IN THE SUPREME COURT OF FLORIDA

ELWOOD C. BARCLAY,

Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CASE NO. 64,765



ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

# BRIEF OF APPELLEE

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**PRELIMINARY STATEMENT**

The record is in two consecutively paginated volumes and references thereto will be made by use of the symbol "R" followed by appropriate page number. The pretrial proceedings are in four volumes and will be referred to by the symbol "Pre-T" followed by appropriate volume and page number. The jury selection proceedings are contained in four consecutively paginated volumes and references thereto will be the symbol "JS" followed by appropriate page number. The transcribed trial proceedings are contained in twelve consecutively paginated volumes and references thereto will be the symbol "Tr." followed by appropriate page number. The post-trial proceedings, such as bifurcated sentencing and motions for new trial are set forth in three volumes and will be referred to by the symbol "Post-Tr." followed by appropriate volume and page number. References to the appendix submitted by appellant will be by the symbol "A"

followed by appropriate section and page number. All other references will be specifically designated.

## STATEMENT OF THE CASE

On September 26, 1974, appellant and three others were charged by grand jury indictment with the June 17, 1974 murder of Steven Anthony Orlando (R 1, 1a).[1] The indictment specifically charged that the premeditated murder occurred "in the County of Duval and the County of St. Johns, State of Florida."

On February 19, 20, 1975, the jury was selected for the trial of appellant and codefendants. The jury selection lasted two days and was made up of both men and women, blacks and whites. The trial lasted from February 21, 1975 through March 4, 1975, with the jury returning verdicts of guilty of first degree murder against appellant and codefendant Dougan (R 179, 180).

A bifurcated sentencing hearing was held on March 5, 1975 (Post-Tr.Vol.I) with the jury rendering an advisory sentence of death for codefendant Dougan by a vote of 10-2 (R 185) and life imprisonment for appellant by a vote of 7-5 (R 186). Motions for new trial were filed and denied by the trial judge (R 190, 191, 198, 203). Judgment and sentence was entered against appellant and his codefendant (R 214, 215), by the court after having read the lengthy Sentence into the record on April 10, 1975 (R 217,

[1]The given name of the victim Orlando is spelled Stephen throughout the remainder of the entire record on appeal.

247; Post-Tr.Vol.III, pp. 77-109). The trial judge followed the jury's recommendation as to codefendant Dougan and sentenced him to death by electrocution. However, the trial judge did not follow the jury's recommendation of life imprisonment for appellant but also sentenced him to death by electrocution. The factual basis for the court's decision listing both aggravating and mitigating cicumstances appears in the Sentence (R 217-247).

On the initial appeal appellant's conviction and sentence was affirmed. Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert.denied, 439 U.S. 892 (1978), later remanded for resentencing because of Gardner v. Florida, 430 U.S. 349 (1977). Barclay v. State, 362 So.2d 657 (Fla. 1978). On remand the trial court resentenced appellant to death and the sentence was again affirmed. Barclay v. State, 411 So.2d 1310 (Fla. 1981), aff'd, 77 L.Ed.2d 1134 (1983). Following the United States Supreme Court's affirmance of this court's decision, appellant filed a petition for writ of habeas corpus in October 1983. After the Governor signed appellant's death warrant, an emergency application for stay of execution was filed. The stay of execution was granted as was the petition for habeas corpus for the purpose of allowing appellant a new appeal. Barclay v. Wainwright, ____ So.2d _____ [(Fla. 1984), Case No. 64,386, opinion filed January 19, 1984].

## STATEMENT OF THE FACTS

The law changes; facts do not. The record shows that on Sunday, June 16, 1974, William Lee Hearn was playing basketball in a park in Jacksonville, Florida, when he was confronted by John Dougan, Jr., and asked if he had his gun (Tr. 1351-1353). It was at this point in time that Hearn, appellant, and codefendants Dougan, Evans, and Crittendon, all black males, began the first events that led to the murder of Stephen Orlando. Dougan advised everyone to go home and change into dark clothes (Tr. 1355) and then for everyone to meet at appellant's house (Tr. 1357). They were to proceed from there.

Hearn brought his .22 caliber pistol (Tr. 1355, 1356) and appellant Barclay brought his pocketknife (Tr. 1357). After two stops in Jacksonville, it was apparent to the rest of the group what Dougan was planning. When the group first stopped, Dougan wrote a note which read:

> Warning to the oppresssve state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer a slave. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people.

(Tr. 1359; R 222) At the next stop, Dougan fully stated his plan, ". . . catch a white devil and kill him and leave the note on him." (Tr. 1361) All parties agreed to this plan and

evidenced their agreement by their participation in the subsequent events (Tr. 1362-1392).

The group then drove through Jacksonville seeking out a victim. After a few aborted attempts, they left the downtown area and headed toward the beach (Tr. 1362-1366). Upon arriving in Jacksonville Beach, a young white male was seen hitchhiking and was picked up by the group (Tr. 1369, 1370). The hitchhiker identified himself as Stephen. Hearn, who was driving the car, took a southerly direction along the ocean. Although the hitchhiker Stephen said he wanted to stop on 12th Street (Tr. 1370), the group continued going south (Tr. 1371) under the pretext that they were to meet a girl with drugs (Tr. 1372). The car continued following its southerly course until such time as Hearn drove on to a dirt road (Tr. 1377). After reaching a dead end, Hearn turned the car around and then stopped. Stephen was then ordered out of the car and when he got out he attempted to run but was stopped by Dougan who hit him in the back with the .22 caliber pistol (Tr. 1381, 1382). Appellant Barclay and codefendant Evans then dragged Stephen to the back of the car where he was thrown to the ground (Tr. 1383-1385). Appellant Barclay then proceeded to stab Stephen repeatedly while he was on the ground and all the while Stephen was begging for mercy (Tr. 1019, 1385). Dougan then shot Stephen in the head twice with Hearn's .22 caliber pistol (Tr. 125, 1385). Appellant Barclay then attempted to stick the note written earlier by Dougan into

Stephen's chest with the pocket knife (Tr. 1017, 1387-1391). Appellant Barclay, Dougan, codefendants Evans and Crittendon, and Hearn, all left the scene of the murder in Hearn's car and returned home (Tr. 1391, 1392).

The body was found on the morning of June 17, 1974, in a trash dump in St. Johns County (Tr. 169-173, 202, 252, 261, 280). Later that day, the body was identified as being that of Stephen Orlando (Tr. 155-157). The evidence recovered at the on-scene investigation--note, pocketknife, beer cans, one .22 caliber shell casing--headed by the St. Johns County Sheriff's Office was turned over to the Jacksonville Sheriff's Office (Tr. 331-334).

On June 18, 1974, the body of Stephen Orlando was examined by a physician who testified that there were multiple stab wounds to the chest, stomach, and back (Tr. 125-129), a total of twelve wounds (Tr. 1318). There were two bullet wounds to the head, the bullets entering the left ear and left cheek (Tr. 125-129). Death resulted from the bullet entering the left ear (Tr. 133, 1318). The time of death was estimated to be approximately six to eight hours before the body was found at 8:30 a.m. on June 17, 1974 (Tr. 1320-1322).

The murder of Stephen Orlando was not enough for appellant Barclay and the others. After requesting permission from a friend (Tr. 938), appellant Barclay and the others made tape

recordings of the murder at the friend's house (Tr. 946, 1398). On Wednesday, June 19, 1974, appellant Barclay, Dougan, codefendants Crittendon and Evans, Hearn, friends Otis Bess and Eldridge Black, met at Jim Mattison's house and made five tape recordings describing the murder of Stephen Orlando (Tr. 947-950, 1398, 1403). Appellant Barclay apparently was the leader in making the tapes because at one point he had directed Dougan to "put a little more into it." (Tr. 1402, line 7) The tape recordings were graphic depictions of the events surrounding Stephen Orlando's death. The tapes contained statements alleging racial inequality in America and called for a revolution of blacks against whites. In the tapes, appellant Barclay and the others labeled themselves as the Black Liberation Army. (The tapes were transcribed in their entirety and are found at Tr. 1014-1043). The tapes were sent to various radio and television stations in the Jacksonville area, the victim's mother, and two area police stations (Tr. 382-397, 408-416, 455, 950, 1181). At trial, there was testimony that most of the tapes were made by appellant Barclay and codefendant Dougan and it was their voices on the tapes (Tr. 951-953, 1004-1008, 1181). (See also the transcription of the tapes at Tr. 1021-1023, 1023-1026, 1026-1031, 1040-1043.)

Along with the tapes explaining their involvement in the murder of Stephen Orlando, both appellant Barclay and Dougan made statements to friends admitting their part in the crime (Tr.

1182-1184, 1254-1258, 1399). The .22 caliber pistol was recovered from a creek (Tr. 530-540), and it was established that the .22 caliber shell casing found at the side of Stephen Orlando's body (Tr. 291) came from William Hearn's .22 caliber pistol (Tr. 1548).

At trial, the prosecution presented the testimony of 29 witnesses, including that of eyewitness William Hearn who turned state's evidence after pleading guilty to second degree murder (Tr. 1348, 1349). Appellant Barclay testified in his own behalf as did codefendants Dougan, Crittendon, and Evans. They admitted making the tapes but denied murdering Stephen Orlando (Tr. 1607-1620, 1772-1786).

The sentencing hearing was held on March 5, 1975. Testimony was given on behalf of the state which showed that some of the individuals found guilty by the jury of the murder of Stephen Orlando had also participated in another murder on June 21, 1974. Appellant Barclay was not involved in this second killing subsequent to the murder of Stephen Orlando (Post-Tr.Vol.I, p. 109). The indictment for this second murder returned against Dougan, Crittendon, Evans, and Hearn was read into evidence without objection (Post-Tr. Vol.I, pp. 88, 89).

## ARGUMENT

### ISSUE I

**THE APPELLANT'S DEATH SENTENCE SHOULD BE AFFIRMED.**

**A. THE TRIAL JUDGE PROPERLY REFUSED TO FOLLOW THE JURY RECOMMENDATION OF LIFE IMPRISONMENT.**

Appellant takes umbrage because the trial judge did that which the statute authorizes him to do, i.e., reject the jury advisory of life imprisonment. § 921.141(3), F.S. (1983). Indeed, the trial judge was correct when he advised the jury that sentencing was the function of the judge and not the function of the jury (JS 7, 8). The sentences of appellant Barclay and codefendant Dougan were filed April 10, 1975 (R 217-247), and reflect an unmistakable exercise of reasoned judgment. This court applauded the sentencing order and the findings therein, commenting that this is a case "where the jury did not act reasonably in the imposition of sentence, and the trial judge properly rejected one of their recommendations." Barclay v. State, 343 So.2d 1266, 1271 (Fla. 1977). Four years later following a remand for resentencing because of Gardner v. Florida, 430 U.S. 349 (1977), this court reaffirmed the imposition of the death penalty. Barclay v. State, 411 So.2d 1310 (Fla. 1981), aff'd, 77 L.Ed.2d 1134 (1983). In placing the stamp of constitutional approval on Florida's death penalty statute, the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976), cogently remarked:

> And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Id. at 252.

Dobbert v. State, 328 So.2d 433 (Fla. 1976), is another case in which this court agreed with the trial judge in rejecting a jury advisory of life imprisonment because the defendant was "deserving of no sentence but death." Id. at 441. The United States Supreme Court affirmed even though the "jury by a 10-to-2 majority found sufficient mitigating circumstances to outweigh any aggravating circumstances and recommended a sentence of life imprisonment." Dobbert v. Florida, 432 U.S. 282, 287 (1977).

The statutory authorization granted a trial judge to override a jury recommendation of a life sentence does not violate either the state or federal constitutions. Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert.denied, 454 U.S. 882 (1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Douglas v. State, 373 So.2d 895 (Fla. 1979); Cannady v. State, 427 So.2d 723 (Fla. 1983); Proffitt v. Florida, supra; Barclay v. Florida, ____ U.S.____, 77 L.Ed.2d 1134 (1983); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983); Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983).

**B. THE EXISTENCE OF MULTIPLE AGGRAVATING CIRCUMSTANCES MANDATED THE JURY OVERRIDE.**

Beginning on p. 12 of appellant's brief through p. 41, the finding of the trial judge of the existence of certain aggravating circumstances and the determination that there were no mitigating circumstances is again brought under attack. This court approved the findings of the trial judge, commenting that the "findings are also well documented in the record before us." (Emphasis supplied) Id. at 1271. While the trial judge did not have the benefit of Tedder v. State, 322 So.2d 908 (Fla. 1975), this court did and found that the Tedder standard necessary to affirm a jury override had been met.[2] In Barclay, 411 So.2d 1310, this court refused to reconsider matters previously analyzed and again affirmed the trial judge's sentence of death.

In reviewing this court's decision in Barclay, 411 So.2d 1310, the United States Supreme Court in Barclay v. Florida, supra, listed the four aggravating circumstances previously approved by this court, commenting "[i]t was not irrational or arbitrary to apply these aggravating circumstances to the facts of this case." Id. at 77 L.Ed.2d 1142. It is appreciated that

[2]"Two co-perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted. The variation between defendants being so nominal (a minor age difference but no suggestion of different maturities), the facts here do not warrant the dispensation of unequal justice." Id. at 1271.

this court is not bound by the decision in Barclay v. Florida, supra, but it is suggested that since that decision of the Court puts the unmistakable stamp of approval on two decisions of this court, it would be a good precedent to follow.

Subsequent to the decision of this court in the instant case, a body of case law has developed refining the construction of § 921.141(5)(c), F.S. (1983) (defendant knowingly created a great risk of death to many persons). Appellant naturally seeks any benefit those refinements might give him. But he should not be permitted to do so; rather, the construction placed upon this aggravating circumstance should be governed by case law in existence at the time of the original appeal. The rationale of Witt v. State, 387 So.2d 922 (Fla. 1980), should be applied.[3] It is submitted that subsequent refinements in the construction to be placed on § 5(c) do not constitute a "jurisprudential upheaval [ ]" required for an exception to the Witt rule. The "findings" that this court found to be "well documented in the record" are still there and should be just as persuasive now as they were then. Barclay, 343 So.2d 1271.

Appellant urges on p. 15 of his brief that a construction making § 5(c) applicable to every murder in which a defendant

[3]Evolutionary refinements in the criminal law, affording new or different standards for admissibility of evidence, for procedural fairness, for proportionality review of capital cases and for other like matters are not retroactively cognizable in post-conviction proceedings. Witt, at 929, 930.

passes over a crowd to choose a lone victim provides no "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not," citing Godfrey v. Georgia, 446 U.S. 420, 433 (1980). This is a non sequitur. This does provide at least one way to distinguish a case where the death penalty has been imposed from those cases in which it has not. At least the sentencing authority thought that it was one "principled way" to distinguish the instant case from those cases in which the death penalty had not been imposed (R 237).[4]

Appellant takes issue with the trial judge's description of the tapes as being "a call for revolution and racial war." Appellant's brief, p. 16. Euphemistically, this is specious reasoning and seeks to bring this court under a tyranny of words. The tape made by appellant was introduced in evidence as state exhibit 12 (Tr. 1014). The following is quoted from the tape:

> This is directed to enemy Mary Ann Mallory, her ex-fat sucker old man lieutenant E. A. Orlando of the New Jersey fascist department, and especially Pig Pat Garrett.

[4]"On at least two occasions the defendants parked their car--and cased areas where they had chosen potential victims--but were thwarted by the circumstances that fortuitously existed. Thus five persons were saved from their fatal plan. It was not out of concern for the lives of many persons that only a single victim was chosen, but out of concern for their own detection and capture." It is indeed fortunate that rioting did not ensue similar to that following the death of Martin Luther King.

* * * * * * * *

No longer will your crimes go unpunished. A revolution has begun and you are the enemy. Yes, you white racist Americans, if you want to know how to spell America that's spelled with three K's instead of one C. You know, like in Ku Klux Klan.

* * * * * * * *

White people, realize the revolution will only end when you are dead or when black people are free, and if you have to die for black people to be free then you can start to prepare your eulogy because we are going to be free.

* * * * * * * *

But understand black people have given us their support. It won't be a sporadic riot this time. It's gonna be a full scale revolution, you can believe this. That's right, black people, all black people are with us. Prepare, white man, prepare. You day has arrived. We tried talking but you don't understand. Them old things just don't reach you at all. The only thing you understand is the language you speak, the language that comes out of the barrel of a gun, and that's the language we gonna talk to you from now on.

* * * * * * * *

To all my black people, black warriors have emerged on the scene to show you the way to freedom and the destruction of our enemy. Black people unite, the time has arrived.

(Tr. 1014, lines 13-17; 1015, lines 7-13; 1016, lines 17-22; 1018, line 23--1019, line 11; 1020, lines 21-25) To say that this language does not constitute a "call for revolution and

racial war", does not incite to riot and murder, makes a burlesque of the English language. The trial judge properly rejected the jury's advisory recommendation of life because it was unreasonable under the facts of the instant case.

The trial judge properly found that the murder was committed "while the defendant was engaged . . . in the commission of . . . a kidnapping." This aggravating circumstance, § (5)(d), also applies to an attempt to commit any of the enumerated felonies.

Relying on the testimony of William Hearn, appellant contends that Stephen Orlando got into the murder group's car voluntarily and was not kept therein by use of force and/or threats. Query: Would Stephen have entered the car had he known the ultimate intention of the group? Appellee submits that the trial judge was eminently correct in finding that the murder group "[a]gainst his will and over his protest drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay repeatedly stabbed him with a knife." (R 221)

In the 1975 sentencing order, the trial judge does not mention any statute in his comments finding the existence of this aggravating circumstance (R 238, 239). The 1980 sentencing order mentions § 787.01(1)(a)(A Sec. B, p.25). The gravamen of appellant's complaint is that since § 787.01 did not take effect until October 1, 1975, it could not be given retroactive

application to the date of the crime, June 17, 1974. But there was a kidnapping statute in full force and effect at the time of the crime, § 805.01, F.S. (1973), and this is the statute the trial judge relied upon.[5] Neither did the trial judge "implicitly acknowledge the force" of appellant's argument, i.e., sentencing findings did not establish kidnapping under the laws in effect at the time of the crime, by citing the then governing statute, § 787.01, in his 1980 sentencing order. Simply stated, the trial judge did not cite the controlling kidnapping statute in his 1975 order but did in the 1980 order.

Appellant's major participation in the murder of Stephen Orlando abundantly supplies the elements of the crime of kidnapping as set forth in the 1973 statute, as well as the present statute cited by the trial judge in his 1980 sentencing order. It is noted that Barclay, 343 So.2d 1266, was decided March 17, 1977, approximately eighteen (18) months after the

[5]Section 805.01, F.S. (1973)

> **False imprisonment and kidnapping.--** Whoever without lawful authority forcibly or secretly confines or imprisons another person within this state against his will, or confines or inveigles or kidnaps another person, with intent either to cause him to be secretly confined or imprisoned in this state against his will, or to cause him to be sent out of this state against his will; and whoever sells, or in any manner transfers, for any term, the service or labor of any other person who has been unlawfully seized, taken, inveigled or kidnapped from this state to any other state, place or county shall be guilty of a felony of the second degree, punishable as provided in §775.0823, §775.083 or §775.084.

effective date of the present kidnapping statute, i.e., October 1, 1975. This court properly applied the law as it existed when the initial appeal was decided.

Appellant urges the existence of a rational basis for a jury finding rejecting kidnapping as an aggravated circumstance. Frankly, there is no evidence to show that it was rejected by the jury. If we are to second-guess the basis for the jury's recommendation of life imprisonment for appellant, then appellee submits the thesis that Dougan being the triggerman was the basis for the jury's distinction between the two. It is urged that the absence of force in transporting Stephen Orlando would support a rational judgment that such kidnapping was not a sufficient aggravation of the murder itself to justify a death sentence. But what about kidnapping with intent to murder the vic im? Appellant may not agree that even this would be sufficient aggravation of the murder to justify a death sentence. However, the legislature obviously thought that it was of sufficient gravity to constitute an aggravating circumstance in considering whether a death sentence should be imposed.

The trial judge properly found that appellant committed the murder to disrupt or hinder the exercise of governmental functions or the enforcement of law. § (5)(g). If the obvious attempt of the murder group to start a racial revolution, committing murder in furtherance thereof, isn't a sufficient

basis for this aggravating circumstance, then nothing is. While the taped messages threatened "white people," appellant contends that since the government isn't mentioned, § (5)(g) doesn't exist. This, too, is a non sequitur. The "white people" and "black people" are the government of this country! Starting a race war for the purpose of killing white people is nothing short of an attack on the government of this country. It really isn't necessary to mount a revolution similar to the one presently going on in El Salvador before the requirements of § (5)(g) are met. Certainly, there is no Florida case parallel to the facts of the instant case and this is understandable; it isn't often that a group of persons meet together in this country for the purpose of starting a race war and commit murder in furtherance of this aim.

The contention that this court should demand proof beyond a reasonable doubt of a "likelihood or high probability" of a disruption or hinderance of government should be addressed to the legislature. Perhaps there, he would be given a hearing ear; this court should not. The short and correct answer to the the argument that § (5)(g) is unconstitutionally vague and overbroad as applied to appellant's taped messages is Proffitt v. Florida, supra. The trial judge properly considered the tapes in order to arrive at an individualized determination on the basis of the character of the individual and the circumstances of the crime. Zant v. Stephens, ____ U.S. _____, 77 L.Ed.2d 235, 251 (1983).

Again, the trial judge properly considered the tapes, and was authorized to do so under § 921.141(1).[6] Appellee knows of no case, state or federal, that affords First Amendment protection o to writings, words, or actions done or uttered with the express purpose of inciting to, or in furtherance of, a racial war.

It is urged that there was a rational basis for a jury verdict rejecting the applicability of § 5(g). In support of this, appellant posits the conjectural thesis of what "the jury might rationally have decided." (Appellant's brief, p. 21.) We do not know what the jury "might rationally have decided"; we know what the jury did and what the trial judge did--nothing more. The only thing irrational about the jury advisory was its recommendation of life imprisonment for appellant which was properly rejected by the trial judge. In the words of Mr. Justice McDonald: "There appears to be no rational basis, when viewed in this weighing process, for a jury to recommend life imprisonment." Routly v. State, 440 So.2d 1257, 1267 (Fla. 1983), McDonald J., concurring.

[6]In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in Subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules or evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

The murder of Stephen Orlando was heinous, atrocious and cruel in every sense of the word. In fact, those adjectives seem inadequate to describe the utter depravity and degredation that is evidenced in this atrocity. To say that the murder was beastly or animalistic is an insult to the animal kingdom. Animals kill for food. Appellant deserves to die but not in the electric chair. If true justice were done, he would suffer the same death as did Stephen Orlando. But, hopefully, in this enlightened age and with the compassion we all feel, society can rid itself of such clear and present dangers in a more humane way.

It is contended that § (5)(h) does not apply because there is no evidence that the victim was aware of the racial motivation for his murder. Since when is it necessary for a victim to be aware of the motivation for his murder in order to justify the application of this aggravating circumstance? And neither is racial or political motivation irrelevant in determining the applicability of this factor. Barclay v. Florida, 77 L.Ed.2d, at 1143.

It is contended that the trial judge erred in finding that the victim was repeatedly stabbed by appellant as he writhed in pain begging for mercy. The basis for this contention is the alleged contradictory testimony of William Hearn (Tr. 1403). Pain is subjective and more often than not difficult to ascertain

by another. The court can judge for itself whether being repeatedly stabbed with a knife would cause pain. And did Stephen beg for his life? Note the following quoted from Hearn's testimony:

> Q Okay. How many times did you see Elwood stab, if you did?
>
> A I don't remember how many times it was.
>
> Q Was it more than once?
>
> A Yes.
>
> Q What happened then?
>
> A I heard -- Stephen said, "No, I will give you a bag of reefer." And Jacob told Elwood to get back and then Jacob fired it twice and he hold the gun up and he shook it a few times and then he went -- he went back down to fire again but it never did, you know, go off. And --

(Tr. Vol.VII, pp. 1385, 1386) The court will note that it was after appellant had repeatedly stabbed him that Stephen, still conscious and begging for his life, said: "No, I will give you a bag of reefer."

Next, Rembert v. State, ____ So.2d ____ (Fla. 1984), 9 FLW 58, is cited for the proposition that "in similiar circumstances many people receive a less severe sentence." See footnote, 9 FLW, at 60. Rembert is inapposite for two reasons; first, there was only one valid aggravating circumstance as against a considerable amount of nonstatutory mitigating evidence and, secondly, the factual circumstances in Rembert are not "similar"

to those facts found in the instant case. The clubbing of an elderly man can scarcely be compared to those cases where the victim has a knowledge of impending death and then tortured in the process. Sullivan v. State, 303 So.2d 632 (Fla. 1974); Knight v. State, 338 So.2d 201 (Fla. 1976); Douglas v. State, 328 So.2d 18 (Fla. 1976); Jackson v. State, 366 So.2d 752 (Fla. 1978); Washington v. State, 362 So.2d 658 (Fla. 1978), cert.denied, 441 U.S. 937 (1979). And if appellant is alluding to the second degree murder conviction of Crittendon and Evans (R 205), then White v. State, 415 So.2d 719 (Fla. 1982), is an appropriate answer.[7] Appellant was Stephen Orlando's executioner. The attempt to minimize the seriousness of the stab wounds inflicted by appellant can only be termed ludicrous in view of the testimony of Dr. Schwartz (Tr. 126, lines 19--24).[8] In urging a rational basis for a jury verdict that appellant's participation in the murder was not especially heinous, atrocious or cruel, support is again sought in the conjectural thesis of what the jury "might have reasoned" (Appellant's brief, p. 25). However, since the trial judge is the sentencing authority under

[7]"In affirming the sentence we are fully aware that Di Marino escaped with a conviction of a third degree murder. While this is fortunate for him, it does not require the reduction of White's sentence. White was the executioner, and his sentence is warranted." Id. at 721.

[8]In front of the body, however, the knife wounds were somewhat deeper and surrounded by a friction cuff. These wounds were found later to penetrate somewhat deeper into the body and cause injury to the lung in one case and to the liver in another case.

Florida law, what the jury "might have reasoned" is irrelevant. There was a rational basis for the trial judge's rejection of the jury's advisory recommendation of life and imposition of the death sentence. To date, all reviewing courts have approved his action.

The facts of this case--tapes--clearly show appellant was utterly indifferent to the pain suffered by Stephen Orlando and even enjoyed it. If appellant and the other members of the murder group wanted to kill a "white devil," they could have done so without torturing him before the death shots were finally fired. This was a conscienceless and pitiless crime and the stabbing torture was totally unnecessary to effect the final intent of these self-styled members of the Black Revolutionary Army. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Suffice it to say that this court has upheld the application of § (5)(g) where victims have been murdered by gunshot and have died instantaneously. See e.g. Smith v. State, 424 So.2d 726 (Fla. 1982); Griffin v. State, 414 So.2d 1025 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982), cert.denied, 74 L.Ed.2d 148 (1982); Routly v. State, supra. The common thread running through these cases is that, before the instantaneous death occurred, the victims were subjected to agony over the prospect that death was soon to occur, as in Sullivan v. State, supra..

## C. THERE WERE NO MITIGATING CIRCUMSTANCES

Appellant mounts an all-out attack on the failure of the trial judge to find certain alleged mitigating circumstances. The attack is doomed because of lack of ammunition. First, findings of a judge are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings. Sireci v. State, 399 So.2d 964, 971 (Fla. 1981), citing Hargrave v. State, 366 So.2d 1 (Fla. 1978), and Lucas v. State, 376 So.2d 1149 (Fla. 1979). Again, in Mikenas v. State, 407 So.2d 892 (Fla. 1981), the court rejected the argument that certain testimony should have been treated as a mitigating circumstance. Please note:

> In relation to defendant's second point, defendant argues that the new testimony heard by the court was not considered properly in its findings. The testimony heard consisted of two psychologists concerning the possibility of defendant's rehabilitation and a minister concerning his alleged progress in religion. Their testimony was not considered as a mitigating circumstance by the court. The testimony was apparently permitted by the trial court in an abundance of fairness to the defendant, but the court was not required to give it weight as a mitigating circumstance.

Id. at 893. See also Smith v. State, 407 So.2d 894, 901 (Fla. 1982).

The trial judge properly found that the mitigating circumstance of no significant history of criminal activity was

not applicable. § 921.141(6)(a). In a concurring opinion filed in Barclay v. Florida, supra, Justice Stevens commented as follows:

> As petitioner's own statement of facts makes clear, the jury was erroneously informed by defense counsel in closing argument that petitioner "had never been convicted of a crime and had no criminal charges pending against him." This statement may have led the jury to believe that there was a statutory mitigating circumstance--no substantial history of prior criminal activity. But the presentence report revealed that petitioner had previously served six months for the felony of uttering a forgery, had been on probation for the felony of breaking and entering with intent to commit grand larceny, and had been arrested on several misdemeanor charges and convicted of at least one. The judge could properly consider that information in deciding whether to accept or reject the jury's recommendation. In addition, even if the jury found that there were nonstatutory mitigating factors, it is clear that the trial court knew of each of the factors petitioner recites and did not find them persuasive.

Id. at 1157, 1158. Of course, it was necessary to consider appellant's prior criminal record because unless the existence of this mitigating circumstance was negated, then there would be a presumption that appellant had not engaged in any previous criminal acitivity. Booker v. State, 397 So.2d 910 (Fla. 1981), cert.denied, 102 S.Ct. 493.

At the time of appellant's trial in February-March, 1975, Purdy v. State, 343 So.2d 4 (Fla. 1977), had not been decided.

Consequently, at that time the trial judge did not err in reviewing a nonstatutory aggravating circumstance. However, at the time the trial judge entered his sentencing order in 1980, following the Gardner hearing, Purdy, supra, had been decided and so had Mikenas v. State, 367 So.2d 606 (Fla. 1978). Then, in 1980, five years after appellant's trial, the trial judge's determination that the mitigating circumstance of no significant history of criminal activity constituted more of an aggravating, rather than a mitigating circumstance, could be viewed as a technical violation of Mikenas, supra. But in view of Hargrave, supra, and its progeny, the error was antiseptic beyond all reasonable doubt and the United States Supreme Court so found. Barclay v. Florida, supra.[9] This is nothing more than an affirmation of the rule articulated in Elledge v. State, 346 So.2d 998 (Fla. 1977), and Proffitt v. Florida, supra (approval of death penalty based on nonstatutory aggravating factor, i.e., propensity to commit murder). And, should appellant be heard to complain, in determining the existence vel non of aggravating and mitigating circumstances, it is not improper for a trial judge to rely on information not available to the jury. White v. Florida, 403 So.2d 331, 339-340 (Fla. 1981); Swan v. State, 322 So.2d 485, 488-489 (Fla. 1975).

[9]"There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance." Id. 77 L.Ed.2d, at 1149.

The court granted appellant a Gardner hearing, Barclay, 362 So.2d 657, for the purpose of permitting him to rebut any information found in the "notoriously inaccurate and unreliable rap sheets" and in the presentence investigation reports. (Appellant's brief, p. 29) He rebutted nothing, and this court properly affirmed the trial judge's imposition of the death penalty. Barclay, 411 So.2d 1310.

The trial judge plainly stated that Barclay "was not under sentence of imprisonment." (R 235) This same issue was addressed in Barclay v. Florida, supra.[10]

In a footnote on p. 32 of appellant's brief, the claim is made that there was an unfair shift in the burden of proof, citing Mullaney v. Wilbur, 421 U.S. 684 (1975), and Sandstrom v. Montana, 442 U.S. 510 (1979). Appellant confuses a shift in the burden of proof in the determination of guilt/innocence with the burden of going forward with the evidence in a Gardner hearing. Appellant's argument is nothing more than an accusation that this

[10]"Barclay also argues that the trial judge improperly found the 'under sentence of imprisonment' and 'previously been convicted of a [violent] felony' aggravating circumstances. The Florida Supreme Court, however, construed the trial judge's opinion as finding that these aggravating circumstances 'essentially had no relevance here.' 343 So.2d at 1271. (Footnote omitted.) We see no reason to disturb that conclusion." Id. at 77 L.Ed.2d 1142. The "footnote" referred to is footnote 3, Barclay, 343 So.2d 1271. The footnote shows that this court in affirming the trial judge's imposition of the death penalty found that appellant was not under sentence of imprisonment, was not attempting to avoid arrest or escape custody, had not been previously convicted of a major felony, and had not acted for pecuniary gain.

court in granting the Gardner hearing, Barclay, 362 So.2d 657, unlawfully shifted the burden of proof.

It is next contended that the trial judge committed egregious error in reciting his World War II experiences in the sentencing order and concluding that "racial motivation [was] a major ground for imposing the death penalty. . .." (Appellant's brief, p. 33) It is contended that the trial judge's reliance on "racial motivation" introduced an impermissible nonstatutory aggravating factor into the sentencing equation, citing Purdy v. State, supra.[11] Appellee has noted previously, citing Barclay v. Florida, 77 L.Ed.2d 1143, that appellant's desire to start a race war was relevant to several statutory aggravating factors. As noted earlier, this court approved the trial judge's sentencing order, lauding his "thorough analysis". Barclay, 343 So.2d 1271, n. 8. And as for the trial judge's reliance on his experiences in World War II, please note the following quoted from the opinion in Barclay v. Florida, supra:

> In particular, the comparison between this case and the Nazi concentration camps does not offend the United States Constitution. Such a comparison is not an inappropriate way of weighing the "especially heinous, atrocious and cruel" statutory aggravating circumstance in an attempt to determine

[11]Since Purdy v. State, supra, had not been decided at the time the trial judge entered his 1975 sentencing order, appellant's claim that an "impermissible nonstatutory aggravating factor" was introduced into the sentencing equation in violation of Purdy, is, to say the least, curious.

whether it warrants imposition of the death penalty.

Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the state entrusts an important judgment to decide in a vacuum, as if he had no experiences. The thrust of our decisions on capital punishment has been "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Zant v. Stephens, US _____ 11, 77 L Ed.2d 235, 103 S.Ct. (1983), quoting Gregg v. Georgia, 428 U.S. 153, 189, 49 L.Ed. 2d 859, 96 S.Ct. 2909 (1976) (opinion of Stewart, Powell, and Stevens, J.J.). This very Term we said in another capital case:

> "In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar 'central issue' from which the jury's attention may be diverted. Once the jury finds that the defendamt falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether or not death is the appropriate punishment." California v. Ramos, U.S. _____, 14, 77 L.Ed.2d 1171, 103 S.Ct. ___ (1983).

We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably do

> precisely that. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability.

Id. at 1144.

Appellant misreads Provence v. State, 337 So.2d 783 (Fla. 1976), and Riley v. State, 366 So.2d 19 (Fla. 1978), in his claim that the same facts cannot support multiple aggravating circumstances § (5)(d) (capital felony committed in the course of a robbery), and § (5)(f) (capital felony committed for pecuniary gain). As this court pointed out, a defendant committing a capital crime in the course of a robbery "will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged." Id. at 786. In Riley, this court disregarded two of the aggravating circumstances because of not being enumerated in the statute. This was in harmony with Purdy which was decided prior to Riley. Then, in harmony with Provence, the court held that the adding of § (5)(d) and (f) was duplicative and should constitute only one aggravating circumstance. Since there was at least one mitigating circumstance, the court remanded for reconsideration in light of Elledge v. State, supra. Thus, in neither Provence nor Riley was reversal mandated because the trial judge determined multiple aggravating circumstances on the same facts. In fact, to the contrary, the

aggravating circumstances found valid by this court were based on the same facts. The case of Routly v. State, supra, provides an appropriate coup de gras to appellant's argument. Justice Adkins, writing for an almost unanimous court, remarked as follows:

> The defendant's next contention, that the application of section 921.141(5)(f) (capital felony was committed for pecuniary gain) was improper due to doubling of the aggravating factors of robbery and pecuniary gain uder Provence v. State, 337 So.2d 783 (Fla. 1976), cert.denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), is without merit. Here the defendant also committed a kidnapping and an improper doubling has not occurred. Bolender v. State* 422 So.2d 833 (Fla.1982), cert.denied U.S.____, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983); Stevens v. State, 419 So.2d 1058 (Fla. 1982), cert. denied, ____U.S.____, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983).

Id. at 1264. (Emphasis supplied.) See also, Funchess v. State, ____ So.2d ____ (Fla. 1984), slip op. 4.

Appellant's argument that the sentencing orders violate the due process and equal protection clauses of the Fourteenth Amendment to the federal constitution presents a display of confused rhetoric. In Barclay v. Florida, supra, Justice Stevens in a concurring opinion, joined by Justice Powell, had this to say:

> After giving careful consideration to this case and others decided by the Supreme Court of Florida, I am convinced that Florida has retained the procedural safeguards that supported

> our decision to uphold the scheme in Proffitt v. Florida, supra, and that the death sentence imposed upon Elwood Barclay is consistent with federal constitutional requirements.

Id. 77 L.Ed.2d, at 1150.

The trial judge found that there were no mitigating circumstances. Appellant's argument that he erred is nothing more than a rehash of allegations challenging the trial judge's finding of multiple aggravating circumstances. Appellee has already presented argument contrary to appellant's position, citing Lucas v. State, supra; Sireci v. State, supra; Smith v. State, 407 So.2d 894 (Fla. 1981). See also Michael v. State, 437 So.2d 198 (Fla. 1983). The trial judge stated no conclusion in his sentencing order on nonstatutory mitigating factors. The reason for this is that there were none about which to state a conclusion. Appellant does not contend here, nor did he contend before the United States Supreme Court, that any relevant mitigating evidence was excluded from his initial sentencing hearing. Barclay v. Florida, 77 L.Ed.2d 1151, n. 2. There has been no violation of Lockett v. Ohio, 438 U.S. 586 (1978). The Florida death penalty statute permits a defendant to present evidence as to any mitigating circumstance, Lockett requires the sentencer to listen. Eddings v. Oklahoma, 455 U.S. 104 (1982), n. 10.

The case of McCampbell v. State, 421 So.2d 1072 (Fla. 1982), can be of no comfort to appellant and, in fact, reflects the wisdom of the trial judge sub judice in finding no mitigating circumstances applicable to appellant. In McCampbell, the record reflected the following factors: (1) an exemplary employment record, (2) his prior record as a model prisoner, (3) the positive intelligence and personality traits detailed through the testimony of Dr. Yarbrough which showed his potential for rehabilitation, (4) family background, and (5) the disposition of the codefendant's cases. None, absolutely none, of those factors appear in the record in behalf of appellant with the exception that the jury knew that it had convicted Evans and Crittendon of second-degree murder because of their relatively minor role in the murder.

The argument is made that appellant Barclay was nothing more than a follower, completely dominated by the superior personality of codefendant Dougan. The record does not support this; it does support the thesis that both had strong personalities and both were leaders. The trial judge in his 1975 sentencing order acknowledged that codefendant Dougan was a personality of some degree and then stated that "it was likewise apparent that Barclay had a strong personality and was eloquent and persuasive in his own right as is evidenced by the repulsive but dramatic tape recording he made boasting of the murder." (R 231) It seemed to the trial judge that each was trying to outdo

the other in homicidal ferocity. The record shows that appellant Barclay's house was the headquarters for the murder group. This is where the group first met together for the purpose of planning the murder (Tr. 1355, 1356). When the group started off, both appellant and Dougan were sitting in the back seat, with Crittendon in the front seat with Hearn who was driving (Tr. 1358). After Dougan had written the note (Tr. 1359), it was passed to appellant for his approval (Tr. 1360). It was appellant who initially decided that "they was in a good place" to kill some people in a car (Tr. 1362). But there were too many people in the car and so another victim was sought (Tr. 1363). After picking up the victim and arriving at the death scene, the parties exited the automobile, the victim being held by appellant and Dougan at the rear of the automobile (Tr. 1383, 1384). The victim was then thrown to the ground and it was appellant who first initiated action toward carrying out their homicidal intent (Tr. 1385, lines 1-20). It was after the shots were fired that Evans used the knife, trying to stick the murder note into the victim's skin. But appellant wasn't happy with the way Evans was performing this task so he took the knife away from him and did it himself (Tr. 1387). Appellant verbally chastised Evans for using an "old rusty knife." (Tr. 1391) Of course, following the murder, the group returned to the headquarters, appellant's house (Tr. 1392). Appellant also exercised supervisory authority over the making of the tapes (Tr. 1403). This is tacitly admitted in

appellant's brief, p. 4. In sum, the record clearly shows that both appellant and Dougan were leaders and each had a major participation in the murder of Stephen Orlando. See generally, Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983).

**ISSUE II**

**APPELLANT RECEIVED A FAIR TRIAL.**

There was no objection from any defense counsel to the use of Mr. Mallory's testimony for the purpose of identifying the body of Stephen Orlando (Tr. 154-159). The only objection made was by Mr. Jackson, counsel for Dougan, and this was on the basis of hearsay, not on the ground of any alleged "emotional impact" of Mr. Mallory's testimony. (Appellant's brief, p. 42) This issue cannot now for the first time be raised on direct appeal. State v. Barber, 301 So.2d 7 (Fla. 1974); Routly v. State, supra.

There was no objection from any defense counsel when Hearn mistakenly testified that appellant was at the meeting on June 21, 1974 (Post-Tr.Vol.I, p. 90). Appellant's name is not mentioned in the remainder of Hearn's testimony on direct examination; neither was it mentioned on cross-examination by Mr. Jackson (Post-Tr.Vol.I, pp. 92-109). On cross-examination by Mr. Buttner (appellant's trial counsel), from the tenor of the questions propounded to the witness Hearn, it is obvious Mr. Buttner was well aware that appellant was not in the meeting at Jim Mattison's house on Friday, June 21, 1974. This was ably

brought out on Mr. Buttner's cross-examination of Hearn (Post-Tr.Vol.I, pp. 109, 110). "Heartrendering" or not, the prosecutor on oral argument did acknowledge that appellant had nothing to do with the Roberts' murder (Post-Tr.Vol.I, p. 113).

There were six lawyers involved in the trial of this case and four defendants. The trial lasted from February 21, 1975 to March 4, 1975, with the sentencing proceeding beginning on March 5, 1975. It is inconceivable that a trial of this length and magnitude could be had without some slip of memory, some inconsequential error slipping into the record. None of us are perfect, not even trial lawyers. Be that as it may, the alleged error was never objected to at trial, and consequently is not preserved for appellate review. State v. Barber, supra, and Routly v. State, supra. Appellant is not entitled to a perfect trial, only a fair one. Michigan v. Tucker, 417 U.S. 433 (1974).

It is now contended that the prosecutor's argument at the sentencing phase (Post-Tr.Vol.I, p. 111, line 23--p. 129, line 16) was inflammatory. When this court examines the prosecutor's argument, it will find that at no time was the prosecutor interrupted by any defense counsel for the purpose of lodging an objection on the ground that the argument was unduly inflammatory. It was only after completion of the prosecutor's argument that objection was raised by Mr. Buttner, trial counsel for appellant (Post-Tr.Vol.I, p. 129-131). The trial judge

properly denied all motions. If it can be said that the prosecutor's argument was inflammatory, this is so only because the murder itself and the facts surrounding it are inflammatory. It is difficult to conceive of anything more inflammatory than the murder, the senseless, brutal murder of a young man, for the avowed purpose of starting a race war. And contrary to Mr. Buttner's argument, the prosecutor was not required to stand perfectly still while making his presentation to the jury. Appellee knows of no case law prohibiting a prosecutor from using gestures for emphasis and clarification during the presentation of his argument to the jury. None of the complaints now raised concerning the prosecutor's argument were timely objected to at trial. White v. State, 377 So.2d 1149 (Fla. 1979); Clark v. State, 363 So.2d 331 (Fla. 1978); Samuels v. United States, 398 F.2d 964 (5th Cir. 1968); Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); State v. Murray, ____ So.2d ____ (Fla. 1984), 9 FLW 16.

When the prosecutor on opening statement inadvertently began to read the wrong indictment, objection was made and the error was acknowledged by the prosecutor (Tr. 45, line 18--47, line 10). The prosecutor did not mention a date or the name of any victim and agreed to retract that name (Hearn's) and explain it. The name of appellant was not mentioned (Tr. 45, lines 23-25). To be sure of this, the trial judge had the court reporter

read back the relevant remarks of the prosecutor (Tr. 50, line 21--51, line 12). The matter was discussed in considerable detail (Tr. 51, line 13--65, line 6). And it was finally agreed that the prosecutor would correct the inadvertent error (Tr. 65, line 7--66, line 4). Mr. Stedeford, defense counsel, agreed, stating that it was "a very positive way of doing it and could remove any error that--or any misstatements" (Tr. 66, lines 7-11). The jury was returned to the courtroom and the prosecutor corrected the error (Tr. 67, line 19--68, line 12), and then proceeded with his opening statement. The trial judge did not declare a mistrial and properly so. Interestingly, Mr. Stedeford, contrary to his assertion (Tr. 48, line 9), did not move for a mistrial (Tr. 46, line 1). The statement in appellant's brief on p. 46 that "they [jury] had no way to know that Barclay was not charged in the other indictment" is incorrect; those names were read by the prosecutor and appellant's name was not among them. Consequently, appellant was not subject to the false impression that he was himself charged in a separate indictment as argued in appellant's brief.

**ISSUE III**

**THE TRIAL COURT PROPERLY EXCLUDED THE TESTIMONY OF SGT. BUTCH GARVIN.**

It is next urged that the trial judge erred in refusing to allow the defense to present the testimony of Sgt. Butch Garvin. Admittedly, Sgt. Garvin was called by Mr. Jackson,

attorney for Dougan, and not Mr. Buttner, attorney for appellant (Tr. 1756, line 12--1759, line 2).

The test of admissibility is relevancy; the test of inadmissibility is a lack of relevancy. Williams v. State, 110 So.2d 654, 660 (Fla. 1959). Sgt. Garvin's testimony was not proffered. Indeed, permission was never requested to proffer his testimony. What we know must be gleaned from the remarks of Mr. Jackson, i.e., that Mr. Garvin was an investigating officer in another murder in which the victim had the words "BLA" carved on his body and that one John Knowles had been indicted for the crime. None of the other defense counsel spoke in support of the admissibility of Mr. Garvin's testimony.

In Huff v. State, 437 So.2d 1087 (Fla. 1983), reversal was predicated on the failure of the trial court to grant a mistrial following the state attorney's comment in closing argument that the defendant had forged his deceased father's name to a guarantee agreement where the state had offered no evidence regarding the forgery of the documents. This court did not say that the exclusion of the photograph, standing alone, would mandate reversal. It is noted, however, that this court did sustain the trial judge's exclusion of character evidence because same was not directed to a pertinent trait of Huff's character. There is a marked distinction between the exclusion of evidence relating to a totally separate crime and evidence which relates

directly to the charge on which a defendant is then being tried. The relevancy requirement for admissibility is simply not there in the former instance.

Appellant's reliance on Chambers v. Mississippi, 410 U.S. 284 (1973), goes wide of the mark. The Chambers Court reversed, first, because of the exclusion of the testimony of three witnesses that one McDonald had admitted the shooting with which Chambers was charged and, secondly, the refusal of the trial judge to permit a full cross-examination of McDonald. The exclusion of critical evidence mandated reversal; the exclusion of evidence that does not even lurk in the penumbra of the instant crime does not.

United States v. Agurs, 427 U.S. 97 (1976), is informative. There, the Court in assessing the effect of new evidence consisting of discovery material upon a claim for new trial, clearly delimited claims of constitutional error thusly:

> The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

427 U.S., at 109-110. Consistent with Agurs, see United States v. Valenzuela-Bernal, ___U.S.___, 102 S.Ct. 3440 (1982), rejecting the "conceivable benefit" test; and State v. Sobel, 363 So.2d 324 (Fla. 1978), citing Agurs.

In Perry v. Watts, 520 F.Supp. 550 (D.C. N.Cal. 1981), the district court held that, given the witness's identification of the defendant and the circumstances of the crime, the proffered evidence would not have raised a reasonable doubt and the affirmance of this holding by the Ninth Circuit, Perry v. Rushen, 713 F.2d 1447 (9th Cir. 1983), is recommended reading.[12] Perry was convicted and the California Court of Appeals affirmed and the California Supreme Court declined to hear the case. People v. Perry, 104 Cal.App.3d 268, 163 Cal.Rptr. 522 (1980). The United States Supreme Court denied certiorari. Perry v. California, 449 U.S. 957 (1980). Following an extended discussion of the issue, the Ninth Circuit concluded as follows:

> In summary, Perry's proffered evidence falls far short of the critical and reliable evidence considered in Chambers and Webb. It is also less weighty and central than the disputed evidence in Pettijohn and Crenshaw. While Perry's evidence is not actually irrelevant, it is sufficiently collateral and lacking in probity on the issue of identity that its exclusion did not violate the sixth and fourteenth amendments. California may constitutionally require more cogent evidence than this before opening up collateral issues at trial.

[12]California Evidence Cose § 352 is very similar to Federal Rule of Evidence 403. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Id. at 1449.

Id. at 1455. For a similar holding affirming the trial court's exclusion of allegedly relevant evidence, see Moody v. State, 418 So.2d 989 (Fla. 1982).

Evidentiary questions are committed to the broad discretion of the trial judge. Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979), citing Singer v. State, 109 So.2d 7, 22 (Fla. 1959); Hitchcock v. State, 413 So.2d 741 (Fla. 1982), cert.denied, 103 S.Ct. 274; United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), cert.denied, 445 U.S. 946 (1980). It is respectfully submitted that the trial judge properly refused to permit Sgt. Butch Garvin to testify, particularly so in view of Mr. Jackson's remarks as to what his testimony would be.

ISSUE IV

EVIDENCE OF DOUGAN'S INVOLVEMENT IN ANOTHER MURDER WAS PROPERLY ADMITTED IN EVIDENCE AT THE JOINT SENTENCING TRIAL.

The trial judge properly allowed the prosecutor to read the indictment returned against codefendant Dougan and others for the Roberts' murder (Post-Tr.Vol.I, pp. 88, 89). In the sentencing hearing, a trial judge may permit any evidence deemed relevant to the nature of the crime and the character of the defendant. § 921.141(1). Dougan's involvement in the Roberts' murder was certainly relevant to his character as well as being necessary to an individualized sentence mandated by Zant v. Stevens, ____U.S.____, 77 L.Ed.2d 235, 251 (1983). The prosecutor was not

permitted to go into the details of the killing, only to read the indictment (Post-Tr., Vol.I, p. 104). Notice also that defense counsel, Mr. Jackson, was not permitted to go into the details of the killing. Following the testimony of Hearn, the prosecutor specifically told the jury that such aggravating circumstances were placed before it "for the sole purpose of aggravating again murderer Jacob John Dougan. That is the reason it was put on." (Post-Tr. Vol.I, p. 113, lines 1-3; p. 154, line 17--155, line 15; 157, line 22--158, line 9). Again, appellant's lack of involvement in the Roberts' murder was particularly well emphasized by his trial counsel, Mr. Buttner.

But appellant complains that the trial judge permitted the reading of the indictment resulting from the Roberts' murder to be considered by the jury without a limiting instruction. However, no such limiting instruction was requested and the issue cannot now be raised for the first time on appeal. Williams v. State, 247 So.2d 425, 427 (Fla. 1971); Rule 3.390(d), Florida Rules of Criminal Procedure. And as noted earlier, appellant's lack of involvement in the Roberts' murder was clearly and forcefully emphasized on Mr. Buttner's cross-examination of William Hearn (Post-Tr.Vol.I, p. 109, 110). Frankly, the contention that the reading of the Roberts' indictment confused the jury as to whom it should be considered against imputes an unwarranted naivete and/or ignorance to the members of the jury.

The testimony of William Hearn did not constitute a "feature" of the penalty phase. The testimony elicited on direct examination comprises, at best, three pages (Post-Tr.Vol.I, pp. 90-92). The extension of Hearn's testimony was the result of Mr. Jackson's cross-examination, nothing else. If there is any error in this (there wasn't), it is difficult to understand how appellant can contend, at least with a straight face, that it should be imputed to the state. It is settled that a defendant cannot initiate error and then seek reversal based on that error, much less does he have standing to complain of alleged error initiated by counsel for a codefendant. Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert.denied, 439 U.S. 1102.

Appellant's motion for severance (Post-Tr.Vol.I, p. 22) was, to say the least, unusual. He wanted the jury to hear the aggravating and mitigating circumstances, if any, followed by argument and instructions by the judge, and then make their recommendation. Then, presumably the following day, the jury would hear the same thing as to codefendant Dougan and make their recommendation. Appellant's trial counsel had been previously advised that the prosecution was going to introduce collateral evidence by way of reading the indictment returned against Dougan, Crittendon, Evans, and Hearn for the Roberts' murder and this was the basis for his motion for severance. However, even appellant's trial counsel was well aware that the testimony would show that he was not involved in that offense, that he was not

charged in that offense, and that the state witnesses would say that he was that he was out of town (Post-Tr.Vol.I, p. 20, line 25--21, line 13). The real basis for his motion for severance was his fear that the jury's advisory verdict would be based on guilt by association. (Post-Tr.Vol.I, p. 21, line 14--22, line 8) Appellant has cited no authority authorizing a severance at the penalty phase of a capital trial based on nothing more than trial counsel's apprehension that the jury advisory would be detrimental to his client because of guilt by association; we know of none. Again, this court does not reverse on conjectural supposition. Sullivan v. State, supra.

**ISSUE V**

**FLORIDA'S MURDER AND CAPITAL-SENTENCING STATUTES ARE CONSTITUTIONAL AND WERE CONSTITUTIONALLY APPLIED TO APPELLANT.**

Appellant contends that Florida's murder and capital sentencing statutes are unconstitutional as applied to him because of the alleged failure of the trial judge to instruct on the distinction between principals in the first and second degree and accessories before the fact. The short answer to this contention is that no such instruction was requested. Williams v. State, 247 So.2d 425 (Fla. 1971); Brown v. State, 124 So.2d 481 (Fla. 1960); Rule 3.390, Florida Rules of Criminal Procedure.

The precise basis on which appellant bases his claim of unconstitutionality was rejected in Alford v. State, 307 So.2d 433 (1975), citing State v. Dixon, 283 So.2d 1 (Fla. 1973);

Antone v. State, 382 So.2d 1205 (Fla. 1980), cert. denied, 449 U.S. 913. Indeed, this issue was raised and rejected on appellant's initial appeal. Barclay, 343 So.2d, at 1269.

Before actually instructing the jury, the trial judge read his instructions in their entirety to defense counsel (Tr. 2099, line 19--2135, line 3). The instruction treating the distinction between principals of the first and second degree and accessory before the fact is just about as clear as the English language can make it (Tr. 2112, line 27--2113, line 14). The trial judge instructed on murder in the first degree (Tr. 2117, line 21--2118, line 3), and then murder in the second degree (Tr. 2119, line 22--2120, line 7), the distinction between the two degrees being the absence of premeditation in second degree murder. The distinction was again emphasized later in the instructions (Tr. 2124, line 20--2135, line 13). Thus, premeditation vel non was the anvil for the jury to distinguish between first and second degree murder. Please note that the trial judge specifically instructed that the defendants were not on trial for any act or conduct not charged in the indictment or included within the lesser offenses, and that the jury must consider the evidence only as it related to "these charges" (Tr. 2133, lines 17-22). As noted earlier, none of defense counsel had any objection to the instructions as read by the trial judge (Tr. 2136). The instructions given the jury were identical to those previously heard and approved by all defense counsel (Tr. 2213-2241).

Appellant's trial counsel had no objections to the instructions given and agreed that they were the same charges that had been agreed upon "just before the lunch recess." (Tr. 2244, lines 9--16) After the jury foreperson had been elected, the trial judge then explained the verdict forms to the jury (Tr. 2246, line 19--2248, line 10). The jury retired to deliberate on its verdict at 5:45 p.m. on March 3, 1975 (Tr. 2249). At 8:45 p.m., the jury requested to play the tape "on Mr. Barclay." (Tr. 2252, 2257) The jury foreperson also requested the trial judge to repeat the definitions of first and second degree murder (Tr. 2259). It was agreed that the trial judge should "read the whole charge" (Tr. 2262). This was done (Tr. 2274, line 15--2282, line 22).

The contention is made that the statute is unconstitutional because it "left Barclay's jury absolute and uncontrolled discretion to find either first or second murder on the same facts." (Appellant's brief, p. 50) Appellee answers that if the jury had not had unfettered discretion to find either first or second degree murder on the same facts, then appellant may have had cause for complaint.

Next it is complained that the trial judge erred in the penalty phase instructions because of failure to define "heinous, atrocious or cruel or any other listed circumstance," citing Cooper v. State, 336 So.2d 1133 (Fla. 1976). First, it is obvious that Cooper was decided subsequent to appellant's trial

and the trial judge did not have the benefit thereof. Secondly, the only objection registered by appellant was to the verdict form (Post-Tr.Vol.I, p. 177). This issue, even if it were meritorious, could not now be raised for the first time on appeal. Vaught v. State, 410 So.2d 147 (Fla. 1982).

But there was no error. Six witnesses were called to testify at the penalty hearing, five by the defense and one by the prosecution, the indictment for the Roberts' murder was read, and the tapes made by appellant and Dougan were played (Post-Tr.Vol.I, p. 58-111). This was all of the evidence offered and this was the evidence that the trial judge deemed to have at least some probative value. The trial judge instructed the jury that they should consider only the evidence "the Court deems to have probative value and also the following" (Post-Tr.Vol.I, p. 170, line 24--171, line 1). The trial judge then went on to read the mitigating and aggravating circumstances listed in the statute. Of course, the jury had already heard the facts surrounding the murder at the guilt-innocence phase of the trial. It is submitted that there is nothing vague about the aggravating circumstance "especially heinous, atrocious or cruel" and the trial judge did not err in not attempting to further describe words of plain meaning, particularly in the absence of a request so to do. In State v. Dixon, supra, the court in commenting on this particular aggravating circumstance noted:

> Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended.

Id. at 283 So.2d 9. The court did go on to state its conception as to what those terms meant but did not say or intimate that a trial judge had to do other than read the enumerated mitigating and aggravating circumstances so that the jury could determine an advisory verdict based on the evidence adduced at the penalty phase of the trial. The recent decision of the Eleventh Circuit in Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983), rev'd on other grounds, is informative. The court had occasion to treat the identical issue appellant raises sub judice, i.e., failure to define statutory aggravating circumstances. Please note:

> Westbrook's first challenge to the instructions--failure to define statutory aggravating circumstances--is unsupportable. The instructions indicate that the court charged the jury on the application of Ga.Code Ann. § 17-10-30(b). That statutory provision states the aggravating circumstances which may be considered by the jury if supported by the evidence. The court read those statutory aggravating circumstances applicable to the evidence in the case, relied upon by the state in seeking the death penalty, and made known to Westbrook prior to trial. Under the facts in this case, the trial court was required to do no more regarding circumstances than to repeat the exact statutory language. [Emphasis ours.]

Id. at 1501. (Footnotes omitted) Westbrook was expressly reaffirmed in Moore v. Zant, 722 F.2d 740, 647 (11th Cir. 1983). Indeed, in Ford v. Strickland, 696 F.2d 804 (11th Cir.

1983), en banc, the court in the course of its opinion had occasion to comment on the instructions given by the state trial judge at the penalty phase of the trial. Please note:

> Instructing the jury on aggravating circumstances, the trial judge stated, "[y]ou shall consider only the following . . ., and read the statutory language. With regard to mitigating circumstances, he said, "[y]ou shall consider the following . . .," omitting the word "only" and again reading the appropriate statutory language. Ford neither objected to the instruction at trial nor raised it on direct appeal.

Id. at 811, 812. And again, in Alvord v. Wainwright, ____ F.2d ____[(11th Cir. 1984), opinion filed February 10, 1984], the above language was quoted with approval. Slip op., at 34.

The sentencing instructions for use at the penalty phase of a capital trial were not adopted until February 4, 1976, almost a year subsequent to appellant's trial. In re Standard Jury Instructions in Criminal Cases, 327 So.2d 6 (Fla. 1976). The instructions adopted May 27, 1970 were prior to Furman v. Georgia, 408 U.S. 238 (1972), and not relevant to the issue. In the final analysis, however, the alleged error must be deemed harmless because the jury returned an advisory recommendation of life imprisonment for appellant. This is the best it could do for him. North v. State, 65 So.2d 77 (Fla. 1952)(harmless error statute applies in capital cases).

## ISSUE VI

**THERE IS NO ERROR IN THE JURY INSTRUCTIONS AT EITHER THE GUILT OR SENTENCING PHASE.**

It is urged that the trial judge erred in giving the first degree felony murder instruction without any definition of the enumerated felonies. The basis for this contention is that there was no evidence of any enumerated felony. This goes wide of the mark. The trial judge found--so did this court--that the murder was committed while appellant was engaged in the commission of a kidnapping. The instructions given by the trial judge were thoroughly discussed at the charge conference and it was finally determined that the instruction on felony murder should be given (Tr. 1976, line 16--1980, line 3). There was no objection by any defense counsel. The instructions agreed upon were the ones given and as noted earlier there were no objections of defense counsel (Tr. 2136, 2244, 2245).

The trial judge did not give an attempt instruction and there was no request that he do so. In fact, the express approval given to the instructions as given constitute an approval of the trial judge's not giving any attempt instruction. After all, the crime was completed and no attempt instruction was required. Burney v. State, 402 So.2d 38 (Fla. 2d DCA 1981); State v. Strasser, ____ So.2d ____ (Fla. 1983), 8 FLW 407; Dobbert v. State, 328 So.2d 433 (Fla. 1976). As to appellant's claim that the wounds he inflicted on Stephen Orlando

were superficial, please see the testimony of Dr. Schwartz referred to earlier in this brief.

There was no shift of the burden of proof as claimed by appellant. Arango v. State, 411 So.2d 172, 174 (Fla. 1982). Appellant claims, however, that the trial judge did not instruct the jury that the reasonable doubt standard applied. Notwithstanding appellant's assertion to the contrary, his trial counsel did not object to any alleged failure of the trial judge to instruct on reasonable doubt. Mr. Buttner's complaint was that in his opinion he didn't believe that a sufficient explanation was given as to what the word "outweigh" means. Mr. Buttner was apprehensive that the wording of the proposed instruction--whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances--would create a presumption necessary to be overcome by the defendant (Post.T.Vol.I, p. 19, line 7--20, line 2). The process of weighing aggravating and mitigating circumstances, if any, is a matter for the judge and jury, and unlike facts, it is not susceptible to proof by either the prosecution or defense. Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982). As noted supra, there were no capital sentencing instructions to be given at the penalty phase at the time of appellant's trial, there was no "reasonable doubt instruction" to be used at the penalty phase. True, State v. Dixon, supra, was on the books at that time. But Dixon does not require the giving of additional instructions; it

simply states "they [aggravating circumstances] must be proved beyond a reasonable doubt before being considered by judge or jury." Appellee reads Dixon as holding that evidence of aggravating circumstances submitted by the prosecution must meet the same standard of proof that any other evidence would have to meet, i.e., the evidence must be sufficient to prove the issue for which it was submitted beyond a reasonable doubt. Although a capital trial is a bifurcated one, it is still one trial. In the complete instructions given at the guilt stage of the trial, the trial judge emphasized the reasonable doubt standard twenty seven (27) times; in his explanation of the verdict forms it was emphasized three times; and the instructions repeated at the request of the jury, four times. The jury was never instructed as to any other standard of proof.

Appellant's position is untenable because he confuses the procedural with the substantive. Substantively, no defendant may be convicted under the Florida death penalty statute without proof beyond a reasonable doubt. Due process entitles a defendant to nothing more. The aggravating and mitigating circumstances are relevant only as a guide to the jury for the purpose of making an advisory recommendation to the trial judge. But those aggravating and mitigating circumstances do not come into play until after a capital defendant has been convicted and such conviction cannot be obtained without proof beyond a reasonable doubt of the capital crime. This necessarily amounts

to proof beyond a reasonable doubt of the underlying aggravating circumstances. It is submitted that the jury's verdict returned against appellant is irrefutable proof that the aggravating circumstances were proven beyond a reasonable doubt.

This precise issue was raised on cross-appeal by petitioner in Henry v. Wainwright, 721 F.2d 990 (5th Cir., Unit B 1983). Please note:

> On cross appeal, Henry first contends that the district judge erred in finding harmless the failure of the trial judge to instruct the jury that aggravating circumstances must be found beyond a reasonable doubt. For the failure to give the instruction to be harmless, the evidence must be so overwhelming that the omission beyond a reasonable doubt did not contribute to the verdict. See, e.g., Brooks v. Francis, 716 F.2d 780 at 794 (11th Cir. 1983). The district judge accurately noted that the evidence of the aggravating circumstances (murder while committing robbery, especially heinous and cruel murder, and pecuniary gain) was overwhelming. The jury never heard an instruction during the trial on any standard of proof other than beyond a reasonable doubt. And, in Florida, the judge, not the jury, imposes the final sentence. We conclude that the judge's failure to repeat his charge to the jury on the standard of proof could not have harmed Henry. [Footnote omitted.]

Id. at 995.

It is claimed that the trial judge erred in failing to instruct on nonstatutory mitigating facts. No such instruction was requested. As noted in Henry, 995, n. 5, this is not a case

in which the judge refused to give the charge; appellant's counsel never requested it. Appellant's claim of error under Lockett v. Ohio, supra, is based primarily on Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). But the thrust of Lockett is that the "sentencer ...[must] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S., at 604. Appellant does not claim that he was "precluded" from submitting any evidence he so desired to the jury as a basis for a sentence less than death. The Eleventh Circuit in Ford, 696 F.2d 804, 811-813 (1983), rejected this issue and distinguished Washington v. Watkins, supra. See also Straight v. Wainwright, 422 So.2d 827, 829-830 (Fla. 1982), rejecting the contention that an instruction which tracked the language of § 921.141(6), Florida Statutes (1975), fails to apprise the jury of its right and duty to consider any factor in mitigation shown by the evidence. Indeed, this court has several times rejected the contention that Florida's capital felony sentencing law and jury instructions limit consideration to statutory mitigating circumstances. Peek v. State, 395 So.2d 492 (Fla. 1981), cert.denied, 451 U.S. 964; Songer v. State, 365 So.2d 696 (Fla. 1978)(on rehearing), cert.denied, 441 U.S. 956 (1979). Appellant's reliance Pait v. State, 112 So.2d 380 (Fla. 1959), for fundamental error is not well taken. Pait was

reversed because of inflammatory remarks by the prosecutor; had nothing whatsoever to do with any alleged failure to instruct on nonstatutory mitigating circumstances in the penalty phase of a capital trial.

In summary, appellant approved the instructions given at the penalty phase, never requested that any instruction be given on nonstatutory mitigating circumstances, and did not introduce any mitigating evidence at the penalty phase. The trial judge correctly instructed the jury that they could consider all evidence introduced at the penalty phase and apply the statutory aggravating and mitigating factors thereto in determining their advisory verdict.

It is next urged that the process of questioning the jurors about their views on the death penalty was prejudicial, implied guilt, and led jurors to infer that appellant was guilty, citing Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), appeal pending, Case No. 83-2113, ___ F.2d ____(8th Cir. 1984). Comment is warranted.

The United States District Court for the Eastern District of Arkansas erroneously concluded that the "death qualification" of prospective jurors by the State of Arkansas is unconstitutional because it (1) denies the accused his right to a trial by a representative jury and (2) creates non-impartial juries that are "conviction prone."[13] In expanding the rights

afforded an accused criminal defendant under the Sixth Amendment, the district court effectively ignored the United States Supreme Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968); misread past decisions of the Supreme Court which addressed the "fair cross-section" jury requirement; relied upon the "fair cross-section" jury requirement; and relied upon unproven and highly speculative sociological studies to make its case against the impartiality of "death qualified" jurors.

This quixotic attempt by a federal district judge to judicially mandate the most perfectly "representative and impartial" state jury selection process conceivable is both impractical and wholly outside the scope of judicial authority. It effectively gives federal judges a blank check to wander the socio-psychological landscape in search of "empirical" support for expanding constitutional rights. Moreover, it impinges upon the right of a State, like Arkansas, whose capital sentencing scheme is indisputably constitutional, to see its laws and judgments properly enforced. If allowed to stand, the federal judge's decision will make it impossible for a state to receive an impartial trial in a capital case, thereby further reducing the already low esteem in which our criminal justice system is held by the public. Appellee does not read appellant's brief as

[13]Appellee uses the term "death qualification" to describe the process whereby a State is allowed to exclude jurors adamantly opposed to the death penalty from serving on a capital jury.

contending that certain jurors were excused for cause in violation of Witherspoon, only that this resulted in a "death oriented" jury. It appears that appellant does not want a constitutionally impartial jury, he wants a favorable one. This he is not entitled to. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Press-Enterprise Company v. Superior Court, ____ U.S. _____ (1983), Case No. 82-556, note 9, opinion filed January 18, 1984, 34 Cr.L.Rptr. 3019, 3021.

Appellant's failure to present evidence in support of his statistical assumption that jurors who are not opposed to the death penalty are more likely to vote to convict a capital defendant than are jurors who oppose the death penalty constitues a waiver of the right to urge the exclusion of the latter category of jurors as error upon appeal. Hulsey v. Sargent, 550 F.Supp. 179 (E.D. Ark. 1981). "Reversible error cannot be predicated on conjecture." Jacobs v. State, ____ So.2d ____ (Fla. 1984), 9 FLW 66; Spinkellink v. Wainwright, supra.

Even if the Grigsby claim was properly before the Court, it would be meritless. Not only is Grigsby inconsistent with decisions of the United States Supreme Court, it is repugnant to this court's earlier decisions in Riley v. State, 366 So.2d 19 (Fla. 1978), cert.denied, ___ U.S.____, 74 L.Ed.2d 294 (1982), and Gafford v. State, 387 So.2d 333 (Fla. 1980), which hold that jurors who oppose the death penalty may be properly excluded from

the guilt phase of a capital trial. See also Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Grigsby is also inconsistent with this court's later decision in Lusk v. State, ____ So.2d ____ (Fla. 1984), 9 FLW 39, which affirms that the defense may dismiss for cause only those jurors who show actual prejudice toward the defendant, as opposed to those whose bias may be merely implied by their membership in a certain group.

As noted supra, Grigsby is inconsistent with Witherspoon v. Illinois, supra, in which the Court declined to judicially notice "that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." 391 U.S., at 518, and Smith v. Phillips, 455 U.S. 209 (1982), in which the Court held that the defense must show the actual prejudice, rather than the implied bias, of a juror in order to receive a new trial. Grigsby is also inconsistent with later decisions. For example, in Maggio v. Williams, ___ U.S. ____, 78 L.Ed.2d 43, 47 (1983), the Court affirmed the foregoing interpretation of Witherspoon in vacating a stay of execution on what was essentially a Grigsby claim; and Sullivan v. Wainwright, ___ U.S. ____, 78 L.Ed.2d 210, 212 (1983), which denied a stay based upon the petitioner's claim "that the jury that convicted him was biased in favor of the prosecution," indicating that this claim had properly been found "meritless" by both the state and federal courts.

Thus, Grigsby has, in essence, already been rejected by this court and the United States Supreme Court. See also Rector v. State, 659 S.W.2d 168 (Ark. 1983). A reading of the Grigsby opinion conveys the unmistakable impression that the district judge began with the conclusion that the Arkansas death penalty law was unconstitutional and then worked backwards using beguiling statistics for the purpose of validating the wholly illegitimate concept that individuals may be infallibly stereotyped on the basis of their memebership in a certain group. Unmistakably, this elevates sociology to constitutional principle and such an approach has no place in Anglo-American jurisprudence. Pulley v. Harris, _____ U.S. ____ (1984), 52 U.S.L.W. 4141; McCorquodale v. Balkcom, ____ F.2d ____ [(11th Cir. 1983), Case No. 82-8011]; Alvord v. Wainwright, ____ F.2d _____ [(11th Cir. 1984), Case No. 83-3345]. See also Huff, How to Lie With Statistics (1st Ed. 1954), an excellent book with an unfortunate title, for an in-depth expose of the various methods of statistical manipulation.

A prohibition on the death qualification of veniremen would deny the state its right to an impartial trial. As Justice Black stated in Witherspoon, "the people as a whole, or as they are usually called, 'society' or the 'state' have as much right to an impartial jury as do criminal defendants." 391 U.S., at 535 (Black, J., dissenting). Furthermore, the Supreme Court has explicitly recognized that juries which are not death-qualified

are not impartial. Logan v. United States, 144 U.S. 263, 298 (1892). See also Spinkellink, 578 F.2d, at 597-98.

In short, any individual who holds beliefs which prevent him from trying a case according to the law may properly be challenged for cause. Simply because a number of individuals hold similar beliefs does not magically transform them into a protected class, the exclusion of which violates the fair cross section requirement of the Constitution.[14]

With all due respect, Grigsby's total reliance upon sociological concepts is fundamentally misplaced as a matter of law and policy. The law is clear that prospective jurors who indicate under oath their ability and willingness to perform their civic obligations as jurors and to obey the law fairly and impartially are qualified to serve on a jury. As the United States Court of Appeals for the District of Columbia Circuit found, such individuals are not prosecution prone:

> No proof is available, so far as we know, and we can imagine none, to indicate that, generally speaking, persons not opposed to capital punishment are so bent in their hostility to criminals as to be incapable of rendering impartial verdicts

[14]No single constitutional provision has ever been held to embody the right to be tried by a jury drawn from a representative cross-section of the community. The Supreme Court first assessed State jury selection process under the Equal Protection Clause of the Fourteenth Amendment. See e.g., Smith v. Texas, 311 U.S. 128 (1940). After the Sixth Amendment was made applicable to the State, the Court assessed jury representativeness under that amendment. See Duncan v. Louisiana, 391 U.S. 145 (1968).

> on the law and the evidence in a capital case. Being not opposed to capital punishment is not synonymous with favoring it. Individuals may indeed be so prejudiced in respect to serious crimes that they cannot be impartial arbiters, but that extreme is not indicated by mere lack of opposition to capital punishment. The two antipathies can readily coexist; contrariwise either can exist without the other; and, indeed, neither may exist in a person. It seems clear enough to us that a person or a group of persons may not be opposed to capital punishment and at the same time may have no particular bias against any one criminal or, indeed, against criminals as a class; people, it seems to us, may be completely without a controlling conviction one way or the other on either subject. We think the premise for the thesis has no substance. [Emphasis ours.]

Tuberville v. United States, 303 F.2d 411, 420-21 (D.C. Cir. 1962). While one might argue that the judiciary's thinking and approach to criminal law was different in 1962 than it is in 1984, even in 1975, appellee submits that the reasoning of the court in Tuberville is far sounder as a matter of criminal justice than is the decision in Grigsby.

Even if appellee were to confine its analysis of jury impartiality to the sphere of sociology, it is evident that the studies relied upon by the district court in Grigsby are both inconclusive and constitutionally meaningless. Such studies are inherently unclear and unreliable for a number of reasons. As Justice Black noted, they "represent [ ] a psychological foray into the human mind. . .." Witherspoon, 391 U.S, at 538 (Black,

J., dissenting). As such, they contain a number of variables which cannot be accurately gauged or identified and are, like all such studies, subject to manipulation by and the bias of those who conduct the study.

Appellant tacitly admits that the scrupled jurors were properly struck for cause. An examination of the record reveals the correctness of his admission. Juror Leslie (JS.Vol.III, p. 487-489); Juror Tompkins (JS.Vol.III, p. 526-533); Juror Norman (JS.Vol.III, p. 534-538); Juror Barnes (JS.Vol.III, p. 542-546); (JS.Vol.III, p. 577-579); Juror Martin (JS.Vol.lII, pp. 585-587); Juror Robinson (JS.Vol.III, p. 591-594); Alternate juror Smith (JS.Vol.IV, 659-660). Mr. Jackson's objections alluded to in the footnote appearing in appellant's brief on p. 55 went to the form of the question propounded by the prosecutor, not to his right to ask it (JS.Vol.III, p. 527).

It is unnecessary that a prospective juror unequivocally indicate that he or she could not subordinate personal views and do their duty to follow the judge's instruction on the law, it is only necessary that the juror make it unmistakably clear that he or she is unalterably opposed to capital punishment and would not join a guilty verdict where the death sentence could be imposed.

Next, it is claimed that the prosecutor's use of peremptory challenges denied appellant the right to a representative jury. While the assertion is untrue, appellee answers that it is

neither possible nor necessary to have a fair cross-section of the community on each individual grand and petit jury. Akins v. Texas, 325 U.S. 398, 403 (1945); Swain v. Alabama, 380 U.S. 202, 208 (1965). Indeed, in Dobbert v. State, 409 So.2d 1053 (Fla. 1982), this precise issue was emphatically rejected.

The argument that in Florida the death penalty is applied arbitrarily, capriciously and discriminatorily in violation of the Fourteenth Amendment ignores the holdings of two United States Supreme Court opinions. In Washington v. Davis, 426 U.S. 229 (1976), the Court held that a District of Columbia Metropolitan Police Department entrance examination designed to test verbal ability, vocabularly, reading, and comprehension did not violate Fourteenth Amendment Equal Protection, even though the examination had a racially disproportionate impact in that far more blacks than whites failed to pass it. While noting the central purpose of the Equal Protection Clause, the Court commented that its prior decisions "have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." 426 U.S., at 239. A year later, in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Court held that the refusal of the Village to rezone a tract of land in order to allow the Housing Development Corporation to build racially integrated low

and moderate income housing did not violate Fourteenth Amendment Equal Protection, reasoning that the Village's rezoning denial was motivated not by racial discrimination but by its desire to protect property values and maintain its zoning plan. A remarkably similar issue[15] was made and rejected in Spinkellink v. Wainwright, 578 F.2d 582, 612, 614 (5th Cir. 1978). The same issue was rejected in Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), in the following manner:

> In Spinkellink this court observed "that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness--and therefore the racial discrimination--condemned in Furman [Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] have been conclusively removed."

Id. at 584. See also Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), rejecting the same issue. Indeed, the issue of racially discriminatory application of the death penalty was just recently rejected in Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983), and Sullivan v. Wainwright, ____ U.S. ____, 78 L.Ed.2d 210 (1983). However, this can be of academic interest only because this issue was never raised in the trial court and cannot now be raised for the first time on appeal. State v. Barber, 301 So.2d 7 (Fla. 1974); Vaught v. State, supra; Routly v. State, supra. Also, please see, McCleskey v. Zant,

[15]Death Penalty discriminatorily applied against defendants convicted of murdering whites, as opposed to blacks.

____ F. Supp. ____ (D.C. N.D. Ga. 1984). It is a treatise on the evaluation of statistics.

## CONCLUSION

Appellant was not convicted because of his race; he was convicted and sentenced to death because of his commission of one of the most heinous murders in the annals of Florida history. His conviction and sentence of death should be affirmed.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief of Appellee to Mr. Talbot D'Alemberte, STEEL, HECTOR & DAVIS, 1400 Southeast Bank Building, Miami, Florida 33131; and to Mr. James M. Nabrit, III, 99 Hudson Street, New York, NY 10013, by U.S. Mail, this 21st day of March, 1984.

WALLACE E. ALLBRITTON
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of Counsel