). The tellers purposely did not try to give the robbers the bait money, because they thought they would know what it was (OR 719, 740, R 316-17). Appellant and Jackson evidently did not know what it was, because they pulled out the bait money themselves (OR 719, 740-41, R 310, 317). Either in this way, or by assistant manager Pat Prince's setting off the alarm, the police were notified of the robbery in progress (see OR 796-97). Bank manager Alex Sparr was in his office on the second floor; when he saw squad cars arriving in front of the building, he phoned downstairs to find out what was going on (OR 805-06, 849-50, R 414-15). Sparr's call alerted Cliff Jackson that something had gone wrong (OR 717, 806, R 578). Appellant went out the back door; Jackson went out the front door and was immediately apprehended by Officer Bailly (OR 864-65, R 392-94, 579). Appellant looked back, saw Jackson on the ground, turned around, and came up behind the officers. The shooting incident which culminated in the death of Officer Taylor followed.

There is no version of the evidence in this case which would support even an inference that the robbery of Janet Pearce and theft of her vehicle was part of a premeditated plan to kill Officer Taylor or anyone else. Appellant and Jackson obviously were hoping to rob the savings and loan without being recognized (hence the shades), and be gone before the police were called. It was only their incompetence and inexperience as bank robbers which caused them to inadvertently set off the alarm and activate the cameras. Bank manager Sparr's phone call alerted the robbers to the arrival of the police - a development which they had obviously not anticipated (see R 332), and which caused them to leave the bank in a hurried and disorganized manner (see R 578-79). Assuming arguendo that when appellant decided to try to free his companion he also formed an intent to shoot the officers, it was (and is)

appellant's position that this decision was made in hot blood and with adrenaline flowing, in the excitement, fear, and confusion of the moment. [See Issue VI, infra]. The state's position is that the decision was made in cold blood, with a heightened degree of calculation. Either way, there is no evidence which would support an inference that appellant formed any intent to kill prior to the point in time when he turned around and saw that the officers had Jackson on the ground. Certainly the robbery of Janet Pearce that morning in Mobile does not even begin to support such an inference. Mrs. Pearce's testimony concerning these uncharged crimes, therefore, had no valid probative value in the guilt phase [see Jackson v. State, supra, 451 So.2d at 460], and certainly none in the death penalty proceeding [see Robinson v. State, supra, 487 So.2d at 1042]. [5]

The "collateral crime" testimony which the state insisted on presenting, over defense objection, to both juries in this case was irrelevant to any valid aggravating circumstance, and irrelevant to rebut any statutory or non-statutory mitigating

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[5] The Janet Pearce robbery was plainly not within the "res gestae" of the charged crimes. To be admissible as part of the res gestae, a collateral matter "must be so connected with the main transaction as to be virtually and effectively a part thereof." Skipper v. State, 319 So.2d 634, 637 (Fla. 1st DCA 1975), quoting 22A C.J.S. Criminal Law §662(1)(1961). Matters are not necessarily admissible as part of the "res gestae" even if they are contemporaneous with the main event. Skipper v. State, supra. [Here, of course, the collateral crime did not occur at the same time or even in the same state as the main event]. See also Smith v. State, 311 So.2d 775, 777 (Fla. 3d DCA 1975 ("res gestae" includes words, declarations, and acts "so closely connected with a main fact in issue as to constitute a part of the transaction"); cf Wheelis v. State, 340 So.2d 950, 952 (Fla. 1st DCA 1976) (evidence would be admissible as "res gestae" to show acts "occuring at the same time and place and which were integral to the conduct for which [defendants] were prosecuted." Nor is this a case where it would have been "impossible to give a complete or intelligent account of the crime charged without referring to the other crime." See e.g. Tompkins v. State, 386 So.2d 597, 599 (Fla. 5th DCA 1980).

circumstance.[6] See Dragovich v. State, ___ So.2d ___ (Fla. 1986) (case no. 65,382, opinion filed May 29, 1986) (11 FLW 236, 238); Fitzpatrick v. Wainwright, ___ So.2d ___ (Fla. 1986) (case no. 65,785, opinion filed June 26, 1986) (11 FLW 292); Maggard v. State, 399 So.2d 973 (Fla. 1981). This evidence was improperly allowed to enter into the penalty phase, thus compromising the jury's weighing process and tainting its penalty recommendation. See Dragovich v. State, supra, 11 FLW at 238; Robinson v. State, supra, at 1043. Trawick v. State, 473 So.2d 1235, 1240-41 (Fla. 1985); Maggard v. State, supra, at 977-78; Perry v. State, 395 So.2d 170, 174-75 (Fla. 1980). Appellant's death sentence must again be reversed. See also Drake v. State, supra; Jackson v. State, supra.

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6 The state may attempt to argue, as the prosecutor did in his closing argument to the jury, that the "Williams rule" evidence was relevant to rebut the testimony of appellant's parents and neighbors concerning his family background and his upbringing; that, as the prosecutor paraphrased it "he was a good boy growing up and was never violent in the neighborhood" (R 676, see R 670, 676-77). Such a contention, if made, will be unavailing. Other violent felonies of which a defendant has been convicted may be used for the purpose of showing propensity to commit crimes, as an element of a defendant's character. Fla. Stat. §921.141(5))b); Elledge v. State 346 So.2d 998, 1001 (Fla. 1977). Crimes for which the defendant has not been tried or convicted may not be so used. Elledge v. State, supra, at 1002; Provence v. State, 337 So.2d 783 (Fla. 1976). Appellant in this case did not request or receive an instruction on the statutory mitigating circumstance of "no significant history of prior criminal activity", nor did he attempt to argue that circumstance to the jury. Therefore, the state was not entitled to "rebut" it by introducing evidence of prior criminal activity not resulting in a conviction. Maggard v. State, supra; Firzpatrick v. Wainwright, supra; Dragovich v. State, supra, As this Court recognized in Dragovich (11 FLW at 238):

> Whatever doctrinal distinctions may abstractly be devised distinguishing between the state establishing an aggravating factor and rebutting a mitigating factor, the result of such evidence being employed will be the same: improper considerations will enter into the weighing process. The state may not do indirectly that which we have held they may not do directly.

The prosecutor's use of the "Williams rule" evidence in closing argument, not to show "heightened premeditation" as he had represented, but to infect the jury's weighing process with what amounted to a non-statutory aggravating factor, demonstrates further the prejudicial effect of the error in admitting the testimony.

ISSUE II

THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY OFFERED BY THE DEFENSE WITH REGARD TO APPELLANT'S FAMILY BACKGROUND, AND TO EXPLAIN THE DEMEANOR OF ONE OF THE WITNESSES.

As the decisions of the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982), and Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. ___, 90 L.Ed.2d 1 (1986) make clear, the exclusion of relevant mitigating evidence from a capital sentencing proceeding violates the Eighth and Fourteenth Amendments, and is reversible error. See also Perry v. State, 395 So.2d 170, 174 (Fla. 1980) (trial court erroneously excluded the testimony of defendant's mother on ground that it did not fall within mitigating factors enumerated in statute).

In the penalty phase in the present case, during the testimony of appellant's mother and father, the trial court sustained the prosecutor's objections to several lines of questioning concerning appellant's family background and his home life while growing up (R 547-48, 557-58). Immediately after their testimony, the court adjourned for the evening (R 561). When court reconvened the following morning, defense counsel explained the purpose of the testimony which the court had excluded:

> MR. TERRELL: Judge I have basically three things. No. 1, I would like to make an offer of proof with regard to the questioning that I was doing regarding Mrs. Hill and Mr. Hill yesterday in the areas where the State had objected. The questions that I was requesting as to Mrs. Hill were going to the circumstances of their home including her having some -- I believe her sisters present who had their children there, and that Clarence was involved during his working years in helping to support not only his family, but the other family.
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> THE COURT: Well, isn't that all character?
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> MR. TERRELL: Yes, sir, and it's entitled to go -- the defense is entitled to --
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> THE COURT: How many times?

MR. TERRELL: That's a different aspect from what we were talking about.

THE COURT: Character is character. Now, I know you have a more liberal situation, but I was sitting here thinking because this is a penalty aspect of this proceeding, obstensibly we could be put to the task, if you want to bring all of Theodore or all of Mobile in here to tell you what a fine fellow somebody was ten years ago.

I don't think it changes that much, Mr. Terrell. I think you're allowed to get your punch in. I think you're allowed to, in any event, have the opportunity to establish or prove whatever you may have been trying to prove, but I don't think the law, in any event, allows or should allow someone to just repeatedly put on the same thing over and over. There was five people that came on here before the mother and father came on, and all they were establishing was character. As I told you when Mr. Allred finally made his objection, I was going to question it myself, because I thought it was too repetitive, too redundant. And after all, how long do we have to hear the same thing? The jury has the benefit of it. It may be in the process they got the benefit of it from people other than those who may have known him more closely. But the overall situation is still the same. So they've that evidence.

MR. TERRELL: Your Honor, as to Mr. Hill, the offer of proof would be in two areas: No. 1, that he was recovering from a heart attack about a month ago and that explained kind of his low attitude.

THE COURT: We're not interested in that. We're not saying this unkindly, but we're not interested in Mr. Hill as part of this case. We may be sorry for him or for any of his problems, but his problems don't have anything to do with the mitigating circumstances of this defendant.

MR. TERRELL: It was to explain his appearance on the stand.

THE COURT: There again, his heart attack has nothing to do with it. Let the jury weigh that. You're trying to interject all sort of collateral matters that have nothing to do with the issue and is doing nothing but clouding the issue, really. And it may be tedious and boring to the jury and it may be -- I don't know this jury, I haven't seen them look that way, but I've seen juries get turned actually off and start getting their views before they ever got to the back of the room because of what was happening right out here, and it was because of the way it was being conducted.

MR. TERRELL: Yes, sir. Your Honor, the other offer with regard to Mr. Hill was that during the time, especially in his later years at home, Mr. Hill worked his main job, I think, was with the railroad and then numerous other jobs, second and third jobs, and

> he was seldom home. And Clarence was given responsibilities of the home to follow up on chores and also help out with the other family situations that we mentioned with regard to Mrs. Hill.
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> THE COURT: Again, that's character. Apparently to them, he was a fine boy. That's what you expect them to say so. If you didn't expect that, you know what I know, they wouldn't be here, as to that's the nature of the case.

(R 561-64).

In excluding the proffered testimony, it is plain that the trial judge was operating under a fundamental misconception of the nature and function of mitigating circumstances; especially the ones he lumped together and cavalierly dismissed as "character." In Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977) this Court observed that:

> ... the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case.

It is for this reason, for example, that evidence of prior criminal activity which might otherwise be inadmissible may be presented by the state in a capital penalty phase to show a defendant's bad character, provided that the evidence is relevant to a statutory aggravating circumstance (e.g., prior violent felonies which have resulted in convictions), or to rebut the mitigating circumstance (if such is at issue) that the defendant has no significant history of criminal activity. See Elledge v. State, supra, at 1001; compare Provence v. State, supra; Perry v. State, supra; Maggard v. State, supra; Odom v. State, supra; Dragovich v. State, supra; Fitzpatrick v. Wainwright, supra. The other side of the coin is that the defendant may not be precluded from offering as a mitigating factor any aspect of his character or record or any evidence concerning the circumstances of the offense, whether such evidence relates to a statutorily enumerated mitigating circumstance or not. Lockett v. Ohio, supra; Eddings v. Oklahoma, supra; Skipper v. South Carolina, supra; Songer v. State, 365 So.2d 696, 700 (Fla. 1978); Perry v. State,

supra. The testimony of a defendant's parents concerning his family background and his upbringing is plainly relevant to an aspect of a defendant's character. See Perry v. State, supra (trial court erred in excluding proffered testimony of defendant's mother); McCampbell v. State, 421 So.2d 1072, 1075-76 (Fla. 1982) (recognizing defendant's "family background" as a valid mitigating factor which could have influenced jury's decision to recommend life); cf. Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981) (recognizing as a valid mitigating circumstance that defendant was the mother of two children). Therefore, appellant was constitutionally entitled to present it. Lockett, Eddings, Skipper.

In the present case, the trial court initially sustained the prosecutor's objections on relevancy grounds, but it became clear during defense counsel's proffer that the trial court's main reason for excluding the testimony is that he perceived it to be "cumulative" because it went to appellant's character[7] (R 561-64). A similar contention, that the excluded mitigating evidence was "merely cumulative", was made by the state and rejected by the Court in Skipper v. South Carolina, supra, 90 L.Ed.2d at 8-9. Likewise, it should be rejected here. The defense, in this penalty phase, presented the testimony of appellant and of his accomplice, Cliff Jackson, who testified primarily with regard to the circumstances of the robbery and shooting incident. [At the time the trial court refused to allow the lines of questioning proffered by defense counsel, neither appellant nor Jackson had yet taken the stand]. The defense called psychologist James Larson, who testified that appellant's verbal

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[7] The trial judge's comments are reflective of this mind-set: "Well isn't that all character" (R 562). "How many times" (R 562). "Character is character" (R 562). "...if you want to bring in all of Theodore [Tominville?] or all of Mobile in here to tell you what a fine fellow somebody was ten yers ago" (R 562). "I don't think the law ... allows or should allow someone to just repeatedly put on the same thing over and over. There was five people that came on here before the mother and father came on, and all they were establishing was his character" (R 563). "... I thought it was to repetitive, too redundant. And after all, how long do we have to hear the same thing" (R 563). "And it may be tedious and boring to the jury ..." (R 564). "Again, that's character. Apparently to them, he was fine boy" (R 564).

intelligence is very low - in the "borderline" range one step above retardation - while his performance skills were about average (R 500-26). Dr. Larson's testimony occupies 26 pages of the record, cross-examination included. The defense then introduced, without objection, the testimony from the prior penalty phase of James P. Wilson and Lucille Tilly (R 526-28). Wilson was an old friend of appellant's; they went to school together for several years in Tominville, and subsequently appellant worked for Wilson for seven or eight months, selling raw chicken. Appellant was a good worker. In the neighborhood when they were growing up, appellant was neither a troublemaker nor a fighter. In more recent times, Wilson and appellant drank a little beer and smoked a little marijuana together. Several days before appellant was arrested in Pensacola, Wilson saw him and he [appellant] looked like he was "on something" (OR 1364-71). Mrs. Tilly knew appellant from childhood, because appellant's mother babysat for her children while she was at work. Appellant "was the one that played with my kids while she babysat my children." One of Mrs. Tilly's children, Robert, developed a severe illness at the age of twelve, which resulted in brain damage (and eventually death). Appellant asked if there was anything he could do to help, and he would sit and talk with Robert. When she heard about appellant's arrest, Mrs. Tilly felt as if it had been one of her own children (OR 1349-56). Peggy Petway knew appellant from their neighborhood in Mobile since he was a child. Appellant and Ms. Petway's son would play football and basketball together. Ms. Petway had never known appellant to be a problem in the neighborhood or to get in any fights (R 529-34). Grace Singleton, who was nearly eighty years old, knew appellant since he was a little boy in the neighborhood. He was an honest child and a nice man, as far as she knew. Appellant was never a problem in the neighborhood that she knew of. Ms. Singleton had trouble getting around and eventually had to have a leg amputated; she testified that appellant would do things to help her, like take her to church, go to the store for her, and clean up around

the house and yard (R 534-39). Patsy McCaskill is appellant's sister-in-law. She had known appellant for the last six years. When she first met him, he seemed kind of mean, but when she got to know him she found him to be a nice, pleasant person. Appellant worked at Colonel Dixie making hamburgers; Ms. McCaskill worked at a different store for the same company. Appellant was well liked by his co-workers and performed well on the job (R 540-45).

All of the above testimony, as the trial court said, goes to "character". The testimony of these five witnesses consumes a grand total of 30 pages in the record, cross-examination included. Each of these friends and acquaintances knew appellant in a different context of their lives and his life, and each testified as to a different aspect of his character. The trial judge expressed the opinion that the jury might find the testimony offered by the defense "tedious and boring." Granted, mitigating character evidence may not be as exciting as hearing the prosecution put on evidence about a shootout - in the colorful words of witness Heyward Norred, "he comes out like Cool Hand Luke" (R 439); "... it sounded like Roman cannons being shot" (R 442); "[it] looked like the gunfight at the OK Corral" (R 442). But that is not the point. The whole purpose of the penalty phase is "to engage in a character analysis of the defendant" to determine whether the ultimate penalty is necessary or appropriate in his particular case [Elledge v. State, supra; Dragovich v. State, supra]; and, to that end, the defendant has a right to introduce evidence concerning any aspect of his character or record, even if the trial court finds it boring. Lockett, Eddings, Skipper. That does not mean, of course, that a defendant is entitled to filibuster. But calling five witnesses, each of whom testified very briefly as to different aspects of appellant's background and character can hardly be termed a filibuster. After presenting these friends and neighbors, the defense called the two people who were probably in the best position to know appellant's background

and character - his parents.[8] Appellant's mother would have testified that one of her sisters and the sister's children lived in their home, and that appellant "was involved during his working years in helping to support not only his family, but the other family" (R 562, see R 547-48). The trial court queried "Well, isn't that all character?" (R 562). When defense counsel explained that the proferred testimony went to a different aspect of appellant's character, the trial court dismissed the argument by saying "Character is character" (R 562). Appellant's father would have testified that his main job was with the railroad, and that he held numerous second and third jobs as well, as a result of which he was seldom home (R 564). Because of this, appellant "was given responsibilities of the home to follow up on chores and also help out with the other family situations that we mentioned with regard to Mrs. Hill" (R 564, see R 558). While it is true that the defense was able, notwithstanding the sustaining of the state's objections, to elicit some testimony that appellant did chores around the house, that he went to work at various jobs when he got older, and that he helped support the household (see R 547-49, 558-59), the defense was precluded from presenting this testimony to the jury in the context of the family's situation (see R 562, 564). Since a defendant's family background is a valid non-statutory mitigating circumstance [see McCampbell v. State, supra], this restriction of relevant mitigating evidence was prejudicial error.[9] Eddings v.

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[8] It is worth noting that, in cross-examining several of the earlier witnesses, the prosecutor made a point of the fact that their acquaintanceship with and knowledge of appellant was limited.

[9] In addition, the trial court sustained the state's objection to defense counsel's asking appellant's father if he was in ill health (R 57). During the proffer, defense counsel explained that appellant's father was recovering from a heart attack "and that explained kind of his low attitude" (R 563). The court expressed the opinion that the father's medical problems were irrelevant to any mitigating circumstance (R 563). Defense counsel did not take issue with that; rather, he stated that the purpose of the question was "to explain [Mr. Hill's] appearance on the stand" (R 563). The court said "There again, his heart attack has nothing to do with it. Let the jury weigh that ..." (R 563).

Appellant submits that this, too, was error. The trial court instructed the jury, as per the standard instructions, that in evaluating a witness' testimony "[y]ou should consider how the witness acted, as well as what they said" (R 708). How was the jury supposed to fairly consider Mr. Hill's demeanor on the witness stand, when the defense was precluded from explaining the reason for his flat affect?

Oklahoma, supra; Skipper v. South Caronlina, supra.

ISSUE III

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE STATUTORY MITIGATING CIRCUMSTANCE THAT THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

Cliff Jackson testified that, on the ride over to Pensacola, he and appellant were doing cocaine (R 574-75). Jackson stated that when they got to Pensacola, low on gas:

> ... I realized that we couldn't go back to Mobile. So I wanted to travel some. I realized, also, in order to travel, I had to have money. So I felt the best way to get money by me not having a job was to rob someone. So by me realizing the more money that we have, the further we can go, I said "Let's go for a bank."

(R 574).

After they decided to rob a bank, and chose Freedom Savings because it was right there in front of them, they "went across the street and bought some shades for a disguise" (R 575). Cliff Jackson bought the sunglasses, for both himself and for appellant, because he didn't want to be recognized (R 575). When they went into the bank, Jackson went to a teller and then began talking with another woman employee about opening an account (R 576). "And that's when I gave Clarence the signal and we made our move behind the counter" (R 576). At one point during the robbery, Jackson saw two women who looked like they were going up under their desks (R 577-78). Jackson thought maybe they were reaching for a gun or an alarm, so he told appellant to "Get those two women" (R 577). Appellant got them and made them lie on the floor with the others (R 577). Jackson asked where the safe was, and when nobody answered, he said "If don't nobody know where the safe is, then this woman here, she goes" (R 577). Another woman then said she had the key, so appellant went with her to the safe (R 477). Then the telephone rang. Jackson told the woman to pick it up and act normal (R 578). From listening

to the phone conversation, Jackson realized there was someone outside the front door (R 578). He called appellant out from the safe (R 578). Appellant came out with an armful of money, which they put in a plastic trash bag (T 578). Appellant went out the back door (R 578). Jackson dropped some money, picked it up, and turned around and went out the front door, where two policemen were waiting (R 579). The shooting incident followed soon after.

On cross-examination, the prosecutor asked Jackson about a prior statement he had made to the police, and said "No signal, you weren't the leader, were you?" (R 595). Jackson answered "Yes, I was" (R 596). Subsequently, the prosecutor asked:

> MR. ALLRED[10]: Mr. Jackson, isn't it true that you have been in contact with Clarence Hill as recently as this morning where you all have discussed what your testimony would be?
>
> A. I was in contact with him this morning, yes.
>
> Q. And you've discussed the way in which you can help him out by coming in here and changing what happened to something to now where you will be considered a leader in this to minimize his role and the fact that he was, in fact, the leader? Isn't that what you've planned with Clarence Hill to do for this jury?
>
> A. Me myself personally, I came back to Escambia County so that I could see justice done. I didn't come back to help him. I came back to help the case, period.
>
> Q. And your sense of justice being done is to change what happened and what you told the police happened, so that you can go back down to Raiford and be a hero among them all?
>
> A. I can't change what happened. If you'll notice from the testimony of the other people involved in the case, you'll see that they said that I was the one who ordered the things that were done in the bank done, because he had the gun. He was the one who I told to get the people -- I was the one who asked where the safe was, and I was the one who told the women that if nobody

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10 The transcript's reference (R 598) to Mr. Terrell (defense counsel) as asking these questions is obviously a clerical error, since the questions were asked on cross, since Mr. Terrell had just interposed an objection to the cross-examination (R 598), and since the tone of the questioning is plainly hostile to Jackson's assertion that he was the leader.

didn't know where the safe was, she goes. But how could I do this without a pistol? It was a bluff. My bluff, and not Clarence.

Q. Clarence wasn't bluffing at all, was he?

A. I don't know him even threatening anybody. I made the threat.

Q. So you think that that is what this jury has heard from those people?

A. I don't know what they heard.

MR. ALLRED: That's all I have.

(R 598-99).

During the charge conference, defense counsel requested that the jury be instructed on the statutory mitigating circumstance set forth in Fla. Stat. §921.141(6)(e) (R 661-62). This instruction would have informed the jury that they could consider as a mitigating circumstance, if they found it to be established by the evidence, that the defendant acted under extreme duress or under the substantial domination of another person (see R 706). The trial court refused to give the requested instruction:

THE COURT: No, I'm not giving that. He wasn't dominated by anyone. In fact, if you take the evidence from the side of the State, they completely refuted he [Jackson] was leading.

MR. ALLRED [prosecutor]: I don't care if you give anything he asks, just to avoid any question.

THE COURT: I'm not going to give it, because he wasn't dominated.

MR. ALLRED: He's saying that he was and would suggest that, you see it's an alternative in that instruction. It says either under the domination of another or under extreme duress. This duress idea may flow from the cocaine thing, if we fail to give the instruction.

THE COURT: That's why you give them the other one.

MR. ALLRED: Under the doubling up thing, I guess.

THE COURT: Yeah, I'm giving that one because he said it. Whether they believe it or not, that's another matter, but he said, "I was high on coke. I didn't know what I was doing." So -- all right, you can give it, that's all. Let's see, we came up with No. 4, wasn't it?

MR. TERRELL [defense counsel]: Yes, sir. For the record, I note my objection regarding No. 5.

(R 662-63).

It is important to emphasize here that the trial court did not refuse the defense's requested instruction on the ground that there was no view of the evidence from which the jury could lawfully find or infer that appellant was substantially dominated by Cliff Jackson during the course of the robbery which culminated in the killing of Officer Taylor. To the contrary, the court refused to instruct the jury on this contested issue of fact, essentially because he didn't believe Cliff Jackson's testimony. As the court put it "... if you take the evidence from the side of the State, they completely refuted he was leading" (R 662). In so ruling, the trial court contravened the basic and well-established principles of Florida law regarding a party's entitlement to have the jury fully and accurately instructed on the law applicable to the case. See e.g. Robinson v. State, 487 So.2d 1040, 1042-43 (Fla. 1986); Toole v. State, 479 So.2d 731, 733-34 (Fla. 1985); Bryant v. State, 412 So.2d 347, 350 (Fla. 1982); Holley v. State, 423 So.2d 562, 564 (Fla. 1st DCA 1982). Moreover, the trial court's failure to inform the jury of a statutory mitigating circumstance which was a contested issue under the evidence was error of constitutional dimension, under the principles recognized in Lockett v. Ohio, supra; Eddings v. Oklahoma, supra; and Skipper v. South Carolina, supra. See also Gregg v. Georgia, 428 U.S. 153, 192-93 (1976); State v. Johnson, 257 S.E.2d 597, 616-17 (N.C. 1979).

It is axiomatic that a defendant is entitled to have the jury instructed on the law applicable to his theory of defense if there is any evidence to support it. See e.g. Gardner v. State, 480 So.2d 91, 92-93 (Fla. 1985); Bryant v. State, 412 So.2d 347, 350 (Fla. 1982); Palmes v. State, 397 So.2d 648, 652 (Fla. 1981). Holley v. State, 423 So.2d 652, 654 (Fla. 1st DCA 1982); Laythe v. State, 330 So.2d 113, 114 (Fla. 3d DCA 1976). The same principle applies, in the penalty phase of a capital

case, to instructions on statutory mitigating circumstances requested by the defense. See Robinson v. State, 487 So.2d 1040,1042-43 (Fla. 1986); Toole v. State, 479 So.2d 731, 733-34 (Fla. 1985). In order to determine whether there is any evidence to support the requested instruction, the evidence must be viewed in the light most favorable to the party who requested it; i.e., the defense. Holley v. State, supra, 423 So.2d at 564. See, generally, Fish v. Los Angeles Dodgers, 56 Cal. App. 3d 620, 91 ALR 1, 15 (1976). Thus, the trial court may not refuse to give the requested instruction merely because the evidence relied on by the defense is "weak" or "improbable" [Holley v. State, supra; Solomon v. State, 436 So.2d 1041 (Fla. 3d DCA 1983); Kilgore v. State, 271 So.2d 148, 152-53 (Fla. 2d DCA 1972)]; he may not refuse to give the instruction because he does not find the evidence convincing [Gardner v. State, supra; Robinson v. State, supra, 487 So.2d at 1043; Edwards v. State, 428 So.2d 357, 358 (Fla. 3d DCA 1983)]; he may not refuse to give the instruction on the ground that the evidence is inconclusive or conflicting, or that the evidence relied on by the defense has been contradicted or rebutted by the state's evidence [Barnes v. State, 93 So.2d 863, 864 (Fla. 1957); Kilgore v. State, supra; Holley v. State, supra]; and he may not refuse to give the instruction where the evidence tending to support it was elicited on cross-examination of state witnesses[Gardner v. State, supra; Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981); Edwards v. State, supra; Hudson v. State, 408 So.2d 224, 225 (Fla. 4th DCA 1981)]. In Mellins v. State, supra, the police officers gave testimony on cross-examination which suggested that the defendant may have been intoxicated, but the defendant herself testified that she was not intoxicated. The defense requested a jury instruction on voluntary intoxication, which was denied. The appellate court reversed, holding that there was evidence to support the requested instruction; i.e., the testimony of the officers on cross. See also Edwards v. State, supra, 428 So.2d at 358.

In the present case, the trial court refused to instruct the jury on the statutory mitigating circumstance because he did not believe that appellant was under the substantial domination of Cliff Jackson (R 662). As the court stated "In fact, if you take the evidence from the side of the State, they completely refuted [that Jackson] was leading" (R 662). The trial court's fundamental mistake was in taking the evidence from the side of the state in ruling on a defense requested instruction on a valid statutory mitigating factor. Even the prosecutor appeared to recognize that the defense was contending that appellant was substantially dominated by Jackson (R 662), and in his closing argument to the jury, he pointedly argued the state's opposing position - that it was appellant, not Cliff Jackson, who was the leader of the robbery (R 670-71, 674).

On appeal, it can be anticipated that the state will indignantly maintain that appellant could not have been under the "substantial domination" of Cliff Jackson when Jackson was flat on his stomach being handcuffed when the shooting took place. First of all, that is jury argument, and jury argument does not obviate the need for appropriate instructions on the law.[11] See Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978); Gardner v. State, supra, at 93; Mellins v. State, supra, at 1209. But in addition, it is important to remember that appellant was convicted of first degree murder on both theories - felony murder as well as premeditation (OR 1660). The predicate felony for the felony murder conviction was the robbery of Freedom Savings and Loan (see OR 1248-49). Moreover, one of the aggravating circumstances

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[11] For the same reason, the fact that defense counsel could argue to the jury that Jackson was the dominant actor in the robbery (R 700-01) does not render "harmless" the trial court's error in refusing to give the requested instruction. Taylor, Gardner, Mellins.

which was presented to the jury by the state was that the murder of Officer Taylor occurred in the course of (or during the flight from) the robbery of Freedom Savings. Since the robbery and the killing were so inseparably intertwined, if the jury found from the evidence that appellant was under the substantial domination of Cliff Jackson in the course of the robbery, that could clearly be considered by them as a mitigating factor with regard to their penalty recommendation. If the jury viewed the evidence in the light most favorable to the defense, it could easily have found that, but for the dominant influence of Cliff Jackson, neither the robbery nor the murder would have ever taken place. Since there was evidence (Jackson's testimony) to support this theory, the instruction should have been given. Robinson v. State, supra; Toole v. State, supra.

Moreover, the robbery and the murder occurred at the same place and at essentially the same time. If the jury found from the evidence that Cliff Jackson was the moving force behind the robbery, and that appellant was acting under his substantial domination, that influence would not have just vanished into thin air when they went out their respective doors of the bank. Indeed, a reasonable inference could be drawn from this to explain why appellant felt he had to try and free Jackson, instead of escaping, by himself, when he had a clear opportunity to do so.[12] Contrast Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) ("Testimony regarding [co-defendant] Ellis' temperament and Cooper's attempts to avoid Ellis on a few occasions reflected events and opinions too removed from the planning of the robbery and commission of the murder for there to be any rational basis on which

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[12] The alternative explanation offered by the prosecutor - that appellant had to free Jackson to get the car keys - was based on a purported fact completely outside of the evidence; i.e. that the keys were found in Jackson's pocket (see R 272-73, 672, 673). See Issue I, supra, p.14n. 4; Issue IV, infra.

the jury could conclude that Cooper acted under Ellis' domination".)[13] In the present case, the testimony of Cliff Jackson, if believed by the jury, established that it was Jackson who decided they needed money (R 574); it was Jackson who decided they should rob a bank (R 574); it was Jackson who expressed concern about being identified, and who bought sunglasses for himself and for appellant (R 575); it was Jackson who gave the signal for the robbery to begin (R 576); Jackson who directed appellant's movements within the bank during the robbery (R 577-78); Jackson who called appellant back from the safe when he realized that something had gone wrong (R 578); Jackson who was the leader, and appellant who was the follower (R 595-96). In contrast to Cooper, the above evidence goes directly to the planning of, and the actual commission of, the robbery which served both as the predicate felony for, and as an aggravating circumstance for, the murder of Officer Taylor.

The trial court refused to instruct the jury on a statutory mitigating circumstance for which there was evidentiary support, because he (improperly) interpreted the evidence in the light most favorable to the state, and concluded that the state had refuted Cliff Jackson's testimony that he was the planner and the leader and the orchestrator of the robbery. However, the weight and credibility to be accorded Cliff Jackson's testimony (as compared to the weight and credibility to be accorded the conflicting testimony introduced by the state through its own witnesses and on cross-examination) was a disputed issue of fact which the jury had a right to resolve, guided by appropriate instructions, in reaching its penalty recommendation. See Robinson v. State, supra, 487 So.2d at 1042-43; Toole v. State, supra, 479 So.2d at 733-74; cf. Cannady v. State, 427 So.2d 723, 731 (Fla. 1983) ("However, the jury may have given more credence to Dr. Hord's testimony than the trial judge in reaching its recommendation. The jury could have found that appellant was under

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13 The precise issue in Cooper was the admissibility of the testimony, rather than the appropriateness of a jury instruction.

mental or emotional disturbance and that he was unable to conform his conduct to the requirements of law even though the trial court was not necessarily compelled to reach the same conclusions"). Similarly, once the factual issue of Jackson's dominant role was raised by the testimony, the jury was entitled to determine, under the appropriate instructions, whether Jackson's leadership over appellant rose to the level of "substantial domination" and to decide for itself how much, if any, weight to accord this factor in reaching its penalty recommendation. The "catch-all" instruction on "any other aspect of the defendant's character or record and any other circumstance of the offense" is patently inadequate to substitute for a specific instruction on a statutory mitigating circumstance.[14] See State v. Johnson, 257 S.E.2d 597, 616-17 (N.C. 1979). In Robinson v. State, supra, the trial court refused to instruct on two statutory mitigating factors because he "perceived a lack of competent, substantial evidence ... to warrant charging the jury on those factors." This Court disagreed, recognizing that the defense had put on some evidence tending to support each of the two requested instructions:

> The degree of Robinson's participation is subject to some debate, but there is at least enough evidence to warrant the giving of this mitigating charge to the jury. Robinson also put on some evidence of impaired capacity. The trial judge may not have believed it, but others might have, and it, too, was adequate at least to instruct the jury on.
>
> The jury must be allowed to consider any evidence presented in mitigation, and the statutory mitigating factors help guide the jury in its consideration of a defendant's character and conduct. We therefore find that the court erred in not instructing on these two statutory mitigating circumstances. Regarding mitigating evidence and instructions, we encourage trial courts to

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[14] Nor can the instruction that "the defendant was an accomplice in the offense ... but the offense was committed by another person and the defendant's participation was relatively minor" (see R 706) serve as a substitute. That mitigating circumstance is plainly inapplicable to the facts of this case, since it is undisputed that appellant fired the shots that killed Officer Taylor and wounded Officer Bailly, and since appellant and Jackson (even by their own testimony) both participated fully in the bank robbery. The mitigating circumstance which is arguably presented under the defense version of the evidence relates to leadership and domination, not to participation. As can be seen by a comparison of Fla. Stat. §921.141(6)(d) with §921.141(6)(e), these are two separate and distinct mitigating factors (though both may be present in some cases).

> err on the side of caution and to permit the jury to receive such, rather than being too restrictive.
>
> We affirm Robinson's conviction, but reverse his death sentence and remand for a new sentencing proceeding before a jury.

Robinson v. State, supra, at 1043.

See also Toole v. State, supra, at 734 (trial court's refusal to instruct the jury on statutory mitigating circumstance of extreme mental or emotional disturbance was prejudicial and reversible error, since it may have affected jury's penalty recommendation). As this Court recognized in Cooper v. State, supra, at 1140:

> The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances whichthe trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

By refusing to instruct the jury on the statutory mitigating circumstance of "substantial domination" because he did not believe that appellant was dominated, and because he was satisfied that the state had successfully impeached or rebutted Cliff Jackson's testimony, the trial court improperly "inject[ed] his preliminary views of the proper sentence into the jurors' deliberations." See Cooper v. State, supra, at 1140.

For the reasons discussed herein, the trial court's plainly erroneous ruling deprived appellant of his right, established by the law of this state and guaranteed by the U.S. Constitution, to have the jury fully and accurately instructed on the law applicable to the evidence, and to his theory of the case, in this capital sentencing proceeding. See e.g. Robinson v. State, supra; Toole v. State, supra; Gardner v. State, supra; Bryant v. State, supra; Holley v. State, supra; Mellins v. State, supra; see also Gregg v. Georgia, supra; Lockett v. Ohio, supra; State v. Johnson, supra. Appellant's death sentence must therefore be reversed.

ISSUE IV

THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT, IN WHICH HE (1) TWICE REPRESENTED AS A CRITICAL FACT THAT THE KEYS TO THE CAR WERE IN CLIFF JACKSON'S POCKET, WHEN THERE WAS NO EVIDENCE TO SUPPORT THIS ASSERTION; (2) BLATANTLY ARGUED THAT APPELLANT SHOULD BE SENTENCED TO DEATH BECAUSE HE EXERCISED HIS RIGHT TO A TRIAL AND REFUSED TO ENTER A GUILTY PLEA, AND (3) URGED THE JURY TO IMPOSE THE DEATH PENALTY AS A MODERN-DAY VERSION OF A LYNCHING, DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR PENALTY TRIAL.

In its recent decision in Darden v. Wainwright, 477 U.S. ___, 91 L.Ed.2d 144 (1986), the United States Supreme Court concluded (by a 5-4 vote) that the prosecutor's comments in closing argument, while unquestionably improper, were not so egregious as to deprive Darden of a fair trial or to violate the Eighth Amendment. Justice Powell, writing for the majority, framed the issue as follows: "The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process' Donnelly v. De Christoforo, 416 U.S. 637, 40 L.Ed.2d 431, 94 S.Ct. 1868 (1974)".[15] The majority went on to say that, under the above standard of review:

> ... we agree with the reasoning of every court to consider these comments that they did not deprive [Darden] of a fair trial. The prosecutor's argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent. See Darden v. Wainwright, 513 F.Supp. at 958. Much of the objectionable content was invited by or was responsive to the opening summation of the defense.

Darden v. Wainwright, supra, 91 L.Ed.2d at 157-58.

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15 The same standard of review has been used in determining whether prosecutorial misconduct in the penalty phase of a capital trial rendered that proceeding fundamentally unfair, so as to require that the death sentence be vacated. See e.g. Caldwell v. Mississippi, 472 U.S. ___, 86 L.Ed.2d 231 (1985); Wilson v. Kemp, 777 So.2d 621, 623-28 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449, 1457-61 (11th Cir. 1985) (en banc).

In the present case, in contrast to Darden, the prosecutor misstated the evidence (three separate times as to the same purported "fact") and blatantly attacked appellant for exercising his constitutional rights. Also in contrast to Darden, the improper argument cannot be attributed to "invited error", since the prosecutor argued first. It is appellant's position that the prosecutorial misconduct in this case was of constitutional dimension [see Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983)], deprived him of a fundamentally fair penalty proceeding, and renders his death sentence a denial of due process. See Darden v. Wainwright, supra; Wilson v. Kemp, supra; Drake v. Kemp, supra.

In the original trial and penalty proceeding held in April, 1983, the evidence established that after the bank robbery was interrupted by the police, Cliff Jackson went out the front door and was immediately apprehended, while appellant had made a clean escape out the back door and was headed back to the car. The shooting incident occurred after appellant looked back and saw that the officers had Jackson on the ground. Appellant, instead of continuing his getaway and leaving Jackson to his fate, got the notion to try and free his companion; a course of action which, predictably, turned out bad for all concerned. The logical question is why didn't appellant just leave, as the state conceded he could have done (see OR 1419). Several possible inferences, alone or in combination, could be drawn to explain appellant's actions. Was it because Jackson was his friend? Was it because Jackson was the dominant partner, and appellant did not feel capable of going it alone? [See Issue III, supra]. Was it the influence of cocaine? The influence of adrenaline? Trying to be a hero? The evidence at the trial and original penalty phase supplied no answer to this question.

In the new penalty phase, in his opening argument, the prosecutor supplied an answer. He told the jury that the evidence would show that the keys to the automo-

bile were found in Cliff Jackson's pocket (R 272). The prosecutor further suggested that appellant's motive for trying to free Jackson was because he needed the car keys to make good his escape (R 273).

In the proceedings which followed, no evidence whatsoever was presented that the keys were found in Jackson's pocket. During cross-examination of Jackson and appellant, the prosecutor (in an effort to show that appellant, not Jackson, was in the leadership role (R 594)) specifically brought out testimony that appellant was the one who drove the car (R 594, 596-97, 630-31, 633). Officer Paul Muller testified that when appellant was ultimately apprehended, approximately $4,341 in cash was recovered from his possession (R 458-59). Officer Muller did not go through all of appellant's pockets and check the contents; he "just pulled out the obvious stuff" (R 459). [According to bank manager Alex Sparr, the total amount of money which was taken was $5200 (R 420)]. The only testimony even remotely touching upon the apprehension of Cliff Jackson was to the effect that Officer T.C. Miller fired a couple of shots at him as he was fleeing; one shot hit an air conditioning unit and it started releasing freon (R 397, 406-08, 418). Miller then lost sight of Jackson (R 407-08), who was captured shortly thereafter at Big 10 Tires (R 397).[16]

The prosecutor must have been aware that he had not introduced any evidence that the keys were found in Jackson's pocket, since he scrupulously avoided that subject during his cross-examination of Jackson (R 582-99, 602-03) and during his cross-examination of appellant (R 618-44, see especially R 638-41). In his closing statement to the jury, however, the prosecutor argued this:

> Now, beyond that, it was the defendant, not Clifford Jackson, who had made good his escape. He was not apprehended by any police officers when he left that bank. He was not apparently even spotted

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16 The officer who apprehended Jackson at the Big 10 Tire store was Pat Adamson, who testified at the original trial (OR 1020-24) but not at the new penalty proceeding (nor was his former testimony introduced in that proceeding). At any rate, Officer Adamson testified only that Jackson was searched for weapons, and that no weapon was found on him (OR 1023).

> by anyone when he left that bank. At that point his escape was good. The only description of him would have been provided by people inside the bank at that point and by the cameras that were there. Then it would be up to law enforcement to find him, because at that point no one outside had recognized the defendant was a [participant] in a robbery. He was free. He was able to go back to the car, except for one thing, the keys were in the pants pocket of Clifford Jackson.

Moments later, the prosecutor did it again:

> The defendant, he's the one that made the decision back there to go, he had to go free his accomplice. He's the one that decided that. He's the one that was thinking all the way up there that he's got to get his buddy loose; his buddy has got the key to the car. He's the one that walked up there. And then when he got close enough and went into the pocket and got the gun out that had been concealed, which kept him from being observed and questioned or suspected, and pulled it out and stalked up quickly and turned around and blew Steve Taylor away, blew him away, executed him, executed him from behind, and tried to execute another Pensacola police officer from behind. He's the one that did that, not Cliff Jackson.

(R 671-73)

In Turner v. Louisiana, 379 U.S. 466, 472-73 (1965), the United States Supreme Court stated, "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." In Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975), the appellate court (after noting at the outset that the absence of an objection did not preclude consideration of the point on appeal, as the prosecutor's improper comments were "so prejudicial to the rights of the accused and unsusceptible to eradication by rebuke or retraction" as to necessitate a new trial) [17] said:

> It is well settled that a prosecutor must confine his closing argument to evidence in the record and must not make comments which could not be reasonably inferred from that evidence. Blanco v. State,

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[17] See also Pait v. State, 112 So.2d 380, 385 (Fla. 1959); Meade v. State, 431 So.2d 1031 (Fla. 4th DCA 1983); Peterson v. State, 376 So.2d 1230, 1234-35 (Fla. 4th DCA 1979). See also State v. Williams, ___ SE2d ___ (N.C. 1986)(39 Cr.L. 2440).

> 150 Fla. 98, 7 So.2d 333, 339 (1942). While some courts have subscribed to the view that it is not improper for a prosecutor to express his individual belief in the guilt of the accused under certain circumstances -- i.e., if such belief is based solely on the evidence introduced and the jury is not led to believe that there is other evidence known to the prosecutor (but not introduced) justifying that belief -- see, Henderson v. United States, 218 F.2d 14, 1950 A.L.R.2d 754 (6th Cir. 1955), cert. denied, 349 U.S. 920, 75 S.Ct. 660, 99 L.Ed. 1253 (1955); United States v. Dawson, 486 F.2d 1326 (5th Cir. 1973), it has consistently been held to be reversible error for the prosecutor to express his belief in the guilt of the accused, McMillian v. United States, 363 F.2d 165 (5th Cir. 1966), or the credibility of a key witness, United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972); Gradsky v. United States, 373 F.2d 706 (5th Cir. 1967), where doing so implies that he does have additional knowledge or information about the case which has not been disclosed to the jury.

Florida courts have long recognized that "[r]emarks of a prosecuting officer before a jury that are entirely outside the record and could not be reasonably inferred from the evidence adduced and prejudicial to the rights of the defendant are grounds for a new trial." Blanco v. State, 7 So.2d 333, 339 (Fla. 1942); see e.g. Huff v. State, 437 So.2d 1087, 1090 (Fla. 1983) (state attorney is prohibited from commenting on matters unsupported by the evidence at trial); State v. Davis, 411 So.2d 1354, 1355 (Fla. 3d DCA 1982) (prosecutor's improper closing argument, based on facts not adduced in evidence, warranted granting of new trial); Smith v. State, 74 Fla. 44, 46 (1917) (prosecutors must not be allowed "to constitute themselves unsworn witnesses, and to state, as facts, matters of which there is no testimony "[emphasis in opinion]).

In the present case, the purported "fact" that the car keys were found in Cliff Jackson's pocket was critical to the jury's assessment of the nature of the crime. Most, if not all, of the reasonable inferences which could be drawn from the properly admitted evidence lead to the conclusion that appellant's actions were done in hot blood, in the panic and excitement of escaping from a hopelessly bungled robbery. Whether appellant was acting under the influence of adrenaline, cocaine, friendship, domination, or misguided heroism, the evidence powerfully suggests that this was a crime of fire, not ice. The prosecutor's repeated statements to the jury that the

keys were in Jackson's pocket (R 272, 273, 672, 673) provided something that was not otherwise there - a calculating, cold-blooded, self-interested reason why appellant would jeopardize his own escape by going back to where the police officers had Jackson on the ground. In one stroke (or, more accurately, four strokes) the prosecutor improperly bolstered his attempt to convince the jury that the murder was committed in a cold, calculated, and premeditated manner; improperly sabotaged the defense's contention that appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired (see R 680); and generally cast the nature of the crime in a new, unfavorable, light. The jury could easily have been led to believe, from the prosecutor's repeated assertions of this "fact", that he had additional knowledge or information about the case which had not been disclosed in the evidence.[18] See Thompson v. State, supra, at 551-52.

In Darden v. Wainwright, supra, as previously mentioned, the majority, in finding that the challenged comments did not render the trial fundamentally unfair, emphasized that the prosecutor's argument there "did not manipulate or misstate the evidence" (91 L.Ed.2d at 157-58), and also that it did not "implicate other specific rights of the accused such as the right to counsel or the right to remain silent" (91 L.Ed.2d at 158). Contrast Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983). In the present case, the prosecutor deliberately and blatantly argued to the jury that one of the reasons it should return a death verdict was because appellant had the temerity to exercise his right to a trial. To wit:

> And he wants equal justice. He wants what Clifford Jackson got. And I suggest not no, but hell no. We're not going to -- we're not going to do that. We're Americans. We're Americans with a tradition of equal justice and fair play, and we're not going to

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18 This likelihood is increased by the fact that the jury was well aware that there had been an earlier trial in this case, before a different jury, in which appellant had been found guilty. Thus, even assuming arguendo that the jury was alert enough to pick up on the fact that it had not heard any testimony to support what the prosecutor told them was a fact, they could reasonably (and incorrectly) have assumed that he got it from the guilt phase.

> give to somebody who has contested his guilt and who has contested the appropriateness of the death penalty the same thing that a co-defendant who entered a plea got, life in prison. I suggest we not do that. It's not in keeping with those principles that are so much a part of what we live with in our daily lives ...

(R 673-74).

This outrageous comment is exacerbated by two additional factors. First of all, the prosecutor in the original guilt phase made a similar improper comment to the jury, to the effect that the case could have progressed a lot quicker but for the fact that appellant "gets that trial merely by entering that plea of not guilty" (OR 1187-88) (see appellant's initial brief in case no. 63,902, at p. 90, 92). Secondly, it appears from the record that appellant's decision to go to trial rather than enter a plea may well have been motivated by the state's insistence on aggressively seeking the death penalty (see OR 710-11, 1276, 1390). In other words, Cliff Jackson entered a plea and got life only because the state was willing to make that deal with him, while appellant had little choice but to go to trial, since the state was unwilling to negotiate a plea with him.[19] The prosecutor's prejudicial and misleading comments on this subject in closing argument invited the jury to penalize appellant for exercising his right to a trial, when, in fact, he had no real alternative but to plead straight up to the electric chair.

Appellant submits that argument of this sort, where the state deliberately uses a defendant's exercise of constitutionally protected rights as a weapon to prejudice the jury against him, is fundmental, constitutional error which undermines the fairness of the proceedings and amounts to a denial of due process. See Bruno v. Rushen,

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[19] Appellant is not arguing or implying that there is anything improper in the state's disparate treatment of appellant and Jackson with regard to plea negotiations. That decision is discretionary with the prosecution, and there clearly exist arguable justifications for the state's posture. What is grossly unfair and improper is for the state to then turn around and argue appellant's supposed insistence on going to trial as a reason why he should be sentenced to death.

supra, at 1194-95. In addition to Bruno, appellant submits that the correct constitutional principles were stated in the dissenting opinions of Justices Overton and McDonald in Bassett v. State, 449 So.2d 803, 809-11 (Fla. 1984); and Judge Rubin in Kirkpatrick v. Blackburn, 777 F.2d 272, 289 (5th Cir. 1985). In Bassett, in the penalty phase of the trial, the defense counsel called the prosecutor as a witness to establish the codefendant's plea bargain for a life sentence. The prosecutor then cross-examined himself, and explained to the jury why he thought the defendant should receive the death penalty, even though the co-defendant got life. The prosecutor stated that, even though he had felt early in the case that it was a death penalty case, he decided to give the two defendants a chance to plead guilty, because it would "be some type of indication of a rehabilitation on their part", and to spare the victims' family from going through a trial. "But", the prosecutor continued, "the [appellant] said he wanted to challenge the Court; he wanted to challenge the evidence. So he has that." Bassett v. State, supra, at 809-10 (dissenting opinion).[20]

Justice Overton, joined by Justice McDonald, wrote:

> It is clear that this evidence was presented as a non-statutory aggravating factor in the sentencing phase of the trial. This Court has emphatically held that "[u]nder the provisions of Section 921.141, Florida Statutes, aggravating circumstances enumerated in the statute must be found to exist before a death sentence may be imposed. The specified statutory circumstances are exclusive; no others may be used for that purpose." Purdy v. State, 343 So.2d 4, 6 (Fla.), cert. denied, 434 U.S. 847, 98 S.ct. 153, 54 L.Ed.2d 114 (1977) (emphasis added). See also McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Miller v. State, 373 So.2d 882 (Fla. 1979).
>
> I recognize that the United States Supreme Court has said in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), that the federal constitution does not prohibit consideration at the sentencing phase of information not directly related to statutory

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20 In one respect, the prosecutor's misconduct in the instant case is worse, or at least more unfair, than that in Bassett. In Bassett, the defendant was attacked for going to trial instead of entering a plea to a life sentence, when, apparently, he had in fact been offered that option. In the instant case, appellant was attacked for going to trial instead of entering a plea, when, in fact, the state at all times was aggressively seeking the death penalty, and would not have agreed to a plea to a life sentence.

> aggravating factors and that our rule that statutory aggravating factors must be exclusive affords greater protection than the federal constitution requires. That holding by the United States Supreme Court is qualified by the phrase "as long as that information is relevant to the character of the defendant or the circumstances of the crime." Id. at 3433 (Stevens, J., concurring). The majority has totally ignored the fact that the defendant's exercise of his right to a jury trial has nothing to do with the character of the defendant or the circumstances of the crime. There is no way the majority[21] can justify the use of this factor as an aggravating circumstance.

Bassett v. State, supra, at 810 (dissenting opinion) [emphasis in opinion].

After clearly distinguishing the case of Jacobs v. State, 396 So.2d 1113 (Fla. 1981), which had been relied on by the majority, the dissenting justices concluded that:

> ... in the instant case there was an improper, prejudicial use of a nonstatutory aggravating circumstance contrary to Florida law. Purdy; McCampbell; Miller. Further, I find a clear violation under the sixth and fourteenth amendments to the United States Constitution in allowing the jury to consider, as a critical aggravating factor in the sentencing phase of this trial, the appellant's exercise of his constitutional due process right to a jury trial.

Bassett v. State, supra, at 811 (dissenting opinion).

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[21] It is also crucial to recognize that in Barclay, in holding that the consideration at the sentencing phase of non-statutory aggravating circumstances did not necessarily violate the federal constitution, the U.S. Supreme Court specifically emphasized that:

> In this case, as in Zant v. Stephens, 462 U.S. at 877-888, 77 L.Ed.2d 235, 103 S.Ct. 2733, nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record. The trial judge did not consider any constitutionally protected behavior to be an aggravating circumstance.

Barclay v. Florida, supra, 463 U.S. at 1148.

See also Zant v. Stephens, 462 U.S. 862, 884 (1983) in which it was held that a jury instruction on an invalid aggravating circumstance did not violate the federal constitution. The Court again emphasized that the instruction in that case did not authorize the jury "to draw adverse inferences from conduct that is constitutionally protected." Similarly, in Darden v. Wainwright, supra, 91 L.Ed.2d at 158, the majority was careful to point out that the prosecutor's improper argument to the jury (which was found not to have violated Darden's constitutional rights) did not "implicate other specific rights of the accused such as the right to counsel or the right to remain silent." Appellant submits that the Supreme Court's consistent statements in these decisions demonstrate the correctness, as a matter of constitutional law, of the views expressed by Justices Overton and McDonald in Bassett and by Judge Rubin in Kirkpatrick.

In Kirkpatrick v. Blackburn, supra, at 289 (a 2-1 panel decision of the Fifth Circuit Court of Appeal), Judge Rubin wrote in dissent:

> The prosecutor's third error, his implied condemnation of Kirkpatrick's invocation of the legal process is equally egregious. The popular media have inflamed public opinion with resentement, if not rage, at the protection accorded the accused while, to assert a popular view, there is less (or no) concern for the rights of the victim. To invoke prejudice against the accused because he is entitled to due process of law before being condemned is to strike at the fundamental due process protections accorded by the fourteenth amendment.

Appellant submits that the caveat noted by the U.S. Supreme Court in Barclay, Stevens v. Zant, and Darden [see p. 44, n. 21 , supra] supports his position that a prosecutor's open invitation to the jury to consider a defendant's exercise of his constitutional right to a jury trial as a reason for recommending the death penalty is fundamental error[22] of constitutional dimension, and that the views expressed by the dissenters in Bassett and Kirkpatrick are the correct ones.

The prosecutor's misconduct[23] so infected this penalty trial with unfairness as

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22 See Pait v. State, supra, at 384-85; Peterson v. State, supra, at 1234-35. See also Ray v. State, 403 So.2d 956, 960 (Fla. 1981); Castor v. State, 365 So.2d 701, 704 n.7 (Fla. 1978) (for error to be so fundamental that it may be urged on appeal even where not preserved below, error must amount to a denial of due process). See also State v. Williams, supra, 39 Cr.L. at 2440.

23 In addition to what has already been discussed, the prosecutor closed his argument with a metaphor involving the time-dishonored practice of lynching:

> I want to end with this, if I can have one minute to tell you this. The more things change, the more they stay the same. And in America things haven't changed. Processes have changed a lot, but things are still the same. 150 years ago if the defendant left a town and stole a horse to come over to Pensacola, some desperado robbing a woman of her horse and he rode here with a companion, and they robbed a bank in the main street of the town, and they were seen by hundreds of people, not hundreds of people, but many people in the main street of town, and the deputy sheriff came up to arrest the defendant's buddy, and the defendant shot the deputy in the back, they would have strung him up from the nearest tree that day.
>
> Now, the process has changed. He now has a jury trial. It's now taking years to do it, but things still remain the same. The crime calls for the sternest punishment for killing the deputy. He must (continued on next page)

to make the resulting death sentence a denial of due process. See Darden v. Wainwright, supra, 91 L.Ed.2d at 157. Appellant's death sentence, imposed after such a proceeding, cannot constitutionally be carried out. See also Caldwell v. Mississippi, supra; Wilson v. Kemp, supra; Drake v. Kemp, supra.

ISSUE V

THE TRIAL COURT ERRED IN DISCLOSING TO THE NEWLY IMPANELED PENALTY JURY THE ORIGINAL JURY'S FINDING THAT THE HOMICIDE WAS PREMEDITATED, WHERE THE ORIGINAL JURY WAS SO TAINTED BY PREJUDICIAL PRE-TRIAL PUBLICITY AND PROSECUTORIAL MISCONDUCT AS TO DEPRIVE APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY IN THE PROCEEDING IN WHICH THE FINDING OF PREMEDITATION WAS MADE.

The procedural background of this issue is set forth in the Statement of the Case, at p. 2-4 of this brief. Appellant submits that by disclosing to the newly impaneled penalty jury the original jury's finding that the homicide was premeditated, the trial court in effect instructed the jury to disregard appellant's testimony (see R 614-17) that he did not intend to kill Officer Taylor or anyone else - that he intended only to disarm the officers and free Cliff Jackson - and that he began firing when Officer Bailly wheeled around and fired at him. The original jury evidently did not believe appellant's testimony, and found the homicide to have been premeditated. But the original jury was so tainted by prejudicial pre-trial publicity and prosecutorial misconduct as to deprive appellant of his constitutional right to a fair and

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23 (cont.) hang from a tree. We're more merciful now. We'll shock him until he's dead. But that is the sentence that is appropriate in this case under the law. Thank you.

(R 682-83).

Undersigned counsel has been unable to find any recent caselaw addressing this specific type of argument in a death penalty case. Hopefully, that is because most prosecutors don't resort to it. In any event, appellant submits that argument of this sort presents an intolerable danger of a death recommendation infected by bias and passion. See Caldwell v. Mississippi, supra, 86 L.Ed.2d at 239-40 and n.2.

impartial jury in the proceeding in which that finding of premeditation was made. Consequently, the instruction to the new jury that appellant had already been found guilty of premeditated murder as well as felony murder, and that the [new] jury was not to concern itself with the question of guilt (R 262), was tantamount to a transfusion of prejudice from the tainted original jury. The new jury should have been permitted to determine the question of premeditation, and to assess appellant's credibility, independently. The trial court's preliminary instruction to the jury, coupled with the testimony of court clerk William Spence which followed immediately thereafter (R 289), deprived appellant of his constitutional right to have these critical issues of fact resolved by an impartial jury.

In the original appeal, this Court did not address the merits of most of the issues raised by appellant. The Court found that the defense's challenge for cause to juror Larry Johnson was improperly denied, but that this error required reversal for a new penalty phase only.[24] The Court stated "Our disposition of this issue makes it unnecessary to consider other penalty phase errors asserted by appellant". Hill v. State, 477 So.2d 553, 554 (Fla. 1985). With regard to the issues addressed to the guilt phase, or to both phases, the Court said "After a thorough review of the record, we find that none of the asserted errors affected appellant's conviction." Hill v. State, supra, at 554. At the end of the opinion, the Court wrote:

> Appellant has also alleged several instances of improper prosecutorial comment during the trial. We find the prosecutor acted improperly by asking the jury to consider him a "thirteenth juror" when it retired to deliberate its verdict in the guilt phase, but find the

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[24] The opinion states "Appellant expressly recognizes that his argument on this issue is directed only to the penalty phase of the trial." Hill v. State, supra, at 554. In fact, at oral argument (while discussing the change of venue issue), undersigned counsel conceded that, since appellant's own testimony established his guilt of first degree felony murder, reversal for a new penalty phase only might be an adequate alternative remedy, but only if the new penalty jury was not informed of the original jury's finding of premeditation. See Statement of the Case, p.2-3; see videotape of March 4, 1985 oral argument in Hill v. State, case no. 63,902 [available at Florida State University law library].

> error harmless under the circumstances of this cause. See United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Had the case involved substantial factual disputes, this "inexcusable prosecutorial overkill" would have resulted in harmful error requiring reversal of each of appellant's convictions. Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). We again caution prosecutors to note that repeated failure to curb this misconduct adds fuel to the flame of those who advocate the adoption of a per se rule of reversal for such misconduct.
>
> We find that none of the alleged trial court errors asserted by appellant affected his convictions. Accordingly, we affirm appellant's convictions and sentences with the exception of the death sentence. For the reasons expressed, we vacate the sentence of death and remand for a new sentencing proceeding before a new jury.

Hill v. State, supra, at 556-57.

The guilt phase in this case may not have involved any factual dispute as to whether or not appellant was guilty of first degree murder, but it clearly did involve a substantial factual dispute as to whether or not the killing was premeditated. See Statement of Facts, p.6-10 of this brief. This, in turn, is a critically relevant issue with regard to penalty. If the penalty jury had believed appellant's testimony that he never intended to kill anyone, it would not have been required to recommend life, but it certainly would have been more favorably disposed toward a life recommendation for an unintentional killing than for an intentional one. By informing the jury, through an instruction and through testimony, that the finding of premeditation had already been made, and by further instructing them that they were not to concern themselves with that question, the trial court prevented this critical issue of fact and credibility from being resolved by an impartial and fairly selected jury, and resurrected the harmful effect of the prejudicial publicity and prosecutorial misconduct

which destroyed the impartiality of the original jury.[25]

Appellant therefore submits that his death sentence must be reversed on account of the error in disclosing the prior jury's finding of premeditation to the new jury. In the event that his death sentence is not reversed on this ground, appellant re-asserts and adopts by reference the arguments made in Issues II, III, IV, V, VI, VIII, X, XI, and XII of his initial brief in case no. 63,902, and asserts that this Court should now reach the merits of those issues, since the state cannot show beyond a reasonable doubt that the errors did not contribute to the original jury's finding of premeditation; nor can it show beyond a reasonable doubt that that finding of premeditation (which the new jury was instructed to accept without further concerning itself with the issue of guilt) did not cause the new jury to disbelieve appellant's testimony, and did not contribute to its decision to recommend death. See Chapman v. California, 386 U.S. 18 (1967).

ISSUE VI

THE TRIAL COURT ERRED IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

For the reasons argued at p. 134-36 of his initial brief in case no. 63,902, and for the reasons discussed elsewhere in this brief, appellant submits that the evidence in this case clearly does not demonstrate a "heightened degree of premeditation,

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[25] Contrary to what will undoubtedly be the state's position, appellant is not seeking to re-litigate an issue which has already been decided adversely to him. The Court found that the errors asserted were harmless with respect to appellant's convictions of first degree murder, and said nothing one way or the other in the opinion as to whether the new jury should or should not be informed of the finding of premeditation. On remand, prior to the new penalty phase, appellant moved in limine to prevent the new jury from being informed of the finding of premeditation. During the proceeding itself, appellant objected to the instruction and to the testimony, and he objected again at the time of sentencing. Appellant is now arguing (1) that the trial court erred in denying the motion in limine and overruling the objections, and (2) that as a result of the trial court's erroneous ruling on this matter, the guilt phase errors, which were harmless as to the conviction of first degree murder, have now become harmful, as to penalty.

calculation or planning" of the homicide of Officer Taylor by appellant. See Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983); White v. State, 446 So.2d 1031, 1037 (Fla. 1984); Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984). Based on the principles recognized by this Court in Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977), the erroneous finding of this aggravating circumstance requires resentencing.

V CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his death sentence, and remand this case to the trial court for a new penalty proceeding before a newly impaneled advisory jury (which would not be informed of the original jury's finding of premeditation), or, in the alternative, imposition of a life sentence without possibility of parole for twenty-five years.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Steven L Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General John W. Tiedemann, The Capitol, Tallahassee, Florida; and by mail to Mr. Clarence Edward Hill, #089718, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 18 day of September, 1986.

Steven L Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender