IN THE SUPREME COURT OF FLORIDA

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RONALD WOODS,

Appellant,

vs. CASE NO. 64,509

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR UNION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant was the defendant in the Circuit Court of Union County. The State of Florida was the prosecuting authority in the circuit court and is the Appellee on appeal.

Citations to the record on appeal and the supplemental record will be made by use of the symbols "R," and "SR," respectively, followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The State submits the following additions and clarifications to the statement of case and facts submitted by Appellant.

Prior to the trial in this case, trial counsel filed numerous pre-trial motions. At a hearing on September 12, 1983, trial counsel obtained permission from the court to expend funds to travel to Jacksonville in order to depose a potential state witness who would testify about blood that had been sent to the Florida Department of Law Enforcement for analysis (R 1722). This motion was granted (R 1723). A similar motion concerning a potential witness in Tallahassee who would testify about hair samples was also granted (R 1723). The court also granted Appellant's motion to allow a witness to be deposed in Delray Beach, Florida (R 1724). Trial counsel also asked for authorization to travel to Appellant's home area in Tampa, Florida, in order to conduct an investigation into Appellant's background (R 1724). The trial court stated that he had no problem with allowing such an investigation, but he was concerned that some limitation be placed on the expenses. Trial counsel agreed and argued that his motion to have an investigator appointed would cost the county less money than if the lawyer went (at a greater daily rate) (R 1725). Trial counsel's original suggestion was for the court to place a $500 limit on the use of the investigator (R 1725), although the order found in the record on appeal reveals that this was later changed to $1,000 (R 703).

At that same hearing, trial counsel asked that his motion for inspection of the prison files of all the inmate witnesses be granted (R 1726). The motion was granted on the condition that further continuances would not be allowed if the various inmate files were no longer available (R 1729). During argument on that motion, trial counsel admitted that he had reason to believe that "my client is going to be treated as being a great deal more culpable than the co-defendant in the cause." (R 1727).

Trial counsel then moved for a change of venue based upon pre-trial publicity (R 1731). This motion was denied (R 1732), as was a motion for additional peremptory challenges (unless the cases were tried separately) (R 1733). Trial counsel's motion to sever the case from that of co-defendant Bean on the ground of antagonistic defenses was taken under advisement (R 1738). Also denied was Appellant's motion to limit impeachment by use of prior convictions (R 1738). In addition to other motions which had been denied for the co-defendant, the trial court also denied motions declaring the death penalty to be improper in this case (R 1741). Concerning his motion to continue, trial counsel argued that he needed more time, but he admitted that what he had before him had been prepared fully (R 1745). He also stated that he could "be effective with what I have." After the prosecutor argued that most of the discovery had already been completed, the trial court stated that he thought this case was extraordinary and he authorized "any reasonable amount of additional

investigative personnel for either of you; I will authorize a professional colleague for Mr. Vipperman, if he--you need it, because of time constraints; I will authorize a separate special assistant public defender to assist you at your need and only as you need him." (R 1746) The trial court did grant, however, counsel's motion to obtain a list of prospective jurors prior to trial (R 1747).

In addition to adopting all motions filed by co-defendant Bean (R 513), trial counsel filed on his own the motions listed below (some of which have been discussed already):

1. Motion to Continue, August 3, 1983 (R 106)
2. Motion to Continue, August 8, 1983 (R 108)
3. Motion for Psychiatric Examination, August 29, 1983 (R 154)
4. Motion for Appointment of Psychiatric Expert, August 29, 1983 (R 156)
5. Motion to Declare that Death is not a Possible Penalty, September 8, 1983 (R 260)
6. Motion for Statement of Aggravating Circumstances, September 8, 1983 (R 271)
7. Motion to Declare Section 922.10, Florida Statutes, Unconstitutional, September 8, 1983 (R 273)
8. Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire, September 8, 1983 (R 276)
9. Motion to Prohibit Impeachment of Defendant by Prior Criminal Convictions, September 8, 1983 (R 278)
10. Motion to Continue, September 8, 1983 (R 281)
11. Motion for Costs for Community Survey Regarding Predisposition of Public Opinion by Prospective Jurors, September 8, 1983 (R 284)
12. Motion for Additional Peremptory Challenges or to Declare Florida Statutes Section 913.08(1)(a) Unconstitutional, September 8, 1983 (R 286)
13. Motion to Declare Florida Statutes 921.141, Unconstitutional as Failing to Provide Procedure of Sufficient Reliability to Determine Whether Death is an Appropriate Penalty, September 8, 1983 (R 288)

14. Motion to Declare Florida Statutes, Section 921.141, Unconstitutional Under Article V, Section 2(a) of the Florida Constitution, September 8, 1983 (R 291)
15. Motion to Declare Florida Statutes 921.141 Unconstitutional, September 8, 1983 (R 294)
16. Motion to Prohibit Questions Regarding Attitudes of Prospective Jurors Towards the Death Penalty, September 8, 1983 (R 299)
17. Motion for Severance of Defendant Ronald Woods from Co-Defendant Leonard Bean, September 8, 1983 (R 304)
18. Memorandum of Law in Support of Defendant's Motion to Prohibit Questions Regarding Attitudes of Prospective Jurors Towards the Death Penalty and Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire, September 9, 1983 (R 310)
19. Memorandum of Law in Support of Motion to Declare Florida Statute Section 921.141 Unconstitutional Under Article V, Section 2(a) of the Florida Constitution, September 9, 1983 (R 322)
20. Motion for Prior Authorization of Expenditure of Funds, September 9, 1983 (R 331)
21. Motion for Prior Authorization of Expenditure of Funds, September 9, 1983 (R 333)
22. Motion for Prior Authorization of Expenditure of Funds, September 9, 1983 (R 335)
23. Motion to Appointment for Investigator, September 9, 1983 (R 337)
24. Motion for Inspection of Prison Files of all Inmates Witnesses, the Defendant, and the Co-Defendant, September 9, 1983 (R 339)
25. Motion for Prior Authorization of Expenditure of Funds, September 9, 1983 (R 341)
26. Motion for Sanctions, September 23, 1983 (R 474)
27. Motion to Continue, September 23, 1983 (R 480)

During voir dire, defense counsel on numerous occasions informed the jury that there would be evidence that the murder and other crimes were committed by a member of an inmate group called the Dixie Playboys or by an inmate who was under the domination or control of the Dixie Playboys. See, e.g., R 1110, 1130, 1154. Mention of the Dixie Playboys was made by lawyers for both defendants during their opening arguments

(R 1308, 1324).

The following is a summary of the evidence which was presented at the trial. The State's first witness was Mitchell Anderson, a Corrections Officer at Union Correctional Institution, who was one of the assault victims. According to Anderson, on the morning of the incident, he and Officer Dennard (the officer who was murdered) observed co-defendant Bean in an area near the school and that Bean should not have been there because he did not have a pass (R 1333). Bean was instructed by the officers to go to the movement center, however Bean did not go. The officers went looking for Bean, and they found him coming through the east gate at which time they took him to the movement center and counseled him about being in an unauthorized area and about disobeying a verbal order from an officer (R 1334, 1335).

Anderson testified that he also had seen Appellant earlier that day. Appellant was on the back of a dump truck, and Anderson hollered at him not to fall off the truck (1335).

Approximately 2:00 p.m. that same day, Anderson and Dennard went to the main housing unit in order to locate an inmate who was wanted at the investigator's office (R 1335). According to Anderson, he and Sergeant Dennard went through the west gate and were heading to the office when Anderson felt something hit him in the back. He immediately turned around and observed Appellant with a homemade weapon, which was approximately 12 to 14 inches long, and Appellant was

"coming down again and I then threw my arm up and at that time he hit me in my arm." (R 1336) Anderson pushed Appellant back and yelled for Sergeant Dennard to go to the office. He then turned and started for the office, and although there were several inmates between him and the door, he was able to get through the inmates and get the door opened. However, as his head and shoulders were going through the door, the inmates pushed the door closed on him. Sergeant Rogers and Lieutenant Wilkerson then pulled Anderson into the office to safety (R 1336). Anderson looked for Dennard, however other officers informed him that Dennard couldn't get to the door.

Anderson then turned around and saw co-defendant Bean with a weapon making stabbing motions in the area where Dennard was located. Anderson testified that Appellant ran up and also made a couple of stabbing motions. Dennard then was able to get to the door and the officers began to help him inside when Appellant ran up again and hit Dennard "between the shoulder blades with the shank." (R 1337) In Anderson's words, the last wound was "brutal," and it went through the body "eight to ten inches." (R 1337) Anderson testified that when he saw Appellant stab Dennard the last time, Dennard was at the door and that the door was open (R 1338). Anderson also testified that the wound inflicted upon him by Appellant went in his neck and down six or seven inches towards his spine and then about six inches up into his arm and up into his shoulder (R 1338). Anderson then

exposed his wounds to the jury (R 1339).

Anderson further testified that there was sufficient lighting in the area where the stabbings occurred to enable him to see his assailants (R 1342). When Appellant stabbed him, they were approximately one foot apart. After Anderson reached the safety of the office, the distance between him and Bean was approximately five to seven feet. When the door opened and Appellant made his last stab wound on Dennard, Appellant and Anderson were approximately five feet apart (R 1343). When asked whether there was any doubt about whether it was Appellant and Bean who stabbed him and Dennard, the officer replied that there was "[n]o doubt at all." (R 1343)

On cross-examination, defense counsel established that there was no way the inmates could have known that Anderson and Dennard were going to be in the area at that time (R 1351). Bean's counsel established that the initial attack came from Appellant (R 1352).

Appellant's trial counsel established that Anderson knew Appellant prior to the incident--"and Woods had had some disciplinary problems with some of the officers and stuff around there and I just knew his name when I seen him." (R 1362) According to Anderson, he "knew him [Appellant] by face." (R 1363) In response to further questioning by Appellant's trial counsel, Anderson described how the last stab wound occurred:

> When the door was opened, Sergeant Dennard was on his knees. He fell toward the door. At the time he fell toward the door, that is when Lieutenant Wilkerson and them grabbed him by his shoulders and started to pull him in and, when they were pulling him in, that is when Woods hit him the last time.
>
> * * *
>
> He was on his knees trying to crawl to the door.

(R 1371) At the time of this last stab wound, Anderson was no longer able to see Bean (R 1373). On redirect examination, the witness testified that although he was unable to state how long it took for the incident to transpire, Appellant and co-defendant Bean were the ones who did it to him (R 1375).

The State's next witness was pathologist William Hamilton who was the medical examiner for the Eighth Judicial Circuit. After being qualified as an expert in the field of pathology, he testified that he performed an autopsy on the body of the murder victim, Sergeant Dennard (R 1409). He observed seven stab wounds on the victim's body--one in the left temporal region of the head, four in the back, and two on the left forearm (R 1411). He discussed in detail the various wounds (R 1411-1414), and he described how one of the wounds had passed through the skull, through the brain, and then through the bottom of the skull into the soft tissues of the neck. "It completely went through the head." (R 1414) The doctor further testified that because of the "multiplicity and the depth of penetration and the

tissues that it passed through," whoever stabbed Dennard must have expended "a very determined effort . . . ." (R 1416)

Dr. Daniel Knauf, a physician at the Shands Hospital in Gainesville, after being qualified as an expert, testified that he performed emergency surgery upon the victim (R 1433). As part of the emergency measures, Dennard's right lung was removed however, this was only temporarily successful in stopping the bleeding and the heart kept stopping (R 1435).

The next witness was Steven Platt, the Bureau Chief of the Florida Department of Law Enforcement Jacksonville Crime Laboratory, and he testified that he had examined Bean's shirt and had found human blood stains which were inconsistent with Bean's blood type (R 1464). He also examined another inmate's shirt, number 064857, and he found a homemade knife with an ace bandage which was wrapped around it, and he concluded that human blood stains were on these items and that the stains were consistent with Anderson's blood type (R 1465).

Florida Department of Law Enforcement Forensic Serologist James Pollack testified that he had examined some white trousers with number 64857 in the waist band and had found human blood stains on them (R 1500). One of the larger stains contained O type blood. Steve Platt had previously testified that Anderson had type O blood, that Correctional Officer Barker had type O blood, and that Dennard also had type O blood (R 1458-1460). Both defendants had type A blood (R 1461).

Union Correctional Institution Investigator R. T. Lee testifed that the shirt marked 078935 was issued to co-defendant Bean (R 1552). He also testified that the other shirt (number 064857) belonged to Appellant (R 1554).

Sergeant Max Denson, the Assistant Institutional Investigator at Union Correctional Institution, testified that he found Appellant's trousers on the roof of the rest-room inside the main housing unit (R 1623). Bean's trousers were found the same day behind the restroom on G floor (R 1626). Denson explained that he had found in the same general area the gloves from which the blood samples previously discussed were taken (R 1628-1630).

Sterling Esford testified that he was the inside Security Supervisor on the day of the murder (R 1699). Woods had been brought to him by another correctional officer that morning, and Esford counseled Woods about Woods' refusal to work (R 1701). Woods volunteered to work for Esford, however, and he was placed on a work detail unloading weights at the confinement barracks. Woods began doing that job, but he then refused to work. Esford then escorted Appellant back to the movement center and informed him that if he refused to work, he would get a disciplinary report (R 1702). Esford advised Appellant to get his property and go back to his housing area and Appellant then left. The time was approximately 1:20 p.m.

Approximately 12:30 p.m. that same day, Officers Dennard and Anderson had brought co-defendant Bean to

Esford's office and explained to Esford that they earlier caught Bean in an area without a pass and that Bean had failed to follow their verbal orders (R 1703). Esford advised Bean that if he was caught again walking all over the place, he would have his job changed. Bean was then released to go to his housing area (R 1703).

Wesley Taylor, an inmate at Union Correctional Institution, testified that on the day of the murder he was an "outside runner" which meant that he was authorized to go to the various floors in the main housing unit (R 1719). He saw Woods and Bean together on the afternoon of the murder and they were discussing in general terms "getting those crackers back, things like that, like threatening remarks and hollering back and forth to each other." (R 1721) He specifically testified that he heard the defendants making statements about how they were tired of being pushed around. Taylor saw two weapons--knives which were in possession of Bean and Woods (R 1722). On cross-examination, the inmate testified that all of the inmates in the group with Bean and Woods were black (R 1728).

Richard Harvey testified that he was a Correctional Officer and that he observed the assault. Specifically, he observed two inmates trying to drag Dennard from the office, and he grabbed one of the inmates but that inmate pulled away (R 1764). The officer turned to look in the office at which time the inmate stabbed him and cut his ear. "He appeared to be going for my throat." (R 1765)

He identified the inmate who had stabbed him as Appellant (R 1766). As Woods was leaving the area, the officer saw him pass and stab Officer Barker. However, before he stabbed Barker, he went to the gate and ascertained that there were no officers present, and he then returned and stabbed Barker (R 1766).

Correctional Officer Thomas Barker testified that he answered a call over the intercom for all officers to come to the office and he ran face to face into Appellant. "He struck me in the neck. I thought he hit me with his fist. I reached up there to grab his hand and he jerked his hand back and cut me on my fingers when the shank came out of my neck." (R 1788) Although Woods initially fled, he returned and attempted to stab Barker again (R 1788).

Sergeant Joseph Lazenby testified that he went to Bean's and Appellant's cell after the incident, and observed Woods hand a weapon to Bean who stuck it under a blanket (R 1805). On cross-examination, the sergeant testified that Woods was wearing "a brand-new, clean pair . . . of coveralls." (R 1810) Also recovered from the same general area were some trousers, some gloves, and a knife found over the bathroom (R 1813).

Inmate Sammy Taylor testified that he was lying in his cell when Woods came to the door along with Bean and asked to "be allowed to come in the cell for a little while because he had got involved in something." (R 1889) Woods explained to the witness that "they had stabbed some officers and he thought one of them was going to die." (R 1890). Bean acknowledged Woods' statement with a nod (R 1891). The inmate's

testimony corroborated the previous testimony about how Woods had passed a knife to Bean while they were in the cell (R 1892). On cross-examination, Taylor stated that it was obvious to him that Bean had an additional weapon located under his t-shirt (R 1896). Bean also stuck this object up under the same blanket.

The State's next witness was Jack Thomas, another inmate at Union Correctional Institution, who testified that he witnessed the assault which occurred approximately 2:00 p.m. on May 5, 1983 (R 1920). Specifically, he saw Woods stab Dennard, and he heard Dennard say to Woods "don't kill me." (R 1922). The inmate further testified that when Dennard asked Woods please not to kill him, Woods replied, "cracker, you dying." (R 1924) According to Thomas, Woods then kicked Sergeant Dennard again and said, "you are dying today." And he stabbed Dennard several more times (R 1925). On cross-examination, the witness testified that after Bean had stabbed Officer Anderson and Officer Anderson had made it into the office, Bean turned and fled. Woods, however, "kicked the door shut and commence[d] to stabbing Officer Dennard." (R 1937) When asked whether a group of black inmates named the Dixie Playboys was after him, he stated that he had no knowledge (R 1962).

Correctional Officer Shirley Gilbert testified that she was in the office on the day of the murder and that she heard someone shout to open the door at which time Lieutenant Wilkerson and Sergeant Rogers opened the door and pulled

Officer Anderson inside the office. The door was then slammed shut. They had difficulty opening the door and when they finally did so they pulled Sergeant Dennard into the office (R 1795). She then turned and looked out the window and saw Appellant running away. However, Appellant stopped and then stabbed Officer Barker in the throat--Appellant came at Officer Barker again but then changed his mind and ran away (R 1976). Her testimony was corroborated by Correctional Officer Wilber Rogers who was also present in the office at the time of the murder (R 1996). He specifically testified that he saw both Appellant and co-defendant Bean with knives while they were running away (R 1998).

After the State rested, co-defendant Bean called Edward Sands, the Prison Inspector and Investigator for the Florida Department of Corrections (R 2038), and asked him whether they had investigated a group of persons known as the Dixie Playboys. The inspector replied that this group had not been investigated during this case (R 2039). On cross-examination by the State, the inspector testified that there had been absolutely no evidence to tie Woods and Bean to a group called the Dixie Playboys (R 2051).

After co-defendant Bean presented several other witnesses, he rested his case. Appellant's counsel then rested (R 2100). Earlier in the trial, when asked by the trial court how long his case would take, Appellant's trial counsel replied, "Mr. Woods doesn't have a case. We will be resting shortly after Mr. Replogle finishes. We will not be putting on any

evidence in the trial until the mitigation phase of the trial." (R 1523)

Just prior to the closing arguments, Appellant's trial counsel moved to have the correctional officers in the spectator gallery removed from the courtroom. The grounds for his motion was that his client was denied a fair and impartial trial of this cause (R 2127). However, the trial court disagreed--the court first stated that he did not find that the gallery was filled and he stated that there was an even distribution of correctional officers and non-uniformed people in the courtroom (R 2130). The court also noted that many of the correctional officers in the spectator gallery were officers who had testified at the trial. The motion was denied.

After closing arguments and the instructions to the jury, co-defendant Bean was found guilty of first degree murder of Dennard, attempted first degree murder of Anderson, and guilty of possession of contraband in a state penal institution (R 2281, 2282). He was found not guilty of attempted murder of Officer Harvey and not guilty of attempted murder of Officer Barker (R 2282). Appellant, on the other hand, was found guilty as charged in all five counts, i.e., guilty of first degree murder of Dennard, guilty of attempted first degree murder of Anderson, guilty of attempted first degree murder of Harvey, guilty of attempted first degree murder of Barker, and guilty of possession of contraband in a state penal institution (R 2282, 2283). The verdicts can be found on pages 594-599 of the record on appeal.

Prior to the penalty phase, counsel for Appellant stipulated that mitigating circumstances would not be considered and that "the state would not be required to rebut it." (R 2289) At the beginning of the penalty phase, the court granted the State's motion to consider the guilt innocence phase of the trial as evidence in the penalty phase (R 2325). The court also took judicial notice that it had adjudicated Bean guilty of attempted murder of Officer Anderson and Woods guilty of attempted murder of Officers Anderson, Harvey, and Barker (R 2326).

Appellant's first witness at the penalty phase was his mother Eloise Woods. She testified that her son was 18 years old (R 2329) and that Appellant's father had left home when Appellant was four years old (R 2330). She also testified that Appellant had had a history of seizures and that he had mental problems and that he had been under medication and had been admitted to a mental health hospital at one time when he was eight years old (R 2330). According to her, when Appellant was small, his father would beat him (R 2331). She testified that Appellant was a follower and that he did not do well in school and that he had been in a special class for mentally retarded children (R 2332).

Appellant's next witness was Dr. Harry Krop who testified that he was a clinical psychologist and that he had examined Appellant and had conferred with Appellant's mother and sister (R 2337). The only test which he gave Appellant was the adult intelligence scale, and Appellant scored 69 on this

test which would mean that Appellant was mentally defective (R 2338). Because of his defective intelligence, it was the doctor's opinion that Appellant would have difficulty in terms of judgment and that he would not be able to plan ahead and consider the consequences of his acts (R 2339). The doctor did not feel that Appellant was a leader but rather that Appellant would typically be a follower (R 2342). The doctor also testified that Appellant's intelligence would be considered only mild mental retardation which would mean that Appellant would be educable (R 2342). It was also the doctor's opinion that based upon Appellant's medical history, Appellant suffered from a chemical imbalance which caused the seizures that had occurred up until Appellant was four years old (R 2344). The doctor qualified his testimony with his observation that Appellant no longer seemed to be suffering from a hyperactive syndrome and that he had grown out of it.

However, on cross-examination by the State, the doctor admitted that Appellant's intelligence score put him at the very top of the moderately retarded classification. He also admitted that he had been appointed in this case for the purpose of assisting the defense in raising the defense of insanity at the time of the offense (2348). In that regard, the doctor testified that he had not found Appellant insane at the time of the offense. The doctor admitted that he had found that Appellant was competent to stand trial and to assist his attorneys (R 2348). The doctor also admitted that he was not contending that when Appellant murdered Dennard

Appellant had acted "under extreme duress or under substantial domination of another." (R 2349) Moreover, the doctor also admitted that he was not even aware of the facts of the case. The doctor also admitted that he did not have any facts to support a conclusion that Appellant had been under the domination of another person when he committed the murder (R 2349). Finally, the doctor admitted that he was not saying that Appellant did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to law.

The doctor stated that he would not expect Appellant's personality or emotional state to change if he remained within the penal system (R 2350). On redirect examination, the doctor claimed that a person of lower intelligence would find it more difficult than a person of normal intelligence to conform his conduct to that of the law (R 2358). On re-cross-examination by the State, the doctor admitted that a person's intelligence quotient (IQ) did not measure criminality and that it was certainly possible for a person with a low IQ to be honest (R 2360). The doctor admitted that the test he gave Appellant had a validity factor in the 60's, which meant that the test could be invalid more than one-third of the time (R 2363). Appellant then rested.

After closing arguments by the lawyers and instructions by the trial court, the jury returned an advisory verdict of death (7-5) in Appellant's case and an advisory verdict of life (9-3) in Bean's case (R 2497, 2498).

The trial court sentenced Appellant to death (R 2590). In his written sentence, the trial court found the aggravating circumstances of §921.141(5)(a) & (g). Specifically, the trial court found that the victim was performing his duties as a correctional (law enforcement) officer at the time he was killed and thus the murder was committed to hinder or disrupt the lawful exercise of governmental functions or the enforcement of laws. The court also specifically found that Appellant was serving a sentence of imprisonment for the felony of first degree arson at the time of the killing (R 654). The only mitigating circumstance found was Appellant's age. Section 921.141(6)(g), Fla. Stat. The trial court specifically rejected Appellant's low intelligence as a basis to find that Appellant was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law (R 655). The court noted in his sentencing order that Appellant had received competent counsel who had filed numerous timely motions in the case. The court also noted that the record reflected that the attorneys went to great lengths to investigate adequately and prepare the case prior to trial: "The court also notes that the record reflects the ends these attorneys went to adequately investigate and prepare the case prior to trial. The record reflects a great number of depositions of witnesses--including potential defense witnesses--taken on behalf of the defendant by his attorneys throughout the State of Florida." (R 656, 657)

After Appellant's Notice of Appeal was filed, this Court entered an order remanding the case to the trial court to allow the trial court to rule on several post-trial motions and to hold a hearing to determine "how many of the black veniremen were peremptorily challenged and excused by the State." (SR 8) This hearing was held on January 4, 1985. At the beginning of the hearing, the State objected for the record the consideration of the racial discrimination issue in this case since this Court has specifically held in State v. Neil, 457 So.2d 481, 488 (Fla. 1984), that Neil was not to be applied retroactively.

The prosecutor explained that prior to the hearing he and defense counsel had agreed upon every juror which had been peremptorily excused. The prosecutor contacted the supervisor of elections and then determined the race of everybody who had been excused. Both the State and the defense agreed that these figures were correct--at the time the jury was selected, the court had excused 14 people for cause, the State had excused 13 people peremptorily, and the defendants had excused 15 people peremptorily between them. Appellant had excused 8, and his co-defendant Bean had excused 7. Nine blacks were called from the venire pool into the jury box. Of those nine jurors, six were excused by the State, two were excused by the defense and one was selected as an alternate juror.

At the time that the objection was made during the trial, five blacks had been excused. Of those five, the

State had excused four, and the defense had excused one. Of the two blacks who were in the jury box at that time, the State excused one and the defense excused the other.

Based upon those figures, the prosecutor argued that the first part of the Neil test had not been met, i.e., that there was not "a strong likelihood that they have been challenged solely because of their race." Neil, supra at 457 So.2d 486. However, in an abundance of caution, the prosecutor decided to offer his testimony as to why the jurors had been excused in the event that this Court found that the stipulated figures indicated a strong likelihood of discrimination (SR 13-16).

The prosecutor began his testimony by explaining that jury selection was extremely important in death penalty cases. The prosecutor testified that between the time of the murder (May) and the time of trial (September) another prison guard had been stabbed literally within five feet of where Dennard had been murdered (SR 20). Because of his investigation into both incidents, he believed that there would be allegations of improper conduct on the part of the inside security squad (known among the inmates as the Goon Squad), and that retaliation might be an aspect of the defense in this case. Because of this knowledge, and because the prosecutor knew that an inmate was going to testify that the murder was committed by someone else, the prosecutor was looking for a specific type of juror (SR 20).

The prosecutor explained that he did not want a juror who had had an adverse reaction with law enforcement, either

as an individual or as a member of a family in which someone else had had an adverse experience with law enforcement (SR 21). The prosecutor specifically testified that the race of the juror did not enter into his decision whether a juror would be good for the prosecution (SR 24). The prosecutor explained that prior to the trial he had attempted to find out as much as possible about the jurors he expected to be called to serve (SR 25). He evaluated all of the potential jurors and prioritized them whether they would be favorable to the State's case, one being a good juror and three being someone who probably would be unacceptable because of a problem with law enforcement (SR 26). The prosecutor categorized jurors as 2's if no information was known about the potential juror or if it was not possible to tell whether the juror should be a 1 or a 3. The prosecutor testified that no juror was given less than a 1 based solely on his race, and he gave examples of white jurors who were given 3 ratings (SR 27). The prosecutor gave an example about how a juror who was rejected in this case because of his feelings about the death penalty was actually selected in a non-death penalty case. Although the prosecutor could not remember whether he had either 20 or 24 peremptory challenges, he used only 13 (SR 28). At the time the objection was made at trial, the prosecutor had used 8 of his peremptory challenges--four for whites and four for blacks. The defense had used 13 challenges at that time--12 for whites and 1 for a black (SR 29). The prosecutor also explained that his jury selection was not

based solely on his numbering system because if a juror that he had determined prior to voir dire was a 1 was revealed to be less than that on vire dire, the juror would not be selected (SR 31). Of the 13 peremptory challenges exercised in this case by the State, 6 were for blacks and 7 were for whites (SR 31). The prosecutor specifically testified that those six black persons were not excused solely on the basis of their race (SR 32).

On cross-examination, the prosecutor testified that he had peremptorily excused one of the black jurors because he had prosecuted members of her family (SR 37). Another black juror (Harvey Thomas) was excused because he was a 3. One of the unrated jurors (Cathy Watkins) was excused once he realized he had prosecuted a member of her family (SR 40). The prosecutor was unable to recall why he peremptorily excused the two jurors which had been unrated (SR 40).

The defense presented the testimony of Appellant's trial counsel, Stephen Bernstein. It was his belief at the time his objection was made that there was no reason other than race for the State to have excused the black jurors which had been excused (SR 51). However, on cross-examination by the State, Mr. Bernstein admitted that at the time the objection had been made, he had miscounted and also one of the black jurors which had been excused had been excused by the defense (co-defendant) (SR 53). Mr. Bernstein admitted that he could not say on what basis the prosecutor had made the decision to exercise his peremptory challenges. Mr. Bernstein also admitted that he had excused a black juror, too (SR 54).

The trial court then stated that he didn't believe this Court's instructions on remand were for him to make a determination of racial discrimination under Neil. However, the trial court then stated that the "record speaks for itself for the testimony of the two witnesses and the stipulation of counsel. Were I called upon to make a finding, it would be one of no discrimination." (SR 54)

During argument on the motion for new trial, Appellant's other trial counsel argued that he had needed more time to present his defense. However, trial counsel admitted "[t]he case was a devastating case." (SR 61) He also admitted that he had never been able to determine why the murder occurred. Trial counsel continued: "My motion for new trial is based on the fact that though it may not have changed the outcome of the guilt phase of this trial, it may well have changed the outcome of the penalty phase . . . ." (SR 62)

In response, the prosecutor explained that of the witnesses whom the defense had not been able to interview, most had merely informed the State that they had not seen anything (SR 63). Thus, the prosecutor argued that there was no reason to grant a motion for new trial because witnesses had not been able to be deposed when those witnesses would not be able to testify to anything other than they had not seen anything on the day of the crime (SR 64). The prosecutor also pointed out that trial counsel's arguments were based upon conjecture since even to that date no information had been found although the defense certainly had ample time to

discover such information if it in fact existed (SR 65).

The trial court then commented that no death case was ever easy and that most advocates never felt a death case was ready for trial (SR 69). The court explained that trial counsel had done "yeoman's work" preparing the case and that the court had made available unusual "access to resources for preparation in the case . . . ." (SR 69) The motion for new trial was denied (SR 70).

SUMMARY OF ARGUMENT

The issue of whether Appellant should be given a new trial because of the prosecutor's allegedly improper excusal of black jurors should not be considered in this case because this Court has already held in State v. Neil, 457 So.2d 481 (Fla. 1984), that the new rule of law announced in Neil should not be given retroactive effect. Appellant's jury was selected more than one year before Neil was decided, and there simply was no way for either the State or the court to predict that a new rule of Florida Constitutional law would be forthcoming. This is particularly true in light of this Court's statement in Neil itself that Neil would not be retroactive because of the extensive reliance on previous standards. Id. at 457 So.2d 488.

Assuming only for the sake of argument that the Court decides to apply the new rule in Neil to a "pipeline case," Appellant still is not entitled to relief. This is because unlike the situation in Neil, the Court is able to determine from the record how many jurors were excluded and the reasons for such exclusion. At the time the objection was made in the trial court, the State had excused four of the seven blacks which had been examined, the defense had excused one, and two jurors remained. This does not constitute a "substantial likelihood" that the black jurors were excused solely because of their race. Should the Court disagree, Appellant still is not entitled to relief because the prosecutor testified at the hearing on remand specifically that the black jurors were

not excused because of their race. Finally, this Court has available the trial court's finding that no discrimination occurred, and it is important to note that it was the trial court who was both present at trial and the hearing on remand, and it is he who is in the best position to determine the credibility of the prosecutor's testimony. Also relevant is the fact that at the time the jury was selected, the defense had numerous peremptory challenges still available.

A defendant claiming reversible error because of the failure of the trial court to grant a continuance has a heavy burden. Cooper v. State, 336 So.2d 1133, 1138 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). The record reveals no abuse of discretion in this case. The record contains numerous pre-trial motions filed by the defense, and Appellant is simply unable to demonstrate any prejudice from the denial of the motions for a continuance. The State's case against Appellant was in the words of trial counsel "devastating," yet, as the trial court found, defense counsel did an outstanding job in this case.

Concerning whether the trial court abused its discretion when it denied Appellant's motion to exclude the uniformed officers from the courtroom, this argument should fail because Appellant has offered no authority to support his argument. First, it is the State's position that this argument came too late because it came at the conclusion of the trial rather than prior to trial when an evidentiary hearing could have been held concerning the number of officers, their location in the

courtroom, etc. If Appellant really were unable to obtain a fair trial, he should have pursued his motion for change of venue, the denial of which has not even been raised on appeal. Finally, for Appellant to prevail on this issue, the Court would have to presume that the jury disregarded its instructions and its oath--and there is nothing in the record to support such conclusion.

The sole basis upon which Appellant asserts his death sentence is unconstitutional is that he should have been given the same life sentence his co-defendant received. However, the co-defendant received a life recommendation whereas Appellant received a death recommendation. Moreover, it was Appellant who committed the more reprehensible conduct in this case--including the stab wound which went through the victim's skull as the victim lay there begging for his life. As the Eleventh Circuit Court of Appeals has noted in Antone v. Strickland, 706 F.2d 1534, 1538 (11th Cir. 1983), the Constitution does not guarantee equal treatment at sentencing--the Constitution is concerned with whether the defendant who got a death sentence deserves it and not whether his co-defendant should have received one also.

Concerning whether a mitigating factor about Appellant's character should have been found, this Court has already held that it will not second-guess a trial court's decision not to find a mitigating factor as long as the record reveals that the trial court was willing to consider all the evidence presented. Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983).

Appellant presented whatever evidence he wished, but the trial court was unpersuaded. Should the Court disagree with the trial court's determination, however, any error would have to be harmless beyond a reasonable doubt in light of the trial court's failure to find three additional statutory aggravating factors which were clearly supported by the record and evidence adduced at trial. See §921.141(5)(b) & (h) & (i), Fla. Stat. Finally, this Court should not be persuaded that because of Appellant's low intelligence he deserved a mitigating factor. See Ruffin v. State, 397 So.2d 277 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981).

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR MISTRIAL WHICH ALLEGED THAT THE PROSECUTOR HAD BEEN SYSTEMATICALLY PEREMPTORILY EXCUSING BLACKS FROM THE JURY.

Appellant's first contention is that the trial court committed reversible error when it denied his motion for mistrial which had been based upon defense counsel's contention that the prosecutor had been systematically peremptorily excusing blacks from the jury. The State submits that this Court should not be persuaded by Appellant's argument for several reasons.

Initially, the State would point out that the case upon which Appellant has relied, State v. Neil, 457 So.2d 481 (Fla. 1984), was not decided until September 27, 1984. Appellant's jury was selected on September 26, 1983--one year before the new rule of constitutional law in Neil was announced by this Court. Since this Court squarely held in Neil at 457 So.2d 488 that Neil would not be retroactive, it simply would not be fair to hold both the State and the trial court to standards which were not yet in existence at the time Appellant's case was tried. This is especially true in light of this Court's recognition in Neil of the "extensive reliance on the previous standards," i.e., those established in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d

759 (1965).

The State's argument that Neil should not be extended to cases "in the pipeline" is supported by the Court's recent decision in State v. LeCroy, 461 So.2d 88, 92 (Fla. 1984). In that case, this Court refused to apply retroactively the United States Supreme Court's opinion in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The Court relied upon Solem v. Stumes, ___ U.S. ___, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984). In that case, the United States Supreme Court had recognized that retroactive application of Edwards would not serve the purpose of the rule, i.e., to deter misconduct. Also, this Court recognized in LeCroy that the Supreme Court had "expressly acknowledged that Edwards v. Arizona established a new rule--just as this Court announced that a new rule had been established in State v. Neil. See also Bowen v. United States, 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975), which affirmed the lower court which had refused to apply retroactively the new constitutional principle announced by the Supreme Court in Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 1535, 37 L.Ed.2d 596 (1973), to cases "in the pipeline." Also relevant is Fuller v. Alaska, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212, 214 (1968), which had refused to apply retroactively the principle announced in Lee v. Florida, 392 U.S. 378, 88 S.Ct. 2096, 20 L.Ed.2d 1166 (1968).

Should Appellant contend that by virtue of the fact that this Court remanded the case to the trial court to

determine the number of black jurors excluded that this Court has already decided to apply Neil retroactively to cases "in the pipeline," the State would respectfully disagree. See Livingston v. State, 441 So.2d 1083, 1085 (Fla. 1983), in which this Court explained that its denial of a petition for writ of prohibition was not a decision to which the principle of res judicata was applicable since this Court had not written an opinion upon which the parties could rely.

In addition to the State's argument that this Court's recognition in Neil itself that prior extensive reliance upon Swain v. Alabama dictated that Neil not be applied retroactively, a second reason exists. This reason is fairness--in State v. LaVazzoli, 434 So.2d 322 (Fla. 1983), this Court refused to apply retroactively the effect of the constitutional amendment to Art. I, Section 12 of the Florida Constitution concerning search and seizure. In that case, the defendant's probation had been revoked long before the constitutional amendment took effect. However, this Court relied upon a prior decision, State v. Dodd, 419 So.2d 333 (Fla. 1982), to approve the lower court which had reversed the revocation of probation--even though the constitutional amendment had, in effect, wiped out the viability of Dodd. The State submits that fairness works both ways and that the people of the State of Florida are entitled to due process also. Stein v. New York, 346 U.S. 156, 197 (1953).

Assuming only for the sake of argument that the Court disagrees with the State's contention that State v. Neil

should not be applied retroactively to cases "in the pipeline," Appellant's argument must fail for a second reason. This is because at the hearing on remand the prosecutor stated under oath that he had not excused blacks peremptorily solely on the basis of race.

The record reveals that at the time defense counsel made his objection below, seven blacks had been examined (SR 14). Of those seven, four had been excused by the State, one had been excused by the defense, and two jurors remained. Thus, as Appellant's trial counsel admitted during the hearing on remand, he had been incorrect when he had accused the State of excusing all the blacks on the jury panel. Also relevant is the fact that of the nine black jurors who were examined, two of those were excused by the defense and one black juror actually served on the jury. It is significant that both the State and the defense had numerous peremptory challenges left at the time the jury was selected (SR 13).[1] (The State takes exception to Appellant's brief at 11 in which it is alleged that the State excused 75% of the blacks examined--apparently it was overlooked by Appellant that a black juror actually served.)

In any event, assuming the Court concludes that at the time of the objection the State's excusal of four of the seven black jurors that had been examined at that time, or even at the time the jury was actually selected that the State's excusal of six of the nine black jurors who were examined, meets the first prong of the Neil test that there exists a

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[1]See Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984).

substantial likelihood that these jurors were excluded solely on the basis of race, Appellant's argument still must fail. This is because the prosecutor testified under oath concerning his motivation and reasons for excluding the various black jurors. Because of this testimony, Appellant's argument concerning "circumstantial evidence" relying upon percentages is misplaced. The prosecutor, Mr. Tobin (who was a minority member himself, SR 32), clearly testified that he had not excused the black jurors solely on the basis of race (SR 32). This evidence was unrefuted by Appellant, and even Appellant's trial counsel admitted that (1) he had been mistaken when he had accused the prosecutor of excluding all the blacks on the jury panel and (2) he could not say on what basis Mr. Tobin had made his peremptory challenges (SR 53). It is interesting to note that the percentage of blacks excused by the State was much less than the percentage of whites (12 of 13) which had been excused by the defense!

The State submits that the prosecutor's unrefuted testimony under oath should end the matter. However, should the Court have any doubt, the State would point out that under the facts of this case, Appellant simply is unable to demonstrate any prejudice in the State's actions because at the time the jury was selected the defense had numerous peremptory challenges available and there were at least a dozen and perhaps as many as twenty-four (24) blacks remaining in the venire pool (SR 30). Finally, although the trial court felt that he did not have to make such a ruling, the trial court

stated on the record that were he directed to rule upon the issue he would find no discrimination (SR 54). The motion for mistrial was properly denied.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO CONTINUE.

Appellant next complains that the trial court committed reversible error when it denied several of his motions to continue the trial. Again, the State emphatically disagrees and asserts that the Court should not be persuaded.

Initially, as counsel for Appellant has recognized, a defendant urging reversible error on the basis that the trial court denied a continuance has a heavy burden. This Court has made it abundantly clear that a trial court's decision whether to grant a continuance is addressed to the trial court's sound discretion and will not be reversed on appeal absent a palpable abuse of discretion. See, e.g., Rose v. State, 461 So.2d 84, 86 (Fla. 1984), Lusk v. State, 446 So.2d 1038, 1041 (Fla.), cert. denied, ___ U.S. ___, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). Moreover, this is true even in death penalty cases. See Rose, supra, in which this Court recognized that in Cooper v. State, 336 So.2d 1133, 1138 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), that "[w]hile death penalty cases command our closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance." Finally, this Court also recognized in Rose, supra, that in Magill v. State, 386 So.2d

1188, 1189 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981), that the requisite "palpable abuse of discretion" must clearly and affirmatively appear in the record. No such abuse of discretion appears in this case.

It should first be recognized that the trial court did grant Appellant's first motion for a continuance. See Order Granting Motion to Continue (R 110). Also, as counsel for Appellant has informed the Court, the trial court subsequently appointed an additional attorney and an investigator to assist Appellant's trial counsel (Brief of Appellant at 21). Thus, Appellant's defense was not overwhelmed as Appellant would attempt to lead this Court to believe.

The trial court specifically noted at sentencing that Appellant's counsel had done a thorough job preparing the case, and he commented about the great number of depositions of potential witnesses (R 656, 657). In addition to the trial court's comments, the State respectfully directs the Court's attention to the numerous pre-trial motions filed by Appellant's trial counsel. These motions were in addition to the motions filed by the co-defendant's trial counsel which were also applicable to Appellant.

Appellant has argued that notwithstanding all that was done, he could have done more if he had had more time. However, this argument is refuted by trial counsel's candid statement on the record that he could be effective with what he had done (R 1745). It should also be recognized that this same laywer admitted during the hearing on the motion for new trial

that the State's case had been "devastating," and that he still had never been able to determine why the murder had occurred (SR 61). He also candidly recognized that the denial of the motion for continuance had not affected the guilt phase of the trial (SR 62). In response to these statements, the prosecutor was quick to point out that the only witnesses that trial counsel had been unable to depose were witnesses who had informed the State that although they had been present in the area near the murder, they had seen nothing (SR 64). Consequently, none of these witnesses were used by the State and their names were given to the defense only because of strict compliance with the discovery rules. The prosecutor also argued that Appellant was unable to show prejudice because to that day no information had been developed although the trial had occurred more than a year prior to the hearing on the motion for new trial (SR 65).

In that regard, it should be remembered that the defense during voir dire on several occasions tipped the jury off that there would be evidence of the so-called Dixie Playboys. Yet, no such evidence was offered at trial even though both defense lawyers had promised such evidence during their opening statements. The only mention of the Dixie Playboys during the trial testimony was that inmate Thomas had no knowledge of the group and that the prison inspector had found no evidence to tie the defendants to the group (R 1962, 2051). Thus, the prosecutor correctly pointed out that at best Appellant's attempt to show prejudice was pure conjecture.

Appellant's reliance upon Valle v. State, 394 So.2d 1004 (Fla. 1981) is misplaced because of the obvious factual differences between the two cases. In Valle, the defendant was forced to go to trial within 24 days of his arrest--however, in Appellant's case, the trial court granted a continuance. In Valle, the defense was denied the opportunity to present a psychiatric witness--however, in Appellant's case, psychological testimony was presented in the penalty phase. In Valle, the defense claimed that there had been insufficient time to develop mitigating witnesses--however, in Appellant's case, mitigating evidence was attempted to be presented, and there was no complaint that other character-type witnesses might be available if more time was given. In addition to these differences, the most obvious difference between the two cases is the difference between 24 days and the number of days between May 5, 1983 and September 26, 1983.

Three years after Valle was decided the United States Supreme Court wrote United States v. Cronic, ___ U.S. ___, 80 L.Ed.2d 657 (1984). In that case, a lawyer had been given only 25 days to prepare for trial even though the government had taken four and one-half years to investigate and file the case. A lower court reversed the defendant's conviction solely on the basis that not enough time had been allowed to prepare for trial even though there had been no proof that any trial errors had occurred, that trial counsel's performance had prejudiced the defense, or that he had not acted as a reasonable advocate. The United States Supreme Court

reversed while recognizing that not every refusal to postpone a criminal trial will give rise to an irrebutable presumption that prejudice can be presumed without any inquiry into what actually occurred at the trial. The State submits that this same rationale should be applicable in Appellant's case--and since even at this late date Appellant is unable to demonstrate any evidence whatsoever which could have been developed that would have assisted the defense either during the guilt phase or the penalty phase, it simply cannot be said that the trial court abused its discretion when it denied the motions for a continuance. Cooper, supra.

In summary, the record reveals that Appellant's trial counsel filed numerous pre-trial motions on his own while adopting the pre-trial motions filed by the co-defendant. The trial court specifically recognized all that trial counsel had done and while recognizing that in nearly every case more could be done, the trial court found no prejudice in this case. This finding is supported by the record, especially in light of the fact that no concrete evidence was offered at the motion for new trial hearing which was held more than one year after Appellant was convicted. Appellant's present counsel has based his arguments upon conjecture--however, conjecture is not enough to demonstrate a palpable abuse of discretion on the record. The motions to continue were properly denied.

ISSUE III

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO EXCLUDE THE UNIFORMED CORRECTIONAL OFFICERS FROM THE COURTROOM.

Appellant's next argument is that the trial court committed reversible error when it denied his motion to exclude the uniformed correctional officers from the courtroom. The grounds for this motion were that Appellant was denied a fair trial because of the presence of the correctional officers.

Appellant's argument must fail for several reasons. First, the motion was not made until the conclusion of the trial--a time which the State contends was too late. Appellant should have prior to trial argued in his motion for change of venue that he would be denied a fair trial because of the presence of the correctional officers. This Court has already recognized that Union County is a small county and that many of the citizens of that county either work for the Department of Corrections or are related to such workers. See, e.g., Lusk v. State, supra and Morgan v. State, 415 So.2d 6 (Fla.), cert. denied, ___ U.S. ___, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

Appellant could have asked for an evidentiary hearing in the trial court in order to prove his contentions. However, since he did not do so, he is unable to demonstrate any prejudice whatsoever--especially in light of the overwhelming evidence against him. Of course, since reversible error cannot be predicated upon conjecture, Sullivan v. State,

303 So.2d 632, 635 (Fla. 1974), Appellant should not be persuasive on this point.

Counsel for the State has been unable to find a single case in which the presence of uniformed correctional officers results in a per se unfair trial. Significantly, counsel for Appellant did not refer to any such case in his brief. However, although there are apparently no cases directly on point, the Eleventh Circuit's recent opinion in Zygadlo v. Wainwright, 720 F.2d 1221 (11th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1921, 80 L.Ed.2d 468 (1984), is instructive. In that case, the defendant complained that the jury had seen him while he was wearing physical restraints. The Court noted that there were uniformed officers and plain clothes officers both at the defense table and in the court-room. The Court found that the defendant had been unable to demonstrate any prejudice from either the restraints or the presence of the officers and the grounds for the objection at the trial (like the grounds here) were merely that the defendant was deprived a fair trial. The Eleventh Circuit refused to order the district court to grant a writ of habeas corpus because the Court was unable to determine from the record that the trial court abused its discretion in conducting the trial the way it did. The State submits that the same should be true in Appellant's case. See also Dorman v. United States, 435 F.2d 385, 398 (D.C. Cir. 1970) (en banc) and Hardee v. Kuhlman, 581 F.2d 330, 332 (2d Cir. 1978).

As a final note, if this Court has already concluded

that the presence of correctional officers on the jury is not per se prejudicial, i.e., Morgan, supra, and Lusk, supra, it should almost go without saying that the mere presence of the officers in the courtroom, without more, does not constitute error. And this is especially true in light of the fact that it is presumed that the jury followed its instruction to base its verdict solely upon the evidence adduced at trial (R 2267). Also, the jury was instructed that its verdict should not depend on whether it felt sorry for anyone or angry at anyone (R 2270).

In support of his argument on appeal, Appellant has contended that there were subtle indicators which should have motivated the trial court to grant Appellant the relief requested. See Brief of Appellant at 31. However, all of these so-called "reasons" are reasons which could have supported a motion for change of venue--the denial of which Appellant has not even seen fit to challenge on appeal. Accordingly, this Court should not be persuaded by Appellant's argument since Appellant has failed to prove anything but instead relied merely upon conjecture. Sullivan, supra.

ISSUE IV

THE TRIAL COURT'S IMPOSITION OF THE DEATH SENTENCE UNDER THE FACTS OF THIS CASE DID NOT CONTRAVENE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Incredibly, Appellant is now claiming that he should not have received a death sentence simply because his co-defendant was sentenced to life imprisonment. The State submits that under the facts of this case, this argument borders on the point of being frivolous.

Florida's capital punishment law has been upheld by the United States Supreme Court because the death penalty is not given (or upheld on appeal) unless the facts and circumstances pertaining to the individual defendant merit death. Proffitt v. Florida, 428 U.S. 282, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). From the very beginning of this case, even Appellant's trial counsel recognized that Appellant's conduct was much more reprehensible than that of the co-defendant--defense counsel recognized prior to trial that "my client is going to be treated as being a great deal more culpable than the co-defendant in the cause." (R 1727)

Counsel's understanding was proven to be true by the evidence adduced by the State. For example, it was Appellant who drove his knife through Dennard's skull all the way to Dennard's shoulder and spine. It was Appellant who told Dennard that he was going to die while Dennard was begging for his life. It was Appellant who placed his foot on the

door to the office thus preventing Dennard from being rescued by the other officers. It was Appellant who committed (and was convicted) of the knife assaults on the other officers. And in that regard, it was Appellant who stabbed Barker, retreated and then returned before fleeing the last time. It was Appellant who informed another inmate that he thought he had killed a guard.

It is the State's position that the above discrepancies between the two defendants fully demonstrate that Appellant deserved the death penalty. Should, however, the Court disagree, it should be noted that the Constitution does not require equal treatment at sentencing--rather, the focus is upon whether the person who received the death sentence deserved it, and not whether someone who did not receive a death sentence deserved it. Antone v. Strickland, 706 F.2d 1534, 1538 (11th Cir. 1983). See also Thompson v. State, 410 So.2d 500 (Fla. 1982). Moreover, Appellant's argument has already been rejected by this Court. See Bassett v. State, 449 So.2d 803, 808 (Fla. 1984), which cited Jacobs v. State, 396 So.2d 1113 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981). Appellant should not be persuasive on this point.

ISSUE V

THE TRIAL COURT DID NOT COMMIT A PALPABLE ABUSE OF DISCRETION WHEN IT DID NOT FIND A MITIGATING FACTOR RELATING TO APPELLANT'S CHARACTER.

Appellant's final point is that the trial court erred when it failed to find a mitigating factor relating to Appellant's character. The State submits that this case is controlled by Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983), in which this Court recognized that when the record reflects that the trial court considered all evidence in mitigation, the trial court's failure to find a specific mitigating factor (or any factor in mitigation) is not error unless there has been a palpable abuse of discretion. See also Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983). In Pope, the alleged mitigating factor was brought out through a psychiatrist whose testimony was unrebutted--the same is true in Appellant's case since the State did not attempt to rebut the testimony of his psychologist. The State relied upon its cross-examination which placed in doubt nearly all of what the psychologist had to say, including the reliability of the IQ test given Appellant. On cross-examination, the psychologist admitted that persons with low IQ's did not necessarily become criminals and that many persons with low IQ's were honest. The trial court considered all of the evidence that was offered, and it simply cannot be said that the trial court committed a palpable abuse of discretion when it found in

mitigation only that Appellant was 18 years old at the time of the offense.

However, should the Court somehow disagree with the trial court's findings, the State asserts that the error would have to be harmless beyond a reasonable doubt. This is especially true when it is considered that the trial court should have found several other aggravating circumstances. For example, at the time of sentencing, Appellant stood convicted of the attempted murders of the three other officers who had been stabbed in the incident. Section 921.141(5)(b), Fla. Stat.; Johnson v. State, 438 So.2d 774, 778 (Fla. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1329 (1984). The trial court also could have (and should have) found that the capital felony was especially heinous, atrocious, or cruel. Section 921.141(5)(h), Fla. Stat.; Lusk v. State, supra; Mason v. State, 438 So.2d 374, 379 (Fla. 1983), cert. denied, 104 S.Ct. 1330 (1984). Finally, the trial court could have (and should have) found that the murder was committed in a cold, calculated manner without any pretense of moral or legal justification. Section 921.141(5)(i), Fla. Stat.; O'Callaghan v. State, 429 So.2d 691 (Fla. 1983).

The State respectfully urges the Court not to be misled by Appellant's attempts to convince the Court that the trial court refused to consider non-statutory mitigating factors. There is no such indication in the record, and to the contrary, the record reveals that the trial court did not restrict any mitigating evidence and that the trial court patiently listened

to all that was offered. Moreover, contrary to Appellant's assertions, this Court has already held that a defendant's intelligence level does not necessarily constitute a mitigating factor when the defendant is of dull normal intelligence. See, e.g., Ruffin v. State, 397 So.2d 277 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). Although Appellant cited Ruffin in his brief, Appellant then proceeded to argue that Appellant's intelligence level should have been found in mitigation anyway. Although there was evidence that Appellant was a follower, there was no such evidence in this case that Appellant was following anyone when this incident occurred. In fact, Appellant's psychologist agreed that there was no such evidence.

Appellant's contention that he was unable to appreciate the criminality of his conduct fails for the same reason. This is because even Appellant's own mitigating evidence in the form of a psychologist's testimony revealed that there was no indication of this mitigating factor (R 2349).

CONCLUSION

The evidence of Appellant's guilt was overwhelming, and Appellant has offered no reason why his convictions should be overturned. Concerning the death sentence, the aggravating factors outweigh the mitigating, and Appellant has shown no reason why the trial court abused its discretion when it followed the jury's death recommendation and concluded that the aggravating factors outweighed the mitigating.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to David A. Davis, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 29th day of April, 1985.

Lawrence A. Kaden

LAWRENCE A. KADEN

OF COUNSEL