IN THE SUPREME COURT OF FLORIDA

CARL ALLEN CARUTHERS,

Appellant,

v.

CASE NO. 64,114

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "AB". Other references will be as denoted in appellant's initial brief.

This reply brief is directed to Issues I, V, and VI; appellant will rely on the arguments advanced in his initial brief as to the remaining issues.

II ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE CHALLENGES FOR CAUSE AND MOTION IN LIMINE; AND THE "DEATH-QUALIFICATION" OF PROSPECTIVE JURORS VIOLATED APPELLANT'S RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state's unhappiness with the Grigsby decision is obvious and not surprising. Having no ammunition with which to contest the conclusion reached in Grigsby -- supported by common sense, experience, and now extensive empirical research as well[1] -- that jurors who would be willing

[1] The various studies are discussed in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983) at pages 1291-1305.

to impose the death penalty in accordance with the applicable statutes are significantly more "guilt-prone" than jurors who would refuse to impose or recommend the death penalty regardless of the circumstances, the state instead resorts to name-calling and innuendo. The state characterizes the Grigsby decision as "notorious" (AB.8), and accuses the defense in that case of "selectively employing statistics to guile a receptive federal judge" (AB.10) into accepting the arguments that death-qualified juries tend to be guilt-prone. The state closes its argument by citing a 1954 book entitled How to Lie With Statistics, "an excellent book with an unfortunate title, for an in-depth exposé of the various methods of statistical manipulation" (AB.10). The state's tactics are transparent -- to portray the Grigsby decision as the aberrent product of legal snake-oil salesmen and sleight-of-hand artists, in order to avoid having to back up its own untenable position. The state's argument is interesting not for what it says but for what it does not say, and cannot say. Is there any empirical evidence which tends to contradict the studies discussed in Grigsby, or which demonstrates that death-qualified juries do not tend to be guilt-prone? Does the state have anything to support its veiled but heavy-handed accusation that the defense attorneys and social scientists "selectively employed", manipulated, and lied with statistics in order to conclude that death-qualified juries tend to be guilt-prone, or is the state blowing smoke? What the state contemptuously dismisses as mere "statistics" (and since everyone knows, as the 1954 book says, that it is possible to lie with statistics, it is a simple leap of faith for the state to rely on its own complacent assumption that this is what every one of those social scientists must have done), are in reality the conclusions drawn by qualified professionals applying social scientific methods to the relevant factual information -- the very empirical evidence

which was unavailable at the time Witherspoon was decided. See Witherspoon v. Illinois, 391 U.S. 510,517-18 (1967)(declining to announce on the basis of "presently available information" or as a matter of judicial notice a per se constitutional rule requiring reversal of every conviction returned by a death-qualified jury). Of vital importance to the legitimacy of the Grigsby holding is the fact that the results of the scientific research cut with, and not against, the grain of common sense and experience. As anyone with even a nodding acquaintance with political science, psychology, or the criminal justice system well understands, attitudes toward the death penalty do not exist in a vacuum. The research studies simply confirm that this is true. Grigsby v. Mabry, supra, at 1322, states:

> The phrase "fireside induction" has been used to refer to "those common sense empirical generalizations about human behavior which derive from introspection, anecdotal evidence, and culturally-transmitted beliefs." Dr. Robert M. Berry's article "Fireside Induction," see supra, states that the "fireside induction suggests that in equivocal or ambiguous cases jurors who favor the death penalty are more likely to vote for conviction whereas jurors who oppose the death penalty are more likely to vote for acquittal." He goes on to say: "Broadly stated, the fireside induction suggests that proponents of the death penalty are conviction-prone and opponents of the death penalty are acquittal-prone." Id. at 6.
>
> Dr. Berry states, and the Court agrees, that both defense attorneys and prosecutors accept this induction as a proposition which "everyone knows," even though prosecutors have argued that their views are to the contrary. He is convinced that "the prosecution shares the view of the fireside induction held by the defense." Id., at 7. The evidence and the discussion above support his opinion.
>
> Dr. Berry observes that the law usually reflects these fireside inductions which may or may not accord with empirical behavioral science studies and principles. To him the

current death-qualification practices, predicated on Witherspoon standards, represent an instance where the fireside induction, held and accepted by most active participants in the trial milieu, has not been accepted and is not presently reflected in the law. Tension develops because the verbal rationalizations and justifications for those practices are at odds with our intuitive feelings and judgments as to the real truth of the matter.

But the Court suggests the "gut" judgments of trial lawyers and judges as to the fairness of voir dire procedures, and as to the necessity therefor, are not just intuitive generalizations about human experience but also represent a reflection of the training and experience of such persons over time in the courtrooms of this nation. After one has conducted or observed hundreds of voir dire examinations and has read endless pages of transcripts of the death qualification process he should be able to form a judgment as to whether such procedures are fair or whether they tend to prejudice one or the other party. Likewise he should be able to ask and answer if there be any good reason to justify the exclusion of a prospective juror and if that exclusion prejudices or benefits one or the other party. This is simply: law work.

Here the fireside inductions clearly support the contentions of petitioners. If asked, "Does the removal of all prospective jurors with adamant objections to the death penalty result in a jury more prone to convict?" Trial lawyers and judges will answer, "yes, of course." If asked, "Does the usual process of death qualification itself, as observed time and again, prejudice the defendant? The answer, "yes, clearly." Yet it is always possible that our dearly held "fireside induction" may be proved to have been in error, to be nothing more than professional superstition. And the U.S. Supreme Court in Witherspoon itself counsels against embracing per se rules based upon judicial notice or intuition without the benefit of empirical studies.

> The research has been done. The studies have been introduced into evidence and explained. What do they show? They prove that what we "knew" all along is in fact true. The trial lawyers and judges could have been wrong but in this case at least they were right.

The state has invited this Court to reject Grigsby "as was done by the Supreme Court of Arkansas in Rector v. State, 659 S.W.2d 168 (Ark. 1983)" (AB.10). Appellant agrees that the Rector opinion is worth examining, because it graphically demonstrates the meaning of the term "guilt-prone", and reveals that an appellate court can be as guilt-prone as any death-qualified jury. The Rector court did not take issue with the accuracy of the empirical research set forth in Grigsby; rather it assumed arguendo that death qualified juries are guilt-prone, and concluded that this is a good thing. Numerous comments in the Rector opinion reveal that the underlying basis of the Arkansas Supreme Court's decision is the presumption that a person accused of a capital crime is in fact guilty; a profoundly disturbing inversion of the constitutional presumption of innocence.

> For this discussion we assume *** that death-qualified jurors are more prone to convict than those excluded under Witherspoon. The question, then, is this: Should jurors unalterably opposed to capital punishment be permitted to participate in the determination of guilt or innocence in capital cases? We are firmly of the view that their exclusion is proper, for either of two reasons.
>
> First, we cannot regard conviction-proneness either as inherently wrong or as destructive of the juror's impartiality. In the various studies on the subject there is almost uniformly an undercurrent of thought, not expressed but easily sensed, that jurors who believe in the death penalty are by their nature barbarians in modern society. That view certainly condemns most Americans. ***
>
> We have no reason to doubt that any tendency

of a particular juror, not inflexibly opposed to the death penalty, to lean toward conviction in capital cases arises from one of the most deeply rooted feelings in human nature: an instinctive urge to condemn injustice. *** It cannot be expected that a juror's ability to reason with complete detachment will be wholly unaffected by such an uncontrollable reaction of human nature to shocking injustice. ***

Human nature is not unconstitutional. From the earliest days of the common law ***, the human urge to redress manifest wrongs played its part in the development of the criminal law. ***

We may ask, why should the most cowardly and contemptible of criminals, merely by reason of the viciousness of their crimes, be favored in jury selection to a greater degree than any other accused person or any litigant in a civil case? The studies opposing death-qualified juries present no answer to that question.

One would expect the most upright and moral veniremen to be the ones most deeply outraged by the type of crime for which the prosecution seeks the death penalty. Must we say that a jury composed of such veniremen cannot be regarded as impartial? On this point a clear indication of legislative policy is to be found in the federal and Arkansas statutes excluding convicted felons from jury service. *** Unquestionably that exclusion is intended to bar from the jury box the one class of persons least likely to respect and give effect to the criminal laws. Are those statutes unconstitutional as depriving an accused of jurors not prone to convict? Obviously not. In harmony with that legislative point of view, we can find no constitutional impartiality in the makeup of a death-qualified jury.

Our second reason for disagreeing with the Grigsby conclusion is a practical one: A jury system that has served its purpose admirably throughout the nation's history ought not to be twisted out of shape for the benefit of those persons least entitled to special facors. ***

Rector v. State, supra (34 Cr.L. 2111-12)

What the Arkansas Court has lost sight of is the fact that the main purpose of a capital trial is not to express outrage at the injustice of the crime, or to determine whether the perpetrator of such a crime is cowardly and contemptible, the main purpose is to determine whether the person accused of the crime committed it, and the constitution requires that, unless and until the state proves its case beyond a reasonable doubt, the jurors must presume that he did not. "Death-qualification" of the jury, as recognized in Grigsby (and as unintentionally revealed by Rector), results in a jury which is uncommonly predisposed to convict, and thereby deprives the accused of his Sixth and Fourteenth Amendment right to an impartial jury.

ISSUE V

THE TRIAL COURT ERRED IN FINDING, AS ALTERNATIVE AGGRAVATING CIRCUMSTANCES, THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST AND THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Concerning the "cold, calculated, and premeditated" aggravating circumstance, the state says:

> Supporting [this] finding...would be the evidence that appellant was experienced with firearms and stole a workable firearm, that he secured bullets for this firearm in order to shoot a dog, that he went to the convenience store in a stolen car after being unable to locate his intended victim, and that he shot Ms. Zereski in the back.
>
> (AB.20)

"Supporting the finding" that the murder was committed for the purpose of avoiding a lawful arrest

> ...would be the evidence that appellant parked his car away from the highway; entered the store

> concealing his firearm; waited for another customer to leave before robbing and killing Ms. Zereski whom he knew; abruptly fled with three customers entering the store within a matter of minutes; immediately grabbed his gun when told about the incident later; sought to assure himself that the victim had died; and effectively denied his guilt by saying "who would shoot an innocent lady" when he revisited the scene.
>
> (AB.20)

Most of the shards of evidence cited by the state "in support of" these findings do not even qualify as window-dressing. Appellant was experienced with firearms in that he had "quite a bit" of experience hunting with a shotgun (R.909, see AB.20). He stole a .38 calibre pistol from Grady Adams, with whom he had been staying, when he left Adams' house two months before the robbery and killing occurred. On January 9, 1983, after spending the day fishing with friends and (according to the uncontradicted testimony of several of the state's own witnesses) drinking something on the order of sixteen or seventeen beers, appellant stole Grady Adams' car, which he knew how to start with a screwdriver Adams kept in the vehicle. As the state notes (AB.2,20), appellant "secured bullets from this firearm in order to shoot a dog"[2], and "after being unable to locate his intended victim" (AB.20), went to the convenience store.[It completely escapes undersigned counsel why the state would believe that appellant's act of loading his gun and going out looking for the dog supports a finding that the subsequent killing of Ms. Zereski was "cold, calculated, and premeditated". Appellant submits that, especially when considered in conjunction with appellant's excessive beer

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[2] State witness James Coleman confirmed that he had given appellant four bullets about a week earlier because he wanted appellant to shoot a dog which had been "running the kids" (R.797-99).

drinking on the day in question, his lack of a significant criminal history or background, and the utterly incompetent manner in which the robbery was carried out,[3] this evidence tends to support exactly the opposite conclusion]. Finally, the state notes that "he [appellant] shot Ms. Zereski in the back" (AB.20), making it sound like an execution. However, the medical examiner's testimony established that the entrance wounds were in the left arm, the upper left side of the back, and the lower left side of the back (R.840-47), which is entirely consistent with appellant's statement to police and his testimony in the penalty phase that the victim was turned sideways from him behind the register; he was "shaking like crazy" and repeating over and over that he didn't want to hurt her; and he fired the shots in panic when she jumped (R.892,897,910,1091-92). See Cannady v. State, 427 So.2d 723,730 (Fla. 1983).

Moving on to the evidence which the state claims to support the finding that the murder was committed for the purpose of avoiding a lawful arrest, the state observes that appellant parked his car away from the highway, entered the store concealing his firearm, and waited for a customer to leave before confronting the clerk with the pistol and telling

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[3] One such item of evidence (supplied by state witnesses including police officers and the manager of the convenience store) is that appellant, without realizing it, dropped a twenty dollar bill and a ten dollar bill, out of the $54.96 he stole, on the ground when he abandoned Grady Adams' still running car in the woods. Does this support the state's theory that this was a calculated robbery and witness-elimination murder? Appellant submits to the contrary that it strongly tends to support the defense's position that appellant's "decision" (if it can be called that after seventeen beers) to rob the store was a spur-of-the-moment, half-baked thought after he couldn't find the dog, and the killing of Ms. Zereski, even if it was premeditated, was the product of a combination of stupidity, alcohol, and panic, but not the heightened degree of calculation or planning necessary to support this aggravating circumstance. See Richardson v. State, 437 So.2d 1091,1094 (Fla. 1983).

her he wanted the money. All this shows (and that not conclusively) is that appellant may have formed the intention to commit the robbery sometime after failing to find the dog but before arriving at the store. None of these facts even remotely establish that he intended to murder the clerk. Next the state notes that after Ms. Zereski was killed, appellant "abruptly fled with three customers entering the store within a matter of minutes" (AB.20). Any robber could reasonably be expected to make a hasty exit after completing his crime, even in cases where the victim is not harmed. In the present case, appellant's "abrupt flight" sheds absolutely no light on whether the shooting was a spontaneous panic reaction, premeditated but with little thought or reflection, or, as the state insists, cold and calculated. The fact that three customers came in within minutes after appellant left is, if possible, even more irrelevant. The state further takes note of the fact that appellant "immediately grabbed his gun when told about the incident later" and "sought to assure himself that the victim had died" (AB.20). When Brenda Jenkins woke up appellant in the camper and told him that the Han-D-Pak Store had been robbed and the clerk had been shot and killed, appellant got a gun out from underneath his pillow and came in the house (R.920-21). His face was flushed, his eyes were red, and "you could smell that he had been drinking", though Ms. Jenkins believed he was in control of his faculties (R.921,923). He kept asking over and over again "Is she dead?" (R.921-22). Does this necessarily mean, as the state assumes, that appellant "sought to assure himself" that the victim had died because he had coldly executed her to avoid identification, or could it not more reasonably mean that appellant did not know whether the shots he had fired in panic had killed the clerk or not, that he was worried about what was going to happen to him now, scared and remorseful about what he had done,

and was hoping that somehow she was not dead? If this was a cold-blooded witness-elimination execution as the state insists, why did appellant, who was alone in the store with the victim, shoot her in the left arm, the upper left side of the back, and the lower left side of the back, and then leave? If he was so concerned with "assur[ing] himself that the victim had died", he could easily have made sure by shooting her in the head or the heart. In Rembert v. State, __So.2d__ (Fla. 1984) (Case No. 62,715, opinion filed February 2, 1984) (1984 FLW 58,59) the trial court concluded that because Rembert and the victim of the robbery and murder had known each other for years, Rembert eliminated the only witness who could testify against him, thereby establishing the avoidance or prevention of arrest. This Court disapproved the finding of this aggravating circumstance, and said:

> In Riley v. State, 366 So.2d 19,22 (Fla. 1978), this Court considered murder to eliminate a witness and stated that "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases."
>
> The victim was alive when Rembert left the premises and could conceivably have survived to accuse his attacker. If Rembert had been concerned with this possibility, his more reasonable course of action would have been to make sure that the victim was dead before fleeing. We do not find that the state demonstrated beyond a reasonable doubt the requisite intent needed to establish this aggravating factor.

Finally, the state says that appellant "effectively denied his guilt by saying 'who would shoot an innocent lady'" when he rode back to the Han-D-Pak store with Betty Boyd and James Coleman to get cigarettes and a man told them about the shooting. Again, undersigned counsel is completely at a loss to understand how the state thinks this demonstrates that the

murder was committed for the purpose of avoiding arrest. Appellant does not dispute that a false exculpatory statement may be circumstantial evidence tending to show consciousness of guilt [see e.g. United States v. Holbert, 578 F.2d 128 (5th Cir. 1978)], but then no one has argued, at trial or on appeal, that appellant is not guilty of shooting Ms. Zereski. Appellant's unsolicited remark to his friends, who had not accused him of anything, basically shows that he had a guilty conscience (...the wicked flee where no man pursueth), and possibly also that he would just as soon not have to face the consequences of what he had done, and that is all it shows. Fla.Stat.§921.141(5)(e) requires that, in order to establish this aggravating circumstance, the state must prove that the capital felony (i.e. the murder) was committed for the purpose of avoiding or preventing a lawful arrest (i.e. an arrest for the robbery). The fact that a defendant, after having killed someone in the course of a robbery, may then take steps to avoid getting caught, is hardly surprising, and is a far cry from proof that the murder was committed for the purpose of avoiding arrest for the robbery. Moreover, it is worth noting that appellant did not exactly take extraordinary measures to escape detection. After leaving the convenience store, he accelerated out of the parking lot in the car he stole from Grady Adams in such reckless haste as to attract the attention of Paul Chase (who was just pulling into the parking lot) and cause Chase to suspect that a robbery had just occurred (R-666-67) (see AB.3). Appellant abandoned the stolen car, with the motor still running because he couldn't find the screwdriver to shut it off, in the woods within walking distance of his residence, accidentally dropped a twenty dollar bill and a ten dollar bill on the ground, and left a trail of footprints from the lefthand door of the car down the

road and into the woods. That same evening, the police found the car and John Townson and his dogs followed the trail by sight and scent directly to the back doorstep of Betty Boyd's house where appellant was living. At the time of his arrest, appellant was wearing shoes which matched the footprints. Appellant was interviewed that night at the Sheriff's Department, and confessed to the robbery and killing of Ms. Zereski. He told the police that he had been waiting at home for them to come, because he knew they would be coming there. Thus, even assuming arguendo that appellant's gratuitous remark to his friends to the effect of "Who would shoot an innocent lady?" were of some minimal circumstantial relevance to the "avoid lawful arrest" aggravating circumstance, it would be negligible in light of the totality of the evidence that appellant's actions after the murder virtually guaranteed that he would quickly be arrested, that he appeared to be aware of this himself, and that he made no real effort to prevent it. [To the extent that this may be attributed to his inexperience, immaturity, incompetence, or consumption of beer, it only further supports appellant's position as to the nature of this crime, the aggravating and mitigating circumstances, and the appropriate penalty].

Stripping away all of the non-sequiturs, the state's argument is reduced to that stated at page 19 of its brief, to wit, "[the state's] belief that the two factors here were legally independently established by evidence that appellant was acquainted with the victim and thus killed her to avoid detection." The state's assumption that proof that a defendant charged with robbery and murder was acquainted with the victim equates with proof beyond a reasonable doubt that the murder was committed for the purpose of avoiding arrest is unsound as a matter of

logic, as a matter of law, and as a matter of fact. See Rembert v. State, supra (trial court found aggravating circumstance based on evidence that defendant and robbery-murder victim had known each other for a number of years "thereby establishing the avoidance or prevention of arrest"; this Court, in vacating the death sentence, held that aggravating circumstance was improperly applied as the state failed to demonstrate beyond a reasonable doubt the requisite intent to avoid arrest and detection). Where the victim is not a law enforcement officer, this aggravating circumstance cannot be found unless there is a clear showing that the dominant or only motive for the murder was witness-elimination. Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979). Proof of the requisite intent to avoid arrest and detection must be very strong. Riley v. State, 366 So.2d 19 (Fla. 1978); Armstrong v. State, 399 So.2d 953 (Fla. 1981). "Logical inferences" drawn by the trial court will not suffice. Clark v. State, 443 So.2d 973, 976 (Fla. 1983). The state's assumption that "appellant was acquainted with the victim and thus killed her to avoid detection" is at best a "logical inference" which is susceptible to other interpretations [see Peavy v. State, 442 So.2d 200, 202 (Fla. 1983)]; an inference which is considerably less logical in light of the totality of the evidence in this case. The only direct evidence of the manner in which the murder was committed was appellant's confession to the police and his penalty phase testimony [see Cannady v. State, 427 So.2d 723, 730 (Fla. 1983)]. The physical and circumstantial evidence, and appellant's background and his behavior before and after the crime, were at least as consistent (if not more so) with appellant's confession as with the state's hypothesis. The state's heavy reliance on Herring v. State, ___ So.2d ___ (Fla. 1984)(case no. 61,994, opinion

filed February 2, 1984)(1984 FLW 49) is completely misplaced, since in Herring there was evidence that the defendant told a detective that he shot the clerk a second time to prevent him from being a witness. See appellant's initial brief, p. 42-43.

This Court in Rembert v. State, supra, found that only one valid aggravating circumstance existed, i.e., that the murder occurred during the commission of a robbery, and that, while the trial court found that no mitigating circumstances had been established, the defense had introduced a considerable amount of non-statutory mitigating evidence. This Court further determined that, notwithstanding the jury's recommendation of death, the facts and circumstances of the case, as compared with other first-degree murder cases, did not warrant the death penalty. Accordingly, this Court remanded for imposition of a life sentence without parole for twenty-five years. In the present case, as in Rembert, there is only one valid aggravating circumstance, that the murder occurred during the commission of a robbery. The trial court found one statutory mitigating circumstance, that appellant does not have a significant history of prior criminal activity. As in Rembert, appellant introduced a considerable amount of non-statutory mitigating evidence. Here, the trial court found that appellant had proved the existence of non-statutory mitigating factors on the basis of the evidence regarding his relationship with his family, his voluntary confession to the police, his offer to plead guilty in exchange for a life sentence, and his expressions of remorse. The trial court's decision to accord these mitigating factors little weight was made in light of his determination that this was a cold, calculated witness-elimination murder, a determination which cannot be supported under the evidence in this case. Moreover, there was

uncontradicted mitigating evidence, supplied by several state witnesses in the guilt phase of the trial, that appellant had consumed something on the order of seventeen or eighteen beers on the day of the crime. The trial court failed to consider this evidence in mitigation, either as establishing a statutory circumstance or as non-statutory mitigation. [See Issue VI, infra]. Under the facts and circumstances of this case, in light of all the evidence, imposition of the death penalty upon appellant is unwarranted. See Rembert v. State, supra. This Court should therefore vacate appellant's death sentence and remand this case to the trial court with instructions to reduce the penalty to life imprisonment without eligibility for parole for twenty-five years. See Rembert v. State, supra. In the alternative and at the least, this Court should vacate the death sentence and remand for resentencing without consideration of the unproven aggravating circumstances. See Peavy v. State, supra.

ISSUE VI

THE TRIAL COURT ERRED IN FAILING TO FIND AS A STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCE THAT APPELLANT'S FACULTIES WERE IMPAIRED BY EXCESSIVE CONSUMPTION OF BEER, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state, citing Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983), intones "the days of voluntary intoxication as a total or partial defense for criminal conduct may well be numbered" (AB-22-23). Whether the state's prophesy proves to be accurate or not is beside the point. Appellant is not claiming intoxication as a defense to the criminal charges, he is simply arguing that the uncontradicted testimony of several state witnesses to the effect that he drank some seventeen or eighteen beers on the day of the robbery and murder, the last one less than half

an hour before the shooting, should have been considered in mitigation. Regardless of the ultimate disposition of Linehan, which has nothing to do with capital sentencing anyway, appellant was constitutionally entitled to have this evidence considered in mitigation, as a possible basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Songer v. State, 365 So.2d 696, 700 (Fla. 1978). The state points out that the same witnesses, Betty Boyd, James Coleman, and Brenda Jenkins, who established that appellant had indeed had that much beer to drink, also expressed their opinion that he was not drunk. Arguably, if the trial court credited these witnesses' non-expert opinion on whether or not appellant was "drunk," he would be entitled to conclude that the statutory mitigating circumstance of "substantially impaired capacity" was not established. But it does not entitle the trial court to refuse to give any non-statutory mitigating weight to the uncontradicted evidence that appellant had that quantity of alcohol circulating in his bloodstream at the time of the robbery and killing. Lockett v. Ohio, supra; Eddings v. Oklahoma, supra. Cf. Stevens v. State, 419 So.2d 1058 (Fla. 1982) ("To allow the defendant to present himself to the court for observation after drinking two cases of beer would have had a very predictable result . . . ").

III CONCLUSION

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

As to Issue I: reverse the conviction and death sentence and remand for a new trial.

As to Issues II, III, and IV: reverse the death sentence and remand for a new trial, with an advisory jury, on the issue of penalty.

As to Issues V and VI: reverse the death sentence and remand for imposition of a life sentence without possibility of parole for twenty-five years, or in the alternative, reverse the death sentence and remand for resentencing by the trial judge.

As to Issue VII: reverse the death sentence and remand for imposition of a life sentence without possibility of parole for twenty-five years.

Respectfully submitted,

MICHAEL E. ALLEN
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General John Tiedemann, The Capitol, Tallahassee, Florida; and by mail to Mr. Carl Caruthers, #090486, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 10 day of April, 1984.

Steven L Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender