IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,765

ELWOOD C. BARCLAY, :

Appellant. :

v. :

STATE OF FLORIDA, :

Appellee. :

ON APPEAL FROM THE FOURTH JUDICIAL
CIRCUIT IN AND FOR DUVAL COUNTY, R. HUDSON OLLIFF, JUDGE

BRIEF OF APPELLANT

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1027D

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EXPLANATION OF REFERENCES

For the convenient reference of the Court, an Appendix is being furnished in a separate volume.

References to the transcript of Barclay's trial will be designated "Tr. ____."

References to the transcript of the voir dire will be designated "V.T. _____."

References to the penalty trial held March 5, 1975 will be designated "S.T _____."

References to the record on the first appeal will be designated "R. _____."

References to the resentencing hearing on June 23, 1979, October 23, 1979, and April 18, 1980 will be designated "R.T. _____."

References to the record on the 1980 appeal will be designated "1980-R. _____."

References to the appendix of this brief will be designated "A._____."

PRIOR OPINIONS IN THIS CASE

1. Barclay and Dougan v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978).

2. Barclay v. State, 362 So.2d 657 (Fla. 1978).

3. Barclay v. State, 411 So.2d 1310 (Fla. 1981), affirmed, 103 S.Ct. 3418 (1983).

4. Barclay v. Wainwright, 9 F.L.W. 32 (Jan. 19, 1984).

STATEMENT OF THE FACTS

This appeal arises out of a trial of Elwood Barclay, and three co-defendants, all charged with first degree murder for the death of Stephen A. Orlando. Also tried with Elwood Barclay were Jacob Dougan, Dwyne Crittendon and Brad Evans. A fifth young black man, William Hearn, pled to second degree murder and was the State's principal witness at trial.

The Homicide as Described By Hearn. William Hearn, knew the four defendants from a karate class taught by Dougan. A. E114. On Sunday, June 16, 1974, Hearn was playing basketball with Crittendon, Evans and Barclay. A. E115-117. Dougan arrived and asked Hearn if he had his gun with him, because Dougan wanted "to go out and scare some people." A. E116. Dougan said he was willing to do it by himself, but that it would be better if they all went together. When Hearn asked what it was they were going to do, Dougan said he'd tell them later. A. E117. Dougan instructed them all to go home and change into dark clothes. A. E117-118.

The five met again at Barclay's house about an hour later, around 8:00 or 8:30 in the evening. A. E119. As instructed, Hearn brought a .22 caliber pistol, which he gave to Dougan. A. E119, 121. Barclay had a "small pocketknife." A. E120. The five got into Hearn's two-door car with Hearn driving, Crittendon in the front passenger seat, and the rest in the back seat. Dougan said he would instruct them where to go and what to do. A. E121, 124.

After driving for a short time, Dougan instructed Hearn to stop the car under a street light. Hearn did, and Dougan wrote out a

note. Dougan read the note to the group and passed it around. Hearn asked again what they were going to do, and Dougan again replied he would tell them later. He told Hearn to drive on and Hearn did so. Dougan continued to direct the route until they arrived at a monument. There Dougan announced that they would "catch a white devil and kill him and leave the note on him." A. E122-124.

For the next couple of hours, the five drove around Jacksonville, looking unsuccessfully for an isolated person in an isolated area. A. E126-128. Dougan directed the movements of the group. Finally the group headed to Jacksonville Beach, arriving about 10:30 p.m. There they saw Orlando, a young white man, hitchhiking by the side of the road. Hearn stopped the car, and Orlando entered the car and sat between Dougan and Evans in the back seat. A. E133. The car headed south. Orlando told the group his name, and they each told him their names. Orlando asked them if they "smoked reefer" (marijuana). Dougan replied that they did, and asked Orlando if he had any with him. Orlando said he did not, but could get them some from a house on 12th Street. A. E133. When they got to 12th Street, Dougan told Hearn to drive past the street and keep going straight. Hearn did. A. E134. Dougan directed the route again. A police car passed by, and Orlando said, "That pig sure is watching us close." Someone asked him if he disliked police officers, and he replied, "Well, my father's one." Dougan then told Orlando that he was taking him to meet a black girl who could give him some drugs. A. E135. As they approached a road, Dougan announced they were getting close to where the girl lived. A. E140. They turned, then turned again down

a dirt road. Dougan told Hearn to stop the car. He did. A. E143.*/

Hearn opened the door on the driver's side and held his seat back but did not leave the car. Crittendon opened the door on the passenger side, got out, and held the seat back. Barclay got out on Hearn's side, Dougan on Crittendon's. As Dougan got out he said, "This is it, sucker, get out." Orlando got out behind Dougan and broke to run. A. E144. Dougan hit Orlando in the back with the gun. A. E145. Hearn, who remained in the driver's seat throughout the incident, said Barclay, who apparently had moved around the car, then grabbed Orlando. Evans got out of the car and stood behind Dougan; Orlando was standing between Dougan and Barclay. A. E147. Hearn watched from the front seat of the car, looking back over his shoulder through the back window. A. E146. He saw Dougan put his hand on Orlando's back and jerk it, throwing Orlando to the ground. A. E148. Hearn said Barclay "started stabbing" Orlando, who offered to given them a "bag of reefer." Id. Hearn said Barclay stabbed Orlando more than once, although Hearn could not say how many times.

Dougan told Barclay to move back, and then fired the gun twice. Id. Dougan pulled the gun up, shook it, and tried to fire again but the gun wouldn't go off. A. E149. Evans moved up

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*/ The original sentencing order stated that Orlando was driven to the scene of the homicide "[a]against his will and over his protest". There is simply no evidence in the record to support such a finding. The only evidence of Orlando's statements or actions during the car ride comes from Hearn's testimony (A. E133-142), and the entire substance of those statements and actions had been described in our text above. The judge and the prosecutor agreed that Orlando had entered the car voluntarily (A. E179), and the prosecutor acknowledged during his closing argument to the jury that Orlando's first reaction of "protest" occurred after the car stopped and Dougan ordered Orlando to step outside. A. E205.

close, went down toward the body a couple of times, and then stood up with the note in his hand. Barclay took the note, went down toward the body with it, and then Evans, Dougan and Barclay returned to the car. A. E150. The car returned to Barclay's house. A. E151.

Other Evidence. On Monday, June 17, 1974, the body of eighteen-year-old Stephen A. Orlando was discovered. Tr. 169. The cause of death was a bullet which entered the left ear. A. E29, 31. Orlando also sustained another bullet wound in the cheek, and several superficial stab wounds. A. E29. A note was found under a small pocketknife lying on his stomach. Tr. 317-18, 321, 324. The note stated that "the revolution" had begun and that the "atrocities and brutalizing" of black people by the "oppressive state" would no longer go "unpunished." The note was signed, "The Black Revolutionary Army. All power to the people."

The Tapes. Hearn next saw the others on Tuesday at the karate class. Dougan told Hearn to bring his car the following day because there would be a meeting at the house of another member of the karate class, James Mattison. Tr. 1396. Wednesday evening after the class, Hearn, Dougan, Crittendon, Evans and Barclay and three other karate students (Otis Bess, Edred Black and James Mattison) met at Mattison's house. Tr. 1397. There Crittendon, Evans, Dougan and Barclay discussed the murder. Dougan brought a tape recorder and suggested that everyone present make tapes. No one disagreed. Tr. 1399. Dougan then wrote out a script for each person to read into the microphone. A. E155. Barclay suggested some additions to Dougan's script. A. E156.

Hearn testified that all the tapes made that night referred to the killing, and that he personally saw Black, Dougan and Barclay

making tapes. Tr. 1399, A. E156. He said that although the taped messages depicted Orlando as begging for mercy, Orlando never had. This was added only to "make it seem more aggressive." A. E156.

Black, Bess and Mattison also testified for the State. Each admitted being present while the tapes were made, and Black and Mattison admitted making tapes themselves, similar in all respects to those made by Barclay and Dougan. A. E54, E56, E92. The three men each denied any direct knowledge of Orlando's death. Black and Mattison claimed to have made the tapes from a script prepared by Dougan. A. E58, E60, E92. They corroborated Hearn's testimony that Dougan was the person who suggested making the tapes, brought the tape recorder, and directed the production of the tapes and mailed them. Tr. 938, A. E55, Tr. 958-59, Tr. 986, A. E84-85, Tr. 1160, A. E91, E98, Tr. 1283, Tr. 1307. Five of the tapes -- only those allegedly recorded by Barclay and Dougan -- were introduced into evidence and played for the jury. Tr. 1009, A. E61-82.

Black testified to incriminating statements made by Crittendon (A. E88), Evans (A. E88, E93), Dougan (A. E92) and Barclay (A. E93). These statements indicated that Evans stabbed Orlando, and that Barclay took the knife from Evans after Orlando was shot. A. E89, E93, E101-102. Bess corroborated the testimony to some extent. A. E101, E102, Tr. 1287. An expert for the State testified that the note found on Orlando's body was written by Dougan. Tr. 1112. Another testified that a cartridge case found by the body was fired from Hearn's gun. Tr. 1550.

Crittendon, Dougan, Evans and Barclay each took the stand. Crittendon, Dougan and Barclay admitted having made the tapes, but

claimed they did so at Mattison's urging and direction. Tr. 1608, 1616, 1782, 1805, A. E171. All four denied complicity in the homicide. Tr. 1607, 1609, 1789, 1817, A. E171. Barclay said he worked for Standard Feed as a truck driver in July 1974. A. E173.

Jury Instructions and Verdict. The trial judge called counsel into chambers to discuss the charge to the jury. It was at first agreed by all counsel and the judge that no felony-murder charge would be given because of a lack of any basis in the record for such a charge. A. E178-79, E184-85. However, when the court later brought up murder in the third degree -- defined as murder in the course of a felony not enumerated in the first and second degree felony-murder provisions -- defense counsel were unwilling to waive a charge on that lesser included offense. A. E190, E199. The state attorney insisted that the felony-murder provisions of first and second degree murder be charged as well, assertedly, to avoid confusing the jury; and the trial judge ultimately agreed. A. E191, E199. The jury was instructed on both premeditated and felony-murder. A. C25.

The jury found Dougan and Barclay guilty of first degree murder. Crittendon and Evans were convicted of second degree murder.

The Sentencing Trial. At the sentencing hearing, Dougan produced several witnesses to testify to his good character. S.T. 59, 61, 64, 66, 70. No additional testimony was presented on Barclay's behalf. The State then brought Hearn back to testify about a second homicide -- the murder of Stephen Roberts. The Roberts murder was committed by Crittendon and Evans at Dougan's direction, with Hearn once again acting as driver and observer on June 21, 1974. A. F37-60. Barclay was not charged in the second homicide, and was unquestionably out of town when it occurred. A. F59-60. But

during direct examination Hearn mistakenly mentioned "Elwood" as one of those present during the planning of the Roberts murder. A. F40. On cross examination Hearn said that Barclay was not present. A. F59-60. The state offered no further evidence about Barclay. The state played the tapes (which the jury had already heard twice) and argued that the crime was "heinous, atrocious or cruel," disdaining reliance on any other statutory aggravating factor. A. F69.2

During closing argument, Barclay's attorney informed the jury that Barclay was twenty-three years old, married and the father of five children. A. F75. He said Barclay was not involved in the Roberts murder. He highlighted the disparity in treatment of Hearn, Crittendon and Evans -- all who had participated in both the Orlando and Roberts murders -- who would be eligible for parole immediately, while a life sentence would make Barclay (secondary role in one murder) ineligible for parole until he was forty-eight years old. A. F77. He argued that Barclay was a follower, not a leader, and that he acted under the domination of another. A. F76.

Seven jurors signed a written verdict that life imprisonment was appropriate for Barclay. The jury recommended death for Dougan. A. F78-79. The trial judge ordered a presentence investigation. S.T. 181. On April 10, 1975, he imposed death sentences on Barclay and Dougan, despite the jury's verdict of life for Barclay, issuing a single order applicable to both young men. A. A1-31.

Resentencing in 1980. This Court subsequently affirmed and later (post-Gardner) vacated the death sentences imposed on Barclay and Dougan. A resentencing hearing was held before the trial judge in 1979. Counsel for Barclay argued that the original sentencing order

contained a number of errors, including the finding of non-statutory aggravating circumstances. R.T. 56-94. The judge reimposed the death sentence on April 18, 1980. A. B1-35. The 1980 sentencing order was similar to the original order, with two important exceptions: First, the finding that the murder was committed in the course of a kidnapping was changed. The 1980 order relies upon the definition of kidnapping in Fla. Stat. § 787.01, which took effect October 1, 1975, more than a year after the crime. A. B25-26. Second, Judge Olliff amended the finding on "great risk of death to many persons" to delete a prior reference to a note found on the victim's body. A. B24-25. The new sentence was affirmed in 1981.

On January 19, 1984, this Court granted a Writ of Habeas Corpus allowing Barclay a new direct appeal. Barclay v. Wainwright, 9 F.L.W. 32.

ARGUMENT

I.

THE APPELLANT'S DEATH SENTENCE SHOULD BE REVERSED.

A. The Jury Recommendation of Life Imprisonment Was Improperly Disregarded By The Trial Court.

1. The Jury Recommendation.

On March 5, 1975 seven jurors at Barclay's trial signed a verdict:

> We, a majority of the jury, rendering an advisory sentence to the Court as to whether the defendant should be sentenced to death or to life imprisonment, find:
>
> 1. Sufficient aggravating circumstances do not exist to justify a sentence of death.

2. Sufficient mitigating circumstances do exist, which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.

3. Based on those considerations, the defendant should be sentenced to life imprisonment. A. C39.

2. Trial Judge Disregards Life Recommendation.

The April 10, 1975 sentencing order made only a single reference to the jury finding:

> In its advisory sentence the Jury recommended life imprisonment for Barclay by the barest majority of seven to five. The Court does not feel bound by the advisory sentence as to the defendant Barclay because of the closeness of the vote and because of his major participation in the murder. A. A9.

The order did not address the reasonableness of the jury findings. The 1980 order resentencing Barclay similarly contains no such discussion, and no citation to Tedder v. State, 322 So.2d 908 (Fla. 1975). The trial took place before Tedder, supra, and the judge did not anticipate its rule. He said quite bluntly that sentencing was "the function of the judge of this Court and not the function of the jury."*/

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*/ The judge told the venire: "The advisory sentence may be by the majority of the jury, and the judge then sentences the defendant, or any of them, to life imprisonment or to death. The judge is not required to follow the advice of the jury in the advisory sentence; thus, the jury does not impose the punishment if there is a verdict of guilty of murder in the first degree. The imposition of any punishment or sentence is the function of the judge of this Court and not the function of the jury." VT. 7-8; see VT. 13-14 (same); VT. 502-03. In his guilt phase instructions" "The Judge is not required to follow the advice of the jury." A. C32-33. The penalty phase instructions: "This Court is not required to follow your recommendation." A. C36.

3. The Court Did Not Give Proper Weight To The Jury Findings And Recommendation.

Florida's capital sentencing law as construed since Tedder v. State, supra, requires that the judge follow a jury recommendation for life imprisonment unless "the facts suggesting a sentence of death" are so "clear and convincing that virtually no reasonable person could differ." Id. at 910. See cases collected in Walsh v. State, 418 So.2d 1000, 1003-1004 (Fla. 1982). As stated recently in Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983), "a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." The Court does not "countenance the denigration of the jury's role." Id. The record in a case should be viewed objectively to determine whether the jury could have been influenced by legitimate sentencing factors in making its recommendation. McCampbell v. State, 421 So.2d 1072, 1075-76 (Fla. 1982). Even where a judge makes fact findings that are "within his domain as the trier of fact", it is still necessary to examine the record to determine whether the jury's giving different "credence to ... [the] testimony than the trial judge" is a permissible and reasonable application of the aggravating and mitigating factors. Cannady v. State, 427 So.2d 723, 731 (Fla. 1983). Thus it is not enough for the court to decide if there is a factual basis for the judge's findings; it must also decide whether there is a rational basis for the jury findings. Cannady, supra; Hawkins v. State, 436 So.2d 44, 47 (Fla. 1983); Washington v. State, 432 So.2d 44, 48 (Fla. 1983) (Boyd, J. "We do not find the remaining

aggravating circumstances are of such grave nature that virtually no reasonable person could differ . . .").

Judge Olliff's rejection of the jury verdict because of the close 7-5 vote is not permissible under Tedder. This Court has held that "it is not material what number of the majority of the jury recommends a sentence of death or recommends a sentence of life." Dobbert v. State, 409 So.2d 1053, 1057-58 (Fla. 1982). The validity of the jury decision should depend on the facts and not the size of the vote.

At pages 12-41 below, we examine each aggravating and mitigating circumstance at issue in this case, and show either that Judge Olliff's findings are unsupportable or that contrary jury findings are thoroughly supportable or both. But even on the face of the sentencing order, Judge Olliff has singularly failed to state or demonstrate a sufficient basis under Tedder for disregarding the jury's advisory verdict of life imprisonment. That verdict scrupulously distinguished between the degree of Dougan's culpability and Barclay's.*/ Judge Olliff concluded that Barclay was a major participant, but he did not, and could not rule that there were not differences between Barclay's role and Dougan's. The jury decision finding vital differences between their roles was entirely reasonable and supported by the evidence. See page 41, infra.

The Tedder rule seeks to preserve the citizens' historic role in the life-death decision making process. Juries of 12 citizens better represent the community conscience than does a single judge.

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*/ The jury also distinguished between Barclay's role and that of Hearn, Evans and Crittendon. At sentencing, the State chose to prove the involvement of these three in a second murder, the Roberts murder, with which Barclay was simply not involved.

Florida provides no peremptory challenge of a Judge who repeatedly overrides jury verdicts against the death penalty and never finds a single mitigating circumstance applicable to the defendants he sentences to death. The defendant can challenge the one percent of jurors who would vote for death in every first degree murder case. Thomas v. State, 403 So.2d 371, 374-376 (Fla. 1981); Grigsby v. Mabry, 569 F.Supp. 1273, 1307 (E.D. Ark. 1983). The Tedder rule is the only protection against an "automatic death penalty" judge.

4. Constitutional Challenge to the Jury Override.

Appellant preserves the objections that a trial judge's override of a jury verdict against the death penalty violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.*/

B. Sufficient Aggravating Circumstances Do Not Exist To Justify The Death Sentence.

1. Whether the "defendant knowingly created a great risk of death to many persons." Fla. Stat. §921.141(5)(c).

a. The Trial Court Finding Is In Error.

The trial court concluded that Barclay and the other defendants "created a great risk of death to others, before, during

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*/ This Court has rejected these contentions but the United States Supreme Court will review them in Spaziano v. Florida, No. 83-5596, cert. granted 52 U.S.L.W. 3509 (Jan. 9, 1984). Petitioner urges the related claim, also presented in Spaziano, supra, that in his case the standards applied to determine if a jury override was permissible violate the constitutional provisions cited above, because the Tedder rule was not applied or applied too vaguely and loosely to comport with the Constitution. Petitioner made the objections in the trial court. A. D1; C4.

and after the murder." The conclusion was based on two circumstances found by the Judge, i.e. (1) that the defendants passed over several other people before Orlando was selected as the victim, and (2) the tapes sent to the media several days after the homicide were a "call for revolution and racial war".

The court's conclusion that §5(c) applied to Barclay is flawed both legally and factually. This homicide did not create a serious probability of death for a large group of people. The finding is inconsistent with this Court's construction of subsection 5(c). Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979), held that "'Great risk' means not a mere possibility but a likelihood or high probability" of death to many persons. The provision requires (1) that the risk of death be to many people, not just one or two,*/ and (2) that there must be something in the nature of the homicidal act itself (as in arson or the use of explosives) or in the defendant's conduct immediately surrounding the homicidal act, which created such

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*/ See Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979) (5 shots fired in bakery with two other present; held not "many" persons); Odom v. State, 403 So.2d 936, 942 (Fla. 1981); (two women present when shotguns fired at victim; held not "many" persons; Lewis (Robert) v. State, 398 So.2d 432 (Fla. 1981) (same; Odom's accomplice; Judge Olliff reversed); Blair v. State, 406 So.2d 1103, 1107-1108 (Fla. 1981) (victim alone with defendant in house; child outside; held "one or two" is not "many" persons); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981) (Shooting close to major highway, but with pistols at close range; few not "many" suffered risk of injury); Johnson v. State, 393 So.2d 1069, 1073 (Fla. 1981), (gun battle in pharmacy, 3 present; held not "many"); Williams v. State, 386 So.2d 538, 541-542 (Fla. 1980) (two people held not "many"); Brown v. State, 381 So.2d 690, 696 (Fla. 1980) (robbery of shop, no indication of numbers, held not "many" persons endangered); Lewis (Enoch) v. State, 377 So.2d 640, 646 (Fla. 1979) (victim's son and daughter in yard when shots fired; held not "many" persons); Dobbert v. State, 375 So.2d 1069 (Fla. 1979) (Defendant killed one child, abused 3 others; held not "many" persons; Judge Olliff's finding vacated).

a risk.*/

There is neither a finding nor a factual basis to support the conclusion that Barclay created a great risk to many persons "during" the murder, which endangered no one but Orlando who was alone in a deserted area. The 1980 sentencing order contains no reference to danger created by any fact immediately surrounding the homicide.**/

Judge Olliff's conclusion about a risk "before" the murder is also flawed. It is simply illogical to find a great risk of death to many people in the defendant's very act of avoiding groups of people. The state presented testimony that it was Dougan's plan to set out to kill one person; that the group searched until they found one person; and that they took him to a still lonelier spot where the murder took place. None of the people who were passed over by the defendants were

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*/ Bolender v. State, 422 So.2d 833, 838 (Fla. 1982) (others present but defendant never directed actions or weapons to endanger them); Ferguson v. State, 417 So.2d 631, 643, 645 (Fla. 1982) (eight people in house shot, six killed; each homicide without risk to others; held inapplicable); Tafero v. State, 403 So.2d 355, 362 (Fla. 1981) (attempt to run roadblock, stopped by police gunfire; held inapplicable); Mines v. State, 390 So.2d 332, 337 (Fla. 1980), cert. denied, 451 U.S. 916 (1981) (defendant killed woman, took hostage, fled in car at high speed; finding vacated because only conduct surrounding homicide, not after-occurring acts, may provide basis for "great risk"); Dobbert v. State, supra, 375 So.2d at 1070 (strangulation murder did not create great risk, despite abuse of other children; Judge Olliff finding vacated); Elledge v. State, 346 So.2d 998, 1004 (Fla. 1977) (Defendant committed another homicide in another city after victim killed; "only conduct surrounding the capital felony for which the defendant is being sentenced may be considered").

**/ It omits the 1975 order's reference to the note left on the body. Nothing about that note, which was left near a trash dump in a deserted area, could possibly meet the Kampff test of creating "a likelihood or high probability" of death to many. A "mere possibility" that the note might have been handled by the authorities or news media in such a way that it would inflame others to kill is insufficient under Kampff.

attacked. A construction making § 5(c) applicable to every murder in which a defendant 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." Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (plurality opinion).*/

Similarly, the conclusion of a great risk "after" the murder fails to meet the Kampff test. The conclusion based upon distribution of tape recordings to the media is flawed because it relates to events several days after the homicide and because it is based on speculation. In White v. State, 403 So.2d 331, 337 (Fla. 1981), the Court held "that a person may not be condemned for what might have occurred. The attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance." The assertion that the tapes endangered a half million people in Jacksonville is speculation about what might have happened if the circumstances had been different, and is contrary to what did occur. The only relevant evidence contradicted the speculation: Mr. Martin, a newscaster, testified that he only broadcast "a section of the tape that I would feel would be non-inflammatory". A. E48-49. There was no evidence about public reaction to the tapes, and no evidence of a "high probability" of death created by people hearing the expurgated tapes.**/

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*/ The order says the defendants parked twice and cased areas where they were thwarted by the circumstances and "thus five persons were saved". There is still no validity to the notion that "casing" the five to select one victim created a "high probability of death" for all five of them.

**/ Indeed, if the Jacksonville community were as endangered and as inflammed as Judge Olliff says, it would not have been possible to conduct a fair trial in that community.

Furthermore, Judge Olliff's description of the tapes includes a characterization and interpretation which is not supported by their actual content. He describes the tapes as "a call for revolution and racial war". But if the tapes are studied carefully, it is apparent that no speaker asks anyone to participate in a revolution or join a racial war. The speakers did assert that a war or revolution had begun, but there was no language urging blacks or whites to commit acts of violence. There was no literal "call" upon anyone to join a revolution. Nor is there any evidence that the parts of the tapes which Judge Olliff construed as a call to racial war and revolution were ever made public by the media. A. E48-49.

b. There Is a Rational Basis For a Jury Finding Rejecting The Applicability Of Subsection 5(c).

If we assume arguendo that one or more of the theories relied upon by Judge Olliff is a permissible application of subsection 5(c), it was nevertheless error for him to reject the jury's contrary finding. There are rational grounds to believe that the murder did not create a great risk of death to many persons. A rational decision to reject the factor can be predicated on any of a number of grounds: (1) the fact that only one victim was present; (2) the fact that the defendants did avoid areas where other people were present; (3) a jury refusal to speculate about "what might have happened"; (4) a view that whatever the intent of the tapes there was no "high probability" of death with the tapes in the hands of the authorities.*/

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*/ Four tapes were intercepted by the police before the envelopes were opened. A. E45; 44. The envelope addressed to Orlando's mother was given to the police unopened. A. E44.

In addition, we know that the jury found important distinctions between Barclay and Dougan. The jury knew of Dougan's leadership role in directing the group in looking for a victim and in making and mailing the tape recordings. Even if the jury thought the great risk factor might apply to Dougan, Barclay's secondary role in these aspects of the case permits a rational distinction between Dougan and Barclay.

Whatever might be one's individual viewpoint about these facts it cannot fairly be said that a jury would be irrational or unreasonable in finding the facts with respect to "great risk" to be either not proved or simply too tenuous to justify a death sentence for Barclay.

2. Whether the murder "was committed while the defendant was engaged ... in the commission of ... a kidnapping." Fla. Stat. §921.141(5)(d).

a. The Trial Court Finding Is In Error.

The facts related in the sentencing order in support of the kidnapping aggravating circumstance are nowhere to be found in the record. The order states that the defendants "by force and/or threats kept (Orlando) ... in their car until they found an appropriate place for the murder." A. B26. But the only witness who testified about the car ride, William Hearn, said that Orlando got in the car voluntarily, joked and exchanged pleasantries, and rode with the defendants without any threat or force being used. A. E132-135. Orlando asked the other passengers if they smoked marijuana and said that he could buy some from a friend. There is no evidence that he protested in the slightest when Dougan ordered Hearn to pass the

street which Orlando had designated as the one where they could buy the marijuana. It was only when Dougan told Orlando to get out of the car at the site of the homicide that Orlando first indicated any unwillingness to accompany the occupants of the car in which he had hitched a ride. A. E132-135. There is simply no evidence that he was kept in the car by force or threats or transported against his will.

At the close of the trial, the Judge himself had deemed the evidence insufficient to establish a kidnapping for the purpose of giving a jury instruction as to felony-murder and all counsel including the prosecutor agreed. A. E178-179. The prosecutor actually contradicted a kidnapping theory, stating in his jury argument that Orlando was unaware of danger during the ride. A. E-205. The sentencing findings did not establish kidnapping under the laws in effect at the time of the crime.*/ Judge Olliff implicitly acknowledged the force of this argument by changing his order in 1980 to rely upon a new statute, Fla. Stat. §787.01 which did not take effect until October 1, 1975. A. B25. But there is no evidence to fit the new definition either. Furthermore, this violated the ex post facto clause of the Constitution of the United States and Article I, Section 10 and Article 10 Section 9 of the Constitution of Florida. Lindsey v. Washington, 301 U.S. 397 (1937); Weaver v. Graham, 450 U.S. 24 (1981). The kidnapping finding also violated the due process clause of the Fourteenth Amendment because it rests on no evidence. Thompson v. Louisville, 362 U.S. 199 (1960).

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*/ See Fla. Sta. §§805.02 (kidnap for ransom) and 805.01 (false imprisonment or kidnap). There was neither evidence nor a finding of an intent to collect a ransom or to forcibly or secretly confine or imprison the victim.

b. There Is A Rational Basis For A Jury Finding Rejecting Kidnapping As An Aggravating Circumstance.

Assuming arguendo that one could find some basis to support Judge Olliff's conclusion with respect to kidnapping, it was nevertheless error to overrule the jury verdict on the point. Tedder v. State, supra. The jury cannot be faulted as unreasonable for accepting the facts put forward by the only eyewitness to the crime and the prosecution. A. E-205. It was entirely reasonable for the jury to find nothing in subsection 5(d) which would be sufficient to justify a death sentence.

Nothing about the circumstances of the case leads inexorably to a conclusion that a kidnapping factor required a rational jury to vote for death. Even if it is assumed arguendo that it was in some non-technical sense "kidnapping" to transport a hitchhiker with intent to harm him, the absence of force in transporting him would support a rational judgment that such "kidnapping" was not a "sufficient" aggravation of the murder itself to justify a death sentence.

Finally, it would not be irrational for the jury to focus on Barclay's personal role as a back seat passenger, while Hearn drove and Dougan gave orders, and to conclude that it would be inappropriate to apply the kidnapping factor to Barclay even if it did apply to Dougan. Distinctions between Barclay and Dougan based on Dougan's leadership are not unreasonable.

3. Whether the defendant committed the murder "to disrupt or hinder the exercise of any governmental function or the enforcement of laws." Fla. Stat. §921.141(5)(g).

a. The Trial Court Finding Is In Error.

Section 5(g) was intended to deter attacks on government officials. Orlando was a young hitchhiker with no connection with the government. The trial court's conclusion that §5(g) applied to Barclay rests on the same erroneous factual interpretation which was used to support the "great risk" finding, e.g. the idea that the taped messages were a "call" to revolution against the government. The evidence does not support the fact finding. While the taped messages threatened "white people", none of the tapes mentions the government. There was no evidence that the defendants intended to overthrow the government or that they took any actions aimed at doing so. No testimony supports the idea that the defendants were attempting to incite an attack on the government by killing a hitchhiker on a deserted dirt road.

The finding of interference with a governmental function or hindrance of law enforcement is not supported by this Court's precedents applying subsection 5(g), which have all dealt with murders to avoid prosecution, or of police officers, informants or witnesses.*/

Subsection 5(g) should be applied using the reasoning stated in interpreting the "great risk" factor in the Kampff case, supra. A death sentence based on interference with the government should

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*/ The Florida Supreme Court cases applying this factor are collected in the appendix and there is no case parallel to the facts of this case which applied this factor. A. H1.

neither rest on speculation about what might have occurred, nor on a "mere possibility". The courts should demand proof beyond a reasonable doubt of a "likelihood or high probability" of a disruption or hindrance of government. Cf. Kampff, supra. A death sentence should not rest on quixotic rhetoric after the homicide which had no actual impact upon the functioning of government.

A limiting principle is needed to save the statute from unconstitutional vagueness and overbreadth particularly if it is to be applied to political speech. Subsection 5(g) is unconstitutionally vague and overbroad under the First Amendment and the due process clause of the Fourteenth Amendment as applied to Barclay's taped messages. Godfrey v. Georgia, 446 U.S. 420 (1980). Alternatively, the finding under this section denies due process because it is based on no evidence of the statutory factors. Thompson v. Louisville, supra.

b. There Is A Rational Basis For A Jury Verdict Rejecting The Applicability of Subsection 5(g).

It was surely rational for the jury to reject the idea that the case involved an attack on the government where no government official was involved and the prosecutor never made such a contention. The jury could not be faulted for failing to predicate its decision on speculation about possible consequences of the defendants' actions which never occurred. Even if some might accept Judge Olliff's finding equating a threat to "white people" with a threat to "government", a jury cannot be faulted as irrational for making a distinction between the two. Similarly, the jury might rationally have decided that there was no realistic possibility that the discovery of the body of a young hitchhiker on a dirt road would

spark the population to revolt against the government. The jury also might rationally have concluded that there was no evidence that Barclay believed that the murder would start a revolution and that this was not a true motive.

Finally, the jury might rationally have concluded that Dougan's leadership role in planning the crime and scripting and mailing the taped messages, and Barclay's role as a follower who obeyed Dougan's orders and read his script, justified a distinction between Barclay and Dougan with respect to this aggravating factor. The jury was not unreasonable in failing to find subsection 5(g) applicable to Elwood Barclay.

4. Whether the murder was "especially heinous, attrocious or cruel." Fla. Stat. §921.141(5)(h).

a. The Trial Court Finding Is In Error.

The trial court conclusion that the murder was "especially heinous, atrocious or cruel" is based on factual assertions which are inconsistent with the evidence and a failure to apply the proper limiting definition to subsection 5(h).

The sentencing order recites that the "defendants, premeditatedly and deliberately stalked their victim and brutally murdered him." There was testimony that the defendants rode around looking for a victim before they saw Orlando, but no testimony that Orlando himself was ever "stalked". Hearn's testimony indicates that Orlando was unaware of any danger until moments before Dougan shot him. The prosecutor told the jury this. A. E205. Thus the "stalking" finding is unsupported and premeditation alone does not set the crime "apart from the norm of capital felonies". State v. Dixon, 283 So.2d 1, 9 (1973);

Kampff v. State, 371 So.2d 1007, 1008, 1010 (1979).

The sentencing order also relied on the racial motivation of the murder in support of this conclusion. But there is no evidence that the victim was aware of this motivation or that it contributed to his suffering so as to make the crime "unnecessarily torturous to the victim". State v. Dixon, supra. Racial or political motivation seems irrelevant to the stated issue of whether the crime was "torturous".

The sentencing order recited that the victim was "repeatedly stabbed by Barclay as he writhed in pain begging for mercy. Then Dougan shot him twice in the head at close range." A. A27. But this finding is contradicted by the only eyewitness, William Hearn, who stated that the taped claims that the victim begged for mercy were untrue and that the tapes exaggerated the account for propaganda purposes. Tr. 1403. There was no testimony that Orlando "writhed in pain." Nothing about the manner of Orlando's death sets it apart as more torturous than a number of stabbing and shooting cases where this Court has vacated findings based on subsection 5(h).*/

Recently in Rembert v. State, ___ So.2d ___, 9 F.L.W. 58 (Fla. 1984) a unanimous Court affirmed a murder conviction but reversed a jury-recommended death sentence even though this Court

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*/ See Halliwell v. State, 323 So.2d 557 (Fla. 1975) (victim beaten to death with 19 inch breaker bar; held "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court."); Simmons v. State, 419 So.2d 316, 318-19 (Fla. 1982) (bludgeoning with roofing hatchet held not especially heinous, atrocious or cruel); Demps v. State, 395 So.2d 501, 503, 504, 506 (Fla. 1982) (multiple stab wounds; §5(h) inapplicable); Lewis v. State, 377 So.2d 640, 646 (Fla. 1979), (multiple shooting while trying to flee, §5(h) not applicable); and see Riley v. State, 366 So.2d 19, 20, 21 (Fla. 1978); and Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Menendez v. State, 368 So.2d 1278 (Fla. 1979) (storekeeper shot twice and died; §5(h) not applicable); McCray v. State, 416 So.2d 804, 805, 807 (Fla. 1982).

concluded that there was a valid aggravating circumstance. The Court based its decision on the fact that the act of hitting the victim once or twice with a club was not especially heinous, atrocious or cruel even though the blows brought about death. Here, Barclay's acts against Orlando were clearly not the cause of death and were not especially cruel. State v. Dixon, 283 So.2d 1 (Fla. 1973).

The Rembert decision also reveals this Court's concern, on review, with other first degree murder cases and the fact, conceded by the State in Rembert, that "in similar circumstances many people receive a less severe sentence," footnote, 9 F.L.W. at 60. If the State is candid with this Court it can scarcely avoid a similar concession in this case. At the sentencing trial, the State introduced proof of the murder of a second victim, Stephen Roberts, who, according to the State's witness, was murdered by Evans and Crittendon accompanied by Hearn. The State sought and obtained indictments for this second murder but, after Dougan and Barclay were sentenced to death, entered a plea bargain with these defendants in the Roberts murder.

The undisputed fact is that Elwood Barclay was not involved in any way with the Roberts murder. The State put on testimony which demonstrated this second murder was very similar to the first -- a white victim selected at random, a note from the Black Liberation Army left with the body. Thus, according to the State's own proof in this very case, it is demonstrated that persons in similar (or, in fact worse) factual circumstances received a less severe sentence and the Court should consider this fact in the same light that the unanimous Court considered the similar fact in Rembert.

The Court does not permit this factor to rest on "events occurring after death, no matter how revealing of depravity and cruelty". Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). Thus the tape recordings cannot support this finding.

The sentencing order is premised on facts which conflict with the only eyewitness testimony. Its legal conclusion rests on the trial judge's subjective analysis which departs from the definition of "especially heinous, atrocious or cruel" announced by this Court in State v. Dixon, supra, and subsequent cases.

b. There is a Rational Basis For A Jury Verdict That Barclay's Participation In The Murder Was Not Especially Heinous, Atrocious or Cruel.

The jury took a view of the facts which led it to recommend life for Barclay and death for Dougan. The record supports a jury view of the facts quite different from those in the sentencing order. For example, while the trial judge said Barclay stabbed Orlando, and some testimony supports this, the testimony also indicated that Evans (who was found guilty of second degree murder) had the knife and stabbed Orlando. A. E89, E93, E101-102. The jury might have reasoned that Hearn's account of Barclay and Evans moving up and down behind the car really did not make it possible to distinguish between the wounds inflicted by Barclay and those inflicted by Evans. The jury's distinction between Barclay and Evans may have been based on Evans's youth and subordinate status in the karate group rather than any idea that Barclay injured the victim more than Evans did. A. E89, E101-102, Tr. 1257.

It was unclear to what extent the stab wounds were inflicted after the victim had been shot by Dougan and was dead or in deep shock. Medical testimony indicated that Orlando died quickly and that some of the wounds were post-mortem. A. E109-110. The medical examiner described all of the knife wounds as superficial and said that none penetrated deeply. A. E29. Thus the jury could reasonably draw a distinction between Barclay and Evans who inflicted non-fatal wounds and Dougan who fired the fatal shots. Hearn's account did make it clear that Dougan struck the first blow and fired the fatal shots. Hearn denied that the victim begged for mercy. A. E156. Thus a jury conclusion that the murder was not "torturous" would be rational.

The jury recommendation that Barclay's life be spared should be given great respect with regard to the racial and political factors, because the jury represents the conscience of the community. The jury heard all the evidence -- the voices on the tapes, Hearn and all the rest -- and decided that the racial motivation did not justify a death penalty for Elwood Barclay. The trial judge disagreed reciting his personal experiences, including those in World War II. But this is exactly the type of judgment issue where the jury verdict should carry the greatest weight. The very uniqueness of the judge's life experience makes it necessary that deference be given to the jury's role as the more representative and authentic voice of community conscience. The jury in this case included two black persons. The judge's assertion that racially motivated crimes are "one of the rarest types of crimes" reinforces the point. With an uncommon crime, where the judge's sentencing experience was no greater

than the jury's Tedder v. State, supra, casts the balance in favor of the jury.

The jury verdict is reasonable on another ground related to the racial issues. Our nation's sad history of lynchings of black people is a historical fact. The perpetrators of racially motivated killings have rarely been punished and the death penalty for those who lynched blacks was unknown.*/ The jury could rationally decide that the history of not punishing racially motivated murders of blacks made it inappropriate to allow the racial factor to now be made determinative. The jury could have decided to make this life-death decision based on other factors and to ignore the question of race. That judgment would have been totally rational and plausible. Thus the racial motive in the case provides no basis for ruling the jury verdict unreasonable.

The reasonableness of the jury conclusion on subsection 5(h) also turns on whether reasonable distinctions could be made between Barclay and Dougan's roles in the murder. The State's evidence was that Dougan was the leader who told everyone else, including Barclay, exactly when to appear, what to carry, what to wear, where to go and what to do. It was Dougan who took Hearn's gun and used it to kill Orlando, and it was Dougan who conceived and directed the propaganda effort following the murder. These facts afford a logical basis for a

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*/ See Appendix G.; Argument VIII, infra; King v. State, 355 So.2d 831 (Fla. 3d DCA 1978); Courtney v. State, 358 So.2d 1107 (Fla. 3d DCA 1978); Jacobs v. State, 358 So.2d 1110 (Fla. 3d DCA 1978), racially motivated murders of blacks not punished by death.

jury verdict distinguishing between the appropriate punishment of Barclay and Dougan. A rational -- indeed traditional -- moral and legal judgment would distinguish between a man who actually killed and an accomplice who did not "have the murder weapon in his hand". Slater v. State, 316 So.2d 539, 542 (Fla. 1975). The jury cannot fairly be faulted as unreasonable for its verdict distinguishing between Barclay and Dougan.

5. "Prior Criminal Activity": A Non-Statutory Aggravating Circumstance. The Trial Court Finding Is In Error.

In both the 1975 and 1980 sentencing orders the trial judge found an aggravating circumstance by holding that there was no proof of the statutory mitigating circumstance of Fla. Stat. §921.141(6)(a) that the defendant "has no significant history of prior criminal activity". The court relied on a rap sheet indicating several arrests which had not resulted in convictions, one felony conviction and a felony probation for non-violent crimes. No convictions were proved by competent evidence either in 1975 or 1980. This finding of an aggravating circumstance violates Florida law on several counts:

First, Florida's statute does not make the presence of a "significant history of prior criminal activity" an aggravating circumstance. Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). The Attorney General's brief in the United States Supreme Court acknowledged this violation of the Mikenas rule which explicitly held that the absence of this mitigating factor cannot be considered as aggravating under the statute, and that it was error to place this

nonstatutory factor in the weighing process.*/ See also Maggard v. State, 399 So.2d 973, 977-78 (1981). Although Barclay's counsel directed the trial court's attention to Mikenas, (R.T. 61) the error was repeated in the 1980 sentencing order.

Second, even as to "violent" felonies "mere arrests" do not qualify as convictions. Provence v. State, 337 So.2d 783, 786 (Fla. 1976) so holds as to §921.141(5)(b). The statute "excludes the possibility of considering mere arrests or accusations as factors in aggravation." Provence, supra at 786. Reliance upon a pending charge is an improper "nonstatutory aggravating factor". Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977).**/

Third, if a defendant does have prior violent felony convictions, these must be proved by "evidence, either at trial or during the sentencing phase," in order to warrant their consideration as a statutory aggravating factor within §921.141(5)(b); their consideration "based solely on information contained in the presentence investigation report" is forbidden. Williams v. State, 386 So.2d 538, 542-543 (Fla. 1980). Use of notoriously inaccurate and unreliable rap sheets cannot satisfy the State's burden of proving prior convictions "beyond a reasonable doubt". Williams, supra at 542.

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*/ The plurality opinion of the U.S. Supreme Court mentions this conceded state law error. See Barclay v. Florida, 77 L.Ed. 2d 1134, 1142, 1144 (1983).

**/ Judge Olliff's rulings on the point were inconsistent. First, at the joint penalty trial of Barclay and Dougan he let the prosecutor read the Roberts murder indictment to the jury, and allowed Hearn to testify about the Roberts murder. Later he ruled that the pending murder charge should not be considered an aggravating factor against Dougan, but that Barclay's prior arrests were relevant components of an "extensive record" supporting an aggravating circumstance for Barclay. A. A11.

Thus, on three distinct and unmistakable counts (one of which was conceded before the United States Supreme Court) the finding that "there is an aggravating, rather than a mitigating circumstance as to the defendant Barclay because of his extensive record" (A. B16), falls outside the contemplation of any statutory aggravating circumstance recognized by Florida's law. Since Purdy v. State, 343 So.2d 4 (Fla. 1977), cert. denied 434 U.S. 847 (1977) and Elledge v. State, supra, it has been clear that a Florida death sentence may not rest upon such non-statutory factors.*/

6. "Under Sentence of Imprisonment". Fla. Stat. §921.141(5)(a). The Trial Court Finding Is In Error.

In the 1975 and 1980 sentencing orders the trial court found that, "Although not imprisoned, the criminal record of Barclay is an aggravating circumstance." Referring to "seven prior arrests" and that he "previously had been convicted of a felony and had been on felony probation" the court found that subsection 5(a) applicable to Barclay by cy pres reasoning that the facts showed something resembling the statutory aggravating factor.

There was not the slightest substance to a conclusion that Barclay was under sentence of imprisonment. At the time of the Orlando murder, Barclay was not imprisoned, was not an escapee, was not on parole, was not on probation, and was not in any other possible sense under "sentence of imprisonment." Barclay's probation was a thing of the past, but even if he had been on

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*/ See McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Blair v. State, 406 So.2d 1103, 1108 (Fla. 1981); Odom v. State, 403 So.2d 936, 942 (Fla. 1981) (arrests and charges not culminating in convictions); Perry v. State, 395 So.2d 170, 174-175 (Fla. 1980) (same).

probation at the time of the crime, subsection 5(a) would not have applied.*/

7. "Previously convicted ... of a felony involving the use or threat of violence to the person." Fla. Stat. §921.141(5)(b). The Trial Court Finding Is In Error.

There is not a shred of evidence that Elwood Barclay was ever involved in violence of any kind apart from the Orlando case. He simply has no record of violent conduct. However, once again the trial court used cy pres reasoning to rule § 5(b) applicable to Barclay. The court said Barclay had been convicted of breaking and entering with intent to commit the felony of grand larceny, that "it is not known if such prior felony involved the use or threat of violence in the crime"; that such crime "can and often does involve violence or threat of violence - if there is a person in the building broken into." A. B22. The 1980 order concluded that "This is more of an aggravating than a negative circumstance". A. B23.

The conclusion that the statute applied when the facts were "not known" flagrantly ignores the requirement that statutory aggravating circumstances must be proved beyond a reasonable doubt. Williams v. State, supra. The conclusion is in error under this

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*/ Ferguson v. State, 417 So.2d 639, 646 (Fla. 1982); Ferguson v. State, 417 So.2d 631, 636 (Fla. 1982); Peek v. State, 395 So.2d 492, 499 (Fla. 1981). In Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979) this Court found error in a similar finding by Judge Olliff. See Ford v. State, 374 So.2d 496, 501, n.1, 502 (Fla. 1979).

The objection that Judge Olliff could not have properly found an aggravating circumstance based merely on a rap sheet quoted in the PSI without having competent proof of a judgment of conviction, also applies to this "imprisonment" finding. Williams v. State, 386 So.2d 538, 542-543 (Fla. 1980).

Court's precedents holding that only capital felonies or those which by definition involve the use or threat of violence (such as armed robbery) may be used in aggravation, unless there is proof that there was actual use or threat of violence by the defendant. Mann v. State, 420 So.2d 578, 580 (Fla. 1982); Ford v. State, 374 So.2d 496, 501 n.1, 502 (Fla. 1979); Lewis v. State, 398 So.2d 432, 438 (Fla. 1981).

Lewis, supra, is a precedent on all fours with this case where the Court reversed an identical finding by Judge Olliff. Lewis held that "two convictions of breaking and entering with intent to commit a felony" did not fall within the statutory aggravating factor which "refers to life-threatening crimes in which the perpetrator comes in direct contact with a human victim." The Lewis precedent is directly in point and is sufficient to dispose of the issue.*/

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*/ Even if Barclay's breaking and entering offense had involved violence -- facts which the sentencing order stated were "not known" -- the State could not prove the aggravating circumstances beyond a reasonable doubt by using a PSI report quoting a rap sheet. Williams v. State, supra, 386 So.2d at 542, 543; Mann v. State, supra, 420 So.2d at 581.

In an earlier brief the State argued that Barclay had the burden of disproving Judge Olliff's speculation about violence. It is illogical to shift the burden to a defendant to disprove something which is entirely unsupported in the first place. The argument is even more unfair in this case where the court file of Barclay's breaking and entering case could not be found. (R.T. 45-47). Such an unfair shift of the burden of proof would violate due process. Mullaney v. Wilbur, 421 U.S. 684 (1975); Sandstrom v. Montana, 442 U.S. 510 (1979). Fortunately Williams and Mann, supra place the burden of proof on the State.

In Barclay's case, the procedural protections vouchsafed by Williams and Mann, supra, would have been far from superfluous because the PSI report contains two versions of Barclay's record which are contradictory and produce only confusion as to the true facts about Barclay's prior encounters with the law. At the sentencing trial, the State's Attorney argued that Barclay and Dougan "didn't have any criminal history" and tried to turn the lack of criminal records into an argument for the death penalty. S.T. 114-115. The State never put on any proof to support Judge Olliff's findings about Barclay's record in 1975 or in 1980.

8. The Trial Judge's World War II Experiences - Racially Motivated Murder; Non-Statutory Aggravating Circumstances.

The sentencing orders make it clear that the racial motivation of the murder was a major reason for the trial judge imposing the death sentence. The judge made the point repeatedly. Sections labeled "COMMENTS OF JUDGE" at the beginning and end of the opinion, describe the judge's experiences and the horror of concentration camp murders in Nazi Germany. A. B7-9, B33-34. The Judge reasoned that racially motivated murder was so dangerous to society that it should be punished by death.

However, Florida's legislature has not made that judgment. It has not chosen to include the factor of racial motivation as a statutory aggravating factor. Other states have listed such factors (cf. Cal. Penal Code §190.2.(a)(16)), but Florida has not. It nowhere appears in the Florida statute that judge or jury should consider whether a victim is killed because the defendant hated a racial or other group.

A legislative judgment to omit such a factor ought to be respected. The pre-Furman procedures were viewed as racially discriminatory, and the Florida statute was intended to avoid that problem. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Omitting any statutory endorsement of racial considerations in sentencing is consonant with an effort to achieve racial neutrality. The trial court's use of racial motivation as a major ground for imposing the death penalty introduced an impermissible non-statutory aggravating factor into the sentencing equation. Purdy v. State, supra.

9. Improper Consideration Of The Same Facts As Multiple Aggravating Circumstances.

The sentencing order violates the rule that the same facts cannot support multiple aggravating circumstances. Provence v. State, 337 So.2d 783 (Fla. 1976); Riley v. State, 366 So.2d 19 (Fla. 1978). Judge Olliff used two sets of facts to support six aggravating circumstances: He found three separate aggravating circumstances based on Barclay's criminal record (see paragraphs 5, 6 and 7 above) and he found three other aggravating circumstances (great risk; hinder law enforcement; and especially heinous, atrocious or cruel) based on the taped messages. Repeated use of the same facts to "pile on" aggravating findings not only violates the Provence rule, it demonstrates the lack of objectivity of the sentencing judge, and buttresses the reasonableness of the jury verdict.

10. Due Process and Equal Protection.

The sentencing orders violate the due process and equal protection clauses of the Fourteenth Amendment. Paragraphs 1 to 9, supra, and Part C. below, show that, as applied to Barclay, the Florida capital sentencing statute denies due process and equal protection. Section 921.141 is vague and overbroad, has been applied where there was no evidence of the statutory factors, and has not been applied equally to others similarly situated to Barclay. Thompson v. Louisville, supra; Godfrey v. Georgia, supra.

C. Sufficient Mitigating Circumstances Do Exist Which Outweigh Any Aggravating Circumstances.

1. Whether defendant "was an accomplice in the capital felony committed by another person and his participation was relatively minor." Fla. Stat. §921.141(6)(d).

The Record Supports A Jury Conclusion That This Factor Applies to Barclay; The Court's Reasoning was in Error.

The judge found that this factor did not apply to Barclay, but the jury might reasonably have found that it did apply by giving "different credence to ... [the] testimony than the trial judge" (Cannady v. State, supra, 427 So.2d at 731), or by differently -- but still reasonably -- applying the mitigating circumstance to the facts. McCampbell v. State, supra.

The judge found that Crittendon, Evans and Hearn were lesser participants but that Barclay and Dougan were "major and primary participants." The order erroneously asserts that Barclay was the first to attack Orlando. Hearn testified that it was Dougan who first struck Orlando, A. E145, and there is no evidence whatsoever to the contrary. The order speculates that if Barclay had not been present Orlando might have escaped from Dougan. But the jury could reasonably reject such speculation since it knew of Dougan's advantages of size and karate expertise and that Dougan, with a gun in hand was at the car door that Orlando used, while Barclay left the car from the opposite side. The court did say that Dougan "was the originator and leading force in the idea and he wrote the note and shot the victim after Barclay repeatedly stabbed him". But the jury might have reasonably found that Barclay's role -- although first degree murder -- was nonetheless "relatively minor" (§ 6(d)) in comparison with

Dougan's role, and that the murder -- i.e. the shooting -- was "committed by another person"(§6(d)) namely Dougan. Meeks v. State, 339 So.2d 186, 192 (Fla. 1976); Slater v. State, 316 So.2d 539, 542 (Fla. 1975).

The judge said the jury verdict of second degree murder for Crittendon and Evans supports the idea that Barclay and Dougan were equally guilty. That confuses the point which the jury understood, i.e. that the mitigating factor of § 6(d) can apply to someone who is guilty of first degree murder; indeed, it applies only to such persons. The phrase "capital felony committed by another person" in §6(d) obviously refers to "non-triggermen" who have already been found guilty of capital murder. Judge Olliff wrongly equated the first degree verdict with a decision that this mitigating factor could not apply.

2. Whether the defendant "acted under ... the substantial domination of another person." Fla. Stat. §921.141(6)(e).

The Record Supports A Jury Conclusion That This Factor Applies To Barclay; The Court's Reasoning was in Error.

The state's evidence was that Dougan was the leader of the group of young men, that he was their karate teacher, and that on the night of the murder he told the others to come with him to "scare some people"; that he told the others, including Barclay, where to meet, what clothes to wear, and what weapons to bring. Dougan instructed Hearn to bring a gun and a car. Dougan directed the route to be traveled. He first told the group of his plan to kill someone after they were in the car and enroute. Dougan selected the spot for the murder. Dougan attacked Orlando first and fired the fatal shots.

Barclay and the others were karate students who obeyed Dougan's orders without question or hesitation. Dougan was older and a combat veteran of the Vietnam war. As Justice Boyd wrote, "Barclay was a follower who did exactly what he was told to do by . . . Dougan . . ." Barclay v. State, supra, 343 So.2d at 1272. The discipline of the karate class was carried forth in military style obedience to each of Dougan's orders. These facts provided an entirely rational basis for the jury to find "substantial domination." Meeks v. State, 339 So.2d 186, 192 (Fla. 1976).

The judge's contrary finding is flawed legally and factually. He erroneously reasoned that if Barclay had been dominated by Dougan then "perhaps the jury would have found him guilty of the lesser crime of murder in the second degree." Here again the judge indicates a misunderstanding of the role of mitigating factors. "Substantial domination" in §6(e) is a mitigating factor for one who is guilty of first degree murder rather than a defense to that charge. It mitigates guilt rather than proving innocence. The jury verdict is more consistent with a proper understanding of the role of mitigating circumstances, than the Court's.

Finally, the judge cites Barclay's intelligence, speaking ability, persuasiveness, marital status and family background as evidence that he was not dominated. But the jury observed these elements and might reasonably have concluded that in some circumstances an intelligent and experienced person can be dominated by an older karate instructor with his own strong and dominant personality. The jury judgment on the issue of substantial domination should be respected where facts in the record provide an adequate basis for the verdict as they do here.

3. Non-statutory mitigating factors; Barclay's life and character; the verdicts on Crittendon and Evans.

a. The judge erred by failing to consider non-statutory mitigating facts in the defendant's life and character.

It is conspicuous that neither the 1975 or 1980 sentencing order contains a finding by Judge Olliff that there were no "non-statutory" mitigating factors present in the evidence. He found that the statutory mitigating facts were not proved but stated no conclusion on non-statutory factors. There are good reasons to think that this omission was not inadvertent. Judge Olliff modeled his sentencing order after his 1974 order quoted in Dobbert v. State, 328 So.2d 433 (Fla. 1976). While in Dobbert he found explicitly that no non-statutory mitigating facts were shown; Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979), there is no such finding as to Barclay.

The judge does list many of the facts that might be thought mitigating in Barclay's life in his discussion of the factor of age; subsection 6(g). He notes that Barclay finished high school, had fathered five children, had married and separated, had worked at various jobs, was in good health, but says only that these facts don't make Barclay's age a mitigating factor. The judge never considers whether these facts are mitigating despite the fact that they don't fit the statutory categories. It is evident that the judge thought, as many Florida lawyers and judges did at the time, that the list of mitigating factors was exclusive.*/

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*/ Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) (" ...the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty ... and we are not free to expand the list."); Perry v. State, 395 So.2d 170, 172, 174 (Fla. 1980); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981).

When Barclay was resentenced in 1980 Judge Olliff had the benefit of Lockett v. Ohio, 438 U.S. 586 (1978) and Songer v. State, 365 So.2d 696 (1978), but still failed to give independent consideration to the facts about Barclay's life and character and stated no conclusion about non-statutory mitigating facts. In so doing the sentencing court violated the Eighth Amendment principles of Lockett, supra, Eddings v. Oklahoma, 455 U.S. 104 (1982), see Enmund v. Florida, 458 U.S. 782, 827-831 (O'Connor J. dissenting), and the Florida statute as clarified by Songer, supra.

b. There is a rational basis for the jury to find non-statutory mitigating factors.

It was reasonable for the jury to find non-statutory mitigating circumstances in Barclay's life and character which were sufficient to justify a life sentence. McCampbell v. State, 421 So.2d 1072 (Fla. 1983). The jury had ample basis for a judgment that Barclay had redeeming qualities and that he should be given another chance in life. Barclay has no record of committing any violent act before the Orlando case. The jury heard Barclay testify and had an opportunity to form its own judgment about his character. The judge in effect held his education, his pleasant personality and intelligence to be either neutral or even negative factors; the jury might properly have found these factors plus his work record and family background indicated that he might deserve a chance to live, that he did not present a threat to society which was so serious that a term of imprisonment was not sufficient to vindicate the public interest. McCampbell, supra. A proper respect for the jury role in reflecting the community judgment about such matters requires that the death

sentence be set aside, where as here, there are ample grounds to believe the jury was reasonable.

The jury verdicts of second degree murder for Evans and Crittendon, life imprisonment for Barclay and death for Dougan reflected a reasoned evaluation of the case. The jury viewed Barclay as more culpable than Evans and Crittendon but less culpable than Dougan. Such an evaluation was not unreasonable. The jury may have decided that capital punishment as society's instrument of retribution should be reserved only for the most culpable perpetrators of a murder. The jury's sensitivity to gradations of guilt marks a rational approach to crime and punishment.

The jury may also have been influenced by the evidence at the penalty trial that Barclay had not participated in the subsequent murder of Stephen Roberts while Evans, Crittendon and Dougan were all involved in that murder. Even had Dougan's role in the Orlando murder been less dominant and more comparable to Barclay's, the jury's distinction between the two men was amply justified by Dougan's participation in a second, unrelated murder. Also the jury sense of equity was undoubtedly evoked when it learned that Evans and Crittendon who had participated in two murders would receive less punishment than Barclay. Thus the treatment of the codefendants' cases by the jury itself, as well as William Hearn's plea bargain, were equitable considerations which support the reasonableness of the jury verdict for Elwood Barclay. Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979).

D. Conclusion.

This Court's prior decision upholding Barclay's death sentence despite Tedder rests ultimately on the reasoning that "Two co-perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted." Barclay v. State, 343 So.2d 1266, 1271 (Fla. 1977). We have shown above, however, that the jury's determination to assign a lesser sentence to Barclay than to Dougan is entirely reasonable, once the relevant facts of record -- not developed for the Court by Barclay's prior appellate counsel -- are examined. In summary:

- The entire design to kill a "white devil" originated with Dougan.

- Dougan directed the activities of his four accomplices throughout the events of the evening, telling them where and when to go and what to do at every stage.

- Dougan was the first person to strike Orlando and the only one of the accomplices to use force that resulted in death.

- The tapes publicizing Orlando's death as an incident of revolution -- so heavily relied upon by Judge Olliff as an aggravating characteristic of this offense -- were scripted by Dougan and dictated by several confederates at his direction.

- Dougan was shown by evidence at the penalty trial to have participated in a second unrelated murder along with Evans, Crittendon and Hearn, but with no involvement by Elwood Barclay.

The jury's verdict recommending life for Barclay rests upon a "reasonable basis" (Richardson v. State, supra, 437 So.2d at 1095), and Judge Olliff was therefore not free to disregard it as he did.

II.

APPELLANT WAS DENIED A FAIR TRIAL BY THE OVERZEALOUS CONDUCT OF THE PROSECUTORS.

Barclay's rights protected by the due process clauses of the state and federal constitutions were violated by several trial errors caused by prosecutorial misconduct:

A. Prosecutorial Tactics Evoked The Jury's Sympathies for Orlando's Family.

The State called the victim's step-father Mr. Mallory as a witness solely to identify the body (Tr. 154-159) despite the fact that several other identification witnesses were available.*/

Use of this witness elicited sympathy for the victim's family. The potential prejudice was realized when Mr. Mallory in an emotional moment before the jury asked the judge to order Mr. Jackson to stop calling his step-son "Orlando" and to please call him "Stephen". A. E39-40. The judge complied (Id.), and the emotional impact was such that when Jackson later resumed his prior usage another defense attorney felt impelled to join Mr. Mallory's request. Tr. 249.

The unnecessary use of a family witness was calculated to and did invoke the jury's sympathies. It violated settled Florida precedents. Melbourne v. State, 51 Fla. 69, 40 So. 189 (1906); Rowe

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*/ A next door neighbor William Colley accompanied Mr. Mallory when he identified the body. A. E38.1. Several trial witnesses knew Orlando; some saw him the night he died. See testimony of Dennis Peters, A. E158-159; Thomas Beaver, Tr. 1692; William Clark, A. E160; James Ryan, A. E165. Cf. Bobby Langston a former schoolmate who found the body. Tr. 225.

v. State, 120 Fla. 649, 163 So. 22 (1935); Ashmore v. State, 214 So.2d 67 (Fla. 1st DCA 1968); Hathaway v. State, 100 So.2d 662 (Fla. 3d DCA 1958); Barnes v. State, 348 So.2d 599 (Fla. 4th DCA 1977); Scott v. State, 256 So.2d 19 (Fla. 4th DCA 1971).

B. The Prosecutors Presented Testimony Which They Knew Was Mistaken Linking Barclay To Another Murder, Failed to Correct The Error, And Gave Inflammatory Jury Arguments.

Barclay's sentencing trial was rendered fundamentally unfair by the prosecutor's eliciting false testimony from William Hearn. Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150, 155 (1972); Lee v. State, 324 So.2d 694 (Fla. 1st DCA 1976)(same prosecutor as Barclay case, Mr. Bowden). Hearn falsely stated on direct examination that "Elwood" was present at a meeting on June 21, 1974 where Dougan, Evans and Crittendon planned another murder -- the murder of Stephen Roberts. A. F40. The prosecutor Mr. Bowden made no effort to correct Hearn's testimony, although the State knew that it was false.*/

On cross-examination Hearn said that Barclay had not been present on June 21st (A. F59-60), but the prosecutor did nothing during the presentation of the evidence to clarify or correct the

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*/ Barclay was never indicted in the Roberts murder case because it was known that he was not in town on June 21, 1974. A. E51, R.T. 7, 24, 27, 31-32. The prosecutor knew, but defense counsel did not know that Hearn had made the same mistake in a sworn pre-trial statement, but corrected it and said that Barclay was not present. Hearn's statement of Jan. 27, 1975, pp. 48-49, is not part of the record in this appeal. The redacted document provided to Barclay's lawyer is the subject of the claimed violation of Brady v. Maryland, 373 U.S. 83 (1963) contained in a Motion to Vacate which Barclay filed in the Circuit Court on January 13, 1984. Copies of that motion have been furnished to this Court.

matter or acknowledge the mistake. Instead, in closing argument the chief prosecutor wilfully exploited his assistant's impropriety in failing to correct Hearn's mistake. Rather than simply conceding that Hearn had made an error, he seized upon the error as the predicate for launching an improper argument belittling and criticizing the defense effort to correct Hearn. The prosecutor sarcastically branded the defense effort as "heartrendering" and combined a half-hearted acknowledgment of Hearn's misstatement with a denunciation of the defendants as liars and of Barclay's efforts to separate himself from Dougan. A. F63, F69. His argument plainly implied that Barclay was in fact involved in the Roberts murder, although some particular "circumstances ... kept Barclay from being there" when the murder was being planned. A. F69.

Barclay's counsel objected to Hearn's testimony about the Roberts murder, and also sought a severance of his penalty trial because of the Roberts murder testimony. A. F1-F36, F48, F55. He also objected to the prosecutor's inflammatory argument and sought a mistrial all to no avail. A. F70-71. The State's entire penalty presentation was improperly emotional, consisting of no new evidence about Barclay, but instead a third replay of the tapes, followed by an emotional argument which asked the jury to vote a death recommendation to take the burden off the judge, to deter future crimes, to keep the streets safe, and to lay down a gauntlet against criminals. A. F61-72. The prosecutor, a long-time state attorney, offered his opinion and experience to the jury on the relative seriousness of the crime ("this is the most cruel and calculated and deliberate exercise in homicide than (sic) any of you or I have ever seen or ever will

see." A. F65, 66.*/ Such tactics offend the Constitution. Hance v. Zant, 696 F.2d 940, 952 (11th Cir. 1983); Brooks v. Francis, 716 F.2d 780 (11th Cir. 1983); Tucker v. Zant, 11th Cir. No. 85-8137, January 20, 1984; Teffeteller v. State, 439 So.2d 840, 844-45 (Fla. 1983).

The jury majority verdict recommending a life sentence for Barclay did not render harmless the penalty trial errors. Judge Olliff expressly relied on the closeness of the jury vote as a reason he felt free to disregard the advisory sentence. A. A9.**/ Five jurors' confused and mistaken notions that Barclay was even peripherally involved in another murder, might have been just enough to cause those jurors to vote for a death sentence.

C. The Jury Learned Of Extraneous Murder Charges.

During his opening statement, prosecutor Bowden began to read the indictment charging Dougan, Evans, Crittendon and Hearn with the murder of Stephen Roberts. An objection stopped the reading before the date and victim's name had been given. A. E1. A mistrial was denied. A. E1-E23.

Because of the way the reading was interrupted, the jurors could readily infer that there was another indictment. Hearn's name

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*/ The prosecutor improperly argued that mitigating factors were aggravating (A. F64), argued without any evidentiary basis (and contrary to the truth) that the defendants had "every break in life" (A. F64), speculated on what might have happened if the knife had gone home (A. F68), and urged the jurors not to send the defendant to an "air-conditioned jail." (A. F69.5).

**/ Although Judge Olliff has overridden juries in imposing death in a number of cases he did give a life sentence in a case where the jury recommendation was unanimous. See State v. Grant, No. 82-140 CF. 4th Judicial Circuit, May 13, 1983.

had been read and they knew that Hearn was not named in the Orlando indictment. But they had no way to know that Barclay was not charged in the other indictment.

The error was compounded when Mr. Bowden apparently subsequently attributed "murders" to the defendants using the plural. Crittendon's lawyer pointed this out and Judge Olliff stated that he remembered the statement by Mr. Bowden. Dougan's lawyer -- Ms. Micks -- also said she heard it and all of the defendants joined in another motion for a mistrial which was denied. A. E25-26.*/

The prejudice was similar to that in Jones v. State, 194 So.2d 24 (Fla. 3d DCA 1967) where the prosecutor's mention of "mug shots" indicated other crimes were charged against a defendant. The indictment of Barclay's codefendants in another murder was irrelevant to his guilt and should not have been made known to the jury.**/ Barclay was subjected to the danger of guilt by association because the jury's perception of him may have been colored by the knowledge of his friends' involvement in the collateral matter. Fulton v. State, 335 So.2d 280, 285 (Fla. 1976). Even worse, Barclay was subject to the false impression that he was himself charged in the separate indictment.

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*/ Although the statement was noticed contemporaneously by counsel and the judge we are unable to find the plural "murders" in the transcript. Later Mr. Bowden mistakenly used the name Stephen Roberts when questioning Hearn about Stephen Orlando. A. E150.

**/ Williams v. State, 110 So.2d 654 (Fla. 1959); Williams v. State, 117 So.2d 473 (Fla. 1960); Weiss v. State, 124 So.2d 528 (Fla. 1960); State v. Norris, 168 So.2d 541 (Fla. 1964); Hirsch v. State, 279 So.2d 866 (Fla. 1973); Whitted v. State, 362 So.2d 668 (Fla. 1978); Drake v. State, 400 So.2d 1217 (Fla. 1981).

III.

THE TRIAL COURT DENIED DUE PROCESS
BY EXCLUDING RELEVANT DEFENSIVE EVIDENCE.

Appellant was denied due process under the federal and state constitutions when the trial court refused to allow the defense to present testimony by police Sgt. Butch Garvin.*/

Sgt. Garvin was the police investigator in charge of another Jacksonville area murder during August 1974 where a victim was found with the initials BLA carved in the body. A man named Paul John Knowles, who had no connection with the defendants in the Orlando case, was indicted for that crime. This testimony would have supported the defenses of Dougan and Barclay who testified that they merely made propaganda tapes about murders done by others. Garvin's testimony separating them from another murder bearing the same "BLA" hallmark would have buttressed their defense. It would have served to create a reasonable doubt as to their guilt.

The judge refused to allow the defense to even call Sgt. Garvin to the witness stand, sustaining an objection by the State that his testimony would not be relevant. A. E166-170. But the evidence was clearly supportive of the defense case and it should have been left to the jury to decide its weight and persuasiveness. The court pre-empted the jury fact finding role by not allowing the witness to testify. The exclusion of such evidence was an error which unfairly

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*/ While Garvin was called by Dougan's lawyer Mr. Jackson, it was agreed throughout the trial that objections and arguments for each defendant would be adopted by the others, unless someone expressly opted out. See A. E26-27, E46-47.

prevented the defendants from supporting their case with authentic circumstantial evidence. Huff v. State, 437 So.2d 1087, 1091 (Fla. 1983). This violated due process and the doctrine of Chambers v. Mississippi, 410 U.S. 284 (1973).

IV.

BARCLAY'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE INFRINGED BY THE STATE'S USE OF EVIDENCE OF DOUGAN'S INVOLVEMENT IN ANOTHER MURDER AT A JOINT SENTENCING TRIAL.

Barclay moved for a severance before trial, and again before the sentencing trial; both motions were denied. A. C8; A. F1-F36. The renewed motion came when it became known that the State would call William Hearn to testify about Dougan's involvement in ordering Evans and Crittendon to murder Stephen Roberts. The trial judge ruled that the State could not bring out the "gory facts" of the Roberts murder, (A. F-31, F54) and otherwise made no rulings or instructions to protect Barclay against the prejudicial impact of evidence about a crime in which he had no involvement.*/ The collateral crime evidence was improper even as to Dougan.**/ It was in no way probative or relevant to a proper individualized consideration of Barclay's sentence because he was not involved in that crime. Such a consideration violated Florida law when the irrelevant collateral crime was made the "feature" of the

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*/ Barclay repeatedly objected to the evidence. (A. F1-36; F48, F55). Even the "gory facts" limitation on the State was no protection for Barclay because Dougan's counsel developed the details on cross examination. A. F42-57.

**/ The State offered it to show a non-statutory factor, Dougan's "propensity" for crime, but he had not been convicted of the Roberts murder. See Elledge v. State, supra; Provence v. State, supra. The Roberts murder indictment against Dougan was eventually nol prossed.

sentencing trial; Hearn was the only state witness at the hearing. Williams v. State, 117 So.2d 473 (Fla. 1960); Williams v. State, 110 So.2d 654 (Fla. 1959); Hirsch v. State, 279 So.2d 866 (Fla. 1973); Whitted v. State, 362 So.2d 668 (Fla. 1978). The trial judge permitted the evidence without even a limiting direction to the jury that it could only be considered as to Dougan. Barclay was thus subject to the danger of "guilt by association" reasoning. It harmed Barclay even though a jury majority recommended life because of the importance placed by the sentencing judge on the closeness of the vote. The denial of a severance combined with the use of the collateral crime evidence introduced impermissible unreliability and unfairness into the capital sentencing procedure, because the evidence had no bearing on the circumstances of Barclay's own life and crime. Lockett v. Ohio, supra; Eddings v. Oklahoma, supra; cf. Fulton v. State, supra.

V.

FLORIDA'S MURDER AND CAPITAL SENTENCING STATUTES WERE UNCONSTITUTIONAL AS APPLIED TO BARCLAY BECAUSE OF VAGUENESS AND OVERBREADTH.

A. Identical Definitions For First and Second Degree Felony Murder.

Barclay moved to dismiss the indictment on federal constitutional grounds because the Florida statute's identical definitions for first and second degree felony murder made the law unconstitutionally vague. (A. C1-2).*/

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*/ The law in effect then was §782.04(1)(a) defining first degree murder and §782.04(2) defining second degree murder. Ch.72-724, Laws of Florida (1972). Both first and second degree felony murder was an unlawful killing "when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb".

The trial court denied the motion (R.84-86) citing State v. Dixon, 283 So.2d 1 (Fla. 1973) where this Court held that the law was not vague since the legislature had "the obvious intention ... to resurrect the distinction" between principals in the first or second degree and accessories before the fact. Dixon, supra at 11. But, the distinction articulated in Dixon was not and could not have been applied to Barclay because the court never explained it to the jury. The jury was merely told that both first and second degree murder included a homicide "committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary or kidnapping." Compare A. C25 with C26-27, and C28 with C29. The identical language was repeated when the jury asked for a clarification. A. E208-216.

When defense counsel pointed out that the definition for second degree was "the same thing without a premeditated -- like a felony murder", and another objected that it wasn't logical, the judge remarked "I don't see anything logical about it, I just think it's marginally constitutional". A. E183.

We submit that the statute slipped over the margin and was unconstitutional as applied because it left Barclay's jury absolute and uncontrolled discretion to find either first or second degree murder on the same facts. The law permitted totally arbitrary and capricious application and thus violated Barclay's rights under the Eighth, and Fourteenth Amendments to the Constitution of the United States.

B. Vagueness of Standards For Imposing the Death Penalty.

Appellant also attacked the Florida death penalty statute as "vague, overbroad, inconsistent and indefinite" invoking the Eighth Amendment, as well as the due process and equal protection clauses.

A. C1; Motion To Dismiss Indictment. The court denied the motion citing State v. Dixon, supra. A. C5. Dixon defined the aggravating factors to avoid the vagueness inherent in the statutory language. But the Court in Barclay's case simply read the statutory list to the jury and gave them no definitions. The failure was error under Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976) holding that a proper definition of "heinous atrocious or cruel or any other listed circumstance, must be given." This violated the Eighth and Fourteenth Amendments. Furman v. Georgia, 408 U.S. 238 (1972); Proffitt v. Florida, 428 U.S. 242 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980).

VI.

BARCLAY'S RIGHTS WERE VIOLATED BY ERRONEOUS JURY INSTRUCTIONS AT THE GUILT AND SENTENCING TRIALS.

A. Guilt Phase.

1. Felony Murder Instruction.

The Judge erred in giving first degree felony murder instructions -- without any definition of the felonies -- where there was no evidence of any enumerated felony. Robles v. State, 188 So.2d 789 (Fla. 1966); State v. Jones, 377 So.2d 1163 (Fla. 1979); Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). The trial court first determined not to give a felony murder instruction after finding -- correctly -- that there was no evidence to support it.*/ However, when defense counsel asked for a third degree murder instruction, the judge complied with the State's request for a felony murder instruction

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*/ Defense counsel requested that the jury be instructed only on premeditated murder, and objected to a felony murder instruction. A. E174-181; E191-192.

solely for the ostensible purpose of making the third degree instruction comprehensible.*/

This procedure was as impermissible and prejudicial as it was unnecessary. The jury could have been informed of the relevant list of enumerated felonies, so as to make third degree murder understandable, without allowing the jury to consider and deliberate on first degree felony murder charges which had no evidentiary basis. The jury should simply have been instructed that it could not convict of felony murder. The possibility of actual prejudice to Barclay is shown by the Judge's kidnapping finding in the sentencing order. That distinguishes this case from Washington v. State, 432 So.2d 44, 47-48 (Fla. 1983).

Neither the Eighth Amendment nor Due Process can countenance a procedure which permits a jury verdict to rest on felony murder where there is no basis in the evidence for such a verdict. The Fourteenth Amendment demands that death sentences be imposed only after reliable fact finding procedures. Beck v. Alabama, 447 U.S. 625 (1980).

2. Attempted Murder Instruction Not Given.

Although defense counsel asked the judge to give instructions on "any lesser included offense," and the prosecutor inquired if there would be an instruction about "attempts," the judge declined to instruct the jury on attempted murder. Tr. 1924, 1963. Attempted murder was a lesser included offense which should have been given to

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*/ A. E184-194; E199-203. The defense objected that this was needless, E199-203, but the instruction was given, and repeated. A. C25-29, A. E208-216.

the jury under this court's precedents applying the former version of Fla.R.Crim.P. 3.510 which was in effect in 1975. Brown v. State, 206 So.2d 377 (Fla. 1968); Lomax v. State, 345 So.2d 719 (Fla. 1977); State v. Abreau, 363 So.2d 1063 (Fla. 1978); State v. Washington, 268 So.2d 901 (Fla. 1972); Rayner v. State, 273 So.2d 759 (Fla. 1973).

This court held that the failure to give an attempted murder instruction was harmless error in Dobbert v. State, 328 So.2d 433, 439 (Fla. 1976); but see dissent by Justice Boyd, 328 So.2d at 442-443. The error was not harmless in Barclay's case. The wounds Barclay inflicted on Orlando were superficial and not fatal. Brown v. State, 427 So.2d 304, 305 (Fla. 3d DCA 1983). Dougan -- not Barclay -- shot and killed him. The failure to give an attempted murder instruction was particularly prejudicial to Barclay in light of the hopelessly confusing instruction given to the jury on second degree murder.

B. Sentencing Phase Instructions.

The errors described below are fundamental constitutional errors which prejudiced the penalty decision and rendered it unreliable. The errors were harmful to Barclay to the extent they misled the 5 jurors who did not agree with the life recommendation, and to the extent that the trial court relied upon the close jury vote.

1. Burden Of Proof Put On Defendant; Failure to Give Reasonable Doubt Instruction.

The vagueness of the statute was exacerbated by the failure of the court to instruct the jury that the State had the burden of proving the aggravating circumstances, (cf. Arango v. State, 411 So.2d 172, 174 (Fla. 1982)), or that the reasonable doubt standard applied.

VII.

THE "DEATH QUALIFICATION" OF
THE JURY AND THE EXCLUSION OF JURORS
WITH SCRUPLES AGAINST THE DEATH PENALTY
VIOLATED BARCLAY'S CONSTITUTIONAL RIGHTS.

Appellant asserts several claims related to the jury selection process.

A. The process of questioning the jurors about their views on the death penalty was prejudicial and implied the defendant's guilt. It was equivalent to saturating the jury with adverse pre-trial publicity, which by focusing on penalty issues, led jurors to infer the defendant was guilty. Grigsby v. Mabry, 569 F.Supp. 1273, 1302-1305 (Ed. Ark. 1983), appeal pending; Keeten v. Garrison, not yet reported, W.D.N.C. No. C-C-77-193-M, Jan. 12, 1984. C. Haney, Juries and the Death Penalty; Readdressing the Witherspoon Question, 1980 CRIME & DELINQ. 512.*/

B. Eight venire members**/ who gave apparently disqualifying answers that their death penalty scruples would prevent their being impartial on the guilt issue, gave such answers (1) without unequivocally indicating they could not subordinate their personal views and do their duty to follow the judge's instructions on

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*/ All defense counsel joined in objecting to the court's initial instructions to the venire on their death penalty views. V.T. 3-10. Subsequently Mr. Jackson repeatedly objected to questioning of individual jurors. For example see V.T. 492-93; 496-99; 526-528; 535; 538; 544-45; 579;587;593-94;660. It was agreed that an objection by one defense counsel would serve for all. A. E26-27, E46-47.

**/ Scrupled jurors struck for cause were Leslie, VT.487-489; Tompkins, VT.525-33; Norman, VT.534-38: Barnes, VT.542-46; Wilder, VT. 577-79; Martin, VT. 585-87; Robinson, VT. 591-94; and alternate Smith, VT. 659-60.

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the law; Boulden v. Holman, 394 U.S. 478, 483 (1969); Maxwell v. Bishop, 398 U.S. 262, 265 (1970); and (2) after being misinformed by repeated statements by the judge and prosecutors that the life-death sentencing decision would be entirely out of their hands. Cf. Beck v. Alabama, 447 U.S. 625, 638-643 (1980); Woodson v. North Carolina, 428 U.S. 280, 294 (1976) (opinion of Stewart, Powell, and Stevens).*/

C. Appellant's Sixth Amendment right to a representative jury was infringed by the State's Attorneys' long-term systematic use -- in this and subsequent cases -- of peremptory challenges to remove qualified jurors who opposed the death penalty and thereby obtain a jury unfairly disposed to convict the defendant.**/ The systematic pattern of conduct by the state's attorney has been documented by Prof. Bruce Winick's survey of cases, including the Barclay case. See Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L.Rev. 1 (1982).

This Court rejected a similar claim in Dobbert v. State 409 So.2d 1053, 1057 (Fla. 1982). However, the Dobbert record was made

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*/ Jurors facing the option of acquital or death may acquit for the impermissible reason "that whatever his crime, the defendant does not deserve death". Beck, supra. The unsatisfactory alternatives could lead members of a venire to state that they could not fairly serve. This seemed to be the problem articulated by venire member Williams who objected to "taking the burden off me and putting it on the judge". V.T. 495-500.

**/ Every scrupled juror not struck for cause was peremptorily struck by the State, with one possible exception. See venire members Johnson, 198-207, 215; Thomas, VT. 219-22, 232-36; Calhoun, VT. 236-40; Jones, VT. 432-36; Williams, VT. 495-500, 503; Richardson, 492-94, 503; Smith, 561-568. The only exception was Mr. Roberson who was "against the electric chair" but was not challenged. VT.235. This comports with the five year pattern found by Prof. Winick.

before Prof. Winick completed his study, and the Court also found a procedural bar to the claim. Barclay did object to the whole death qualification process. VT. 3-10. Furthermore, evidence of the systematic five year pattern of conduct did not exist until after Barclay's trial, because the pattern occurs in numerous capital trials most of which took place after his trial. Thus, there was no way that Appellant could do any more than make the objections to the death qualification procedure that were in fact made.

VIII.
THE DEATH PENALTY WAS APPLIED ARBITRARILY, CAPRICIOUSLY AND DISCRIMINATORILY TO VIOLATE APPELLANT'S RIGHTS UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES AND HIS EIGHTH AMENDMENT RIGHTS. THE IMPOSITION OF THE DEATH PENALTY BECAUSE THE MURDER WAS RACIALLY MOTIVATED IS INCONSISTENT WITH THE SENTENCES FOR SIMILAR CRIMES.

Barclay is a black defendant convicted of killing a white person. As such he belongs to a subgroup of those persons convicted of first degree murder which is more likely than any other to be punished by execution. Such discrimination based on the concurrence of the race of the victim and that of the defendant violates Barclay's Fourteenth Amendment rights. The racial pattern has been proved by numerous scholarly studies.*/

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*/ See authorities collected in Pulley v. Harris, 52 U.S.L.W. 4141, 4149 (Brennan, J. dissenting). Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 Harv. L. Rev. 456 (1981); Radelet, Racial Characteristics and the Imposition of the Death Penalty, 47 American Sociological Review 918 (Dec. 1981); Radelet & Pierce, Race and Prosecutorial Discretion in Homicide Cases, unpublished paper presented at meeting of Am. Sociological Assn., Detroit, 1983; Bowers & Pierce, Arbitrariness and Discrimination under Post-Furman Capital Statutes, 26 Crime & Delinq. 563 (1980); Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 1983 (not yet published).

Florida has never in its history executed a white person for the homicide of a black person. Blacks who have killed white victims are in the category most frequently executed. The failure of the State to have ever executed anyone who has committed a racially motivated murder of a black person demonstrates that the execution of petitioner would be inconsistent with the punishment for similarly motivated crimes. Florida's long history of racially motivated murders is detailed in Appendix G and space permits mention of only two incidents, both closely parallel:

Shortly before the Orlando murder, Duval County white youth James A. Scarborough got a life sentence for the random racial murder of a black hitchhiker who was run over by a car which first missed him and then turned around and deliberately ran him down. See Appendix G.

In September 1974, three young white men, Dale J. King, Phillip B. Courtney and James R. Jacobs set out in a car in Dade County with the plan "Lets go shoot some Niggers." King fired a shotgun into a crowd of black people, killing two and wounding two others. King and Courtney were convicted of two counts of first degree murder, Jacobs was convicted of two second degree murders. No death sentences were imposed. King v. State, 355 So.2d 831, 835 (Fla. 3d DCA 1978); Courtney v. State, 358 So.2d 1107 (Fla. 3d DCA 1978); Jacobs v. State, 358 So.2d 1110 (Fla. 3d DCA 1978). The crime is striking for its similarity to this case, and for the disparity in the sentences.

Barclay's death sentence should be set aside by this Court in accord with its duty to assure the uniform and consistent application of the death penalty law. In State v. Dixon, supra, the Court promised that "no longer will one man die and another live on the

basis of race". 283 So.2d at 10. The execution of Barclay would belie that promise.

CONCLUSION

It is respectfully submitted that the appellant's conviction and death sentence should be reversed and set aside.

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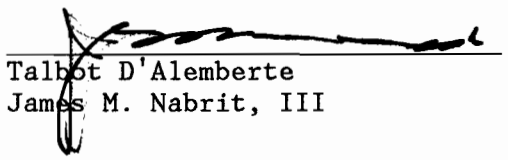
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Brief and Appendix were furnished by Federal Express this 25 day of February, 1984 to The Honorable Wallace Albritton, Assistant Attorney General, State of Florida, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301 and by mail to T. Edward Austin, Esquire, State Attorney, 600 Duval County Courthouse, Jacksonville, Florida 32202.



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