ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,765

ELWOOD C. BARCLAY, :

Appellant. :

v. :

STATE OF FLORIDA, :

Appellee. :

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

# REPLY BRIEF OF APPELLANT

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## STATEMENT OF FACTS AND PROCEEDINGS

The State's Brief contains several statements about the facts and proceedings in the trial court which we believe to be in error.

1. The State incorrectly and unfairly asserts that "Barclay's house was the headquarters for the murder group" and that "This is where the group first met together for the purpose of planning the murder." State Br. p.34. The statements are simply wrong. There is no evidence that any of the other defendants entered Barclay's house on that or any other occasion. Hearn testified that he and Crittendon waited outside Barclay's house in a car until Dougan, Evans and Barclay arrived in Dougan's car; that he did not go inside the house; that Barclay went into his house and returned and joined the group in getting into

Hearn's car. Tr. 1356-57; A. E119-120. No fair reader of this testimony could conclude from it that Barclay's home was the group headquarters, or that the murder was planned in his house. Indeed there was no planning meeting. Dougan formulated the plan and did not disclose it to the others until later when the car stopped near a monument. (Tr. 1354; A. E117; Tr. 1358-1361; A. E121-124).

2. The State's brief wrongly distorts Barclay's role by falsely calling him "Stephen Orlando's executioner" (State Br. p.22), and "the leader in making the tapes." State Br. p.7.

The State's evidence was that it was Dougan who fired the two shots which killed Orlando, and that the gunshots were the cause of death. The evidence on this point is summarized with record citations in Appellant's Brief pp.3-4. There is no evidence that Barclay was the "executioner" and the State's brief elsewhere acknowledges that Dougan was the "triggerman". State Br. pp.5,17. It was the State's witness Dr. Schwartz who used the phrase "quite superficial" in describing Orlando's knife wounds stating "None of these wounds penetrated deeply". Tr. 126; A. E29. Dr. Schwartz also made clear that some of the wounds were inflicted after the victim was dead or in deep shock. Tr. 1142-1143; A. E110.

It is equally clear that all the state witnesses who testified about the matter described Dougan and not

Barclay as the person who was the leader of the tape-making. It was Dougan who announced the meeting at Mattison's house, purchased and brought the tape recorder, wrote the script, directed the production of the tapes, and mailed them according to the witnesses Hearn, Black, Bess and Mattison. See the detailed summary of the testimony in Appellant's Brief at pp.4-5. Calling Barclay the leader of the tape-making is simply a distortion of the evidence.

3. The State's brief incorrectly says that defense counsel did not move for a mistrial when the prosecutor began reading the wrong indictment during his opening statement. State Br. p.38. However the trial judge clearly understood that counsel had made such a motion and he expressly considered and denied the "motion for a mistrial ... made by Mr. Stedeford and the attorneys for the other defendants joined in the motion." Tr. 60-61.

4. The State's brief incorrectly asserts that there was no defense objection to the reading of the Roberts murder indictment to the jury at the sentencing trial. State Br. p.8. The State is simply wrong. The long colloquy during which defense counsel sought a severance and objected to all evidence about the Roberts murder (S.T. 20-55; A. F1-36) concluded with a specific constitutionally grounded objection to the reading of the indictment which was overruled by the Court. S.T. 54-55; A. F35-36.

See also the argument concerning the use of the indictment as evidence at S.T. 39-42; A. F20-23.

5. The State contends that Barclay made no timely objection to the prosecutor's inflammatory arguments at the sentencing trial. State Br. 36-37. However it is quite clear that Mr. Buttner objected to the prosecutor's argument and moved for a mistrial immediately after the prosecutor concluded his remarks (S.T. 129-132; A. F69.10-72), and that this was timely under the very precedent cited by the State. State v. Cumbie, 380 So.2d 1031, 1033 (Fla. 1980).

## ARGUMENT

1. The State attempts to support the trial judge's refusal to accept the jury recommendation of life imprisonment by numerous citations to and arguments based on the prior decisions by this Court and the United States Supreme Court in Barclay's case. See State's Br. at pp. 9, 11, 12, 16-17, 20, 25, 26, 27, 28, 31, 32. The State's reliance upon those prior decisions is misplaced and inappropriate. Barclay was granted this new appeal because this Court held that the attorney who represented him on the first appeal had a conflict of interest and rendered ineffective assistance in violation of Barclay's Sixth Amendment rights. Barclay v. Wainwright, ___So.2d ___ 9 F.L.W. 32 (Fla. 1984). The State's arguments that the new appeal should be decided

based upon the precedent of the earlier opinions would dilute and diminish the relief won by Barclay in his habeas corpus case and subject him to continued disadvantages flowing from his ineffective appellant counsel. Barclay's new appeal should be a true de novo consideration of the merits of his arguments and trial record. The prior opinions were influenced by the fact that Barclay had no proper representation on his original appeal and should be disregarded in deciding the new appeal.

2. The State also argues that Barclay should not be given the benefit of case law that has developed in Florida capital cases since his 1977 appeal. State Br. p.12. The State gives no reason why the Court should not follow the general rule that appellate courts on direct appeal apply the law prevailing at the time of appellate disposition. See Florida East Coast Ry. Co. v. Rouse, 194 So.2d 260 (Fla. 1967); Hendele v. Sanford Auto Auction Inc., 364 So.2d 467 (Fla. 1978); R & R Lounge, Inc. v. Wynn, 286 So.2d 13 (Fla. 1st DCA 1973); United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801). The State's reliance upon the rationale of Witt v. State, 387 So.2d 922 (Fla. 1980) is misplaced. Witt applies only to post-conviction proceedings not to direct appeals. The Witt rule presupposes that the defendant had a fair direct appeal including representation of competent counsel.

The State's brief does not explain how its proposal that Barclay's new appeal should be governed by 1977 case law squares with the State's own reliance on numerous cases decided since 1977. The State does not and cannot explain any principle which could justify judging the appeal on the basis of only those post-1977 precedents which are deemed helpful to the State. Such an unfair and one-sided rule would deny due process. Barclay's new appeal should be judged by the current Florida precedents construing the applicable statutes. The failings of his prior appellate attorney were not Barclay's fault and his new direct appeal should not be burdened with an artificial and contrived rule, applicable only to this case, by which the Court would decide a 1984 appeal based on 1977 law. Barclay is entitled to have his direct appeal decided by this Court based on the Court's current knowledge and experience in applying Florida's capital sentencing law.

3. The confusing organization of the State's brief obscures the fact that it contains no defense of three of the seven aggravating circumstances found by the trial court. The State brief contains no candid confession of error but also no defense of three findings, e.g. the non-statutory aggravating circumstance finding of "prior criminal activity"; Appellant's Br. pp.28-30; the finding of "under sentence of imprisonment" Fla. Stat.

§921.141(5)(a); Appellant's Br. pp.30-31; and the finding of "previously convicted ... of a felony involving the use or threat of violence." Fla. Stat. §921.141(5)(b); Appellant's Br. pp. 31-32. The State's brief confusingly mentions these arguments only in a section purporting to deal with the "mitigating" rather than aggravating circumstances. State Br. pp. 24-27. As to the first point the State does grudgingly acknowledge a "technical violation of Mikenas", State Br. 26, despite having freely conceded the same error for its own purposes in the United States Supreme Court. See Appellant's Br. pp. 28-29. But as to the latter two findings the State attempts to deny that Judge Olliff made the findings he plainly did make by a totally misleading citation to footnote 3 in this Court's 1977 opinion which clearly and explicitly referred only to Jacob Dougan and not to Barclay. See Barclay v. State, 343 So.2d 1266, 1271, note 3, cited at State Br. p. 27.

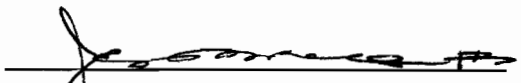
4. The State's brief argues that on the face of the sentencing order Judge Olliff failed to state or demonstrate a sufficient basis under Tedder v. State, 322 So.2d 908 (Fla. 1975), for disregarding the jury recommendation against the death penalty. Appellant relies on the Court's recent applications and explanations of the Tedder doctrine in such cases as Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983); Hawkins v. State, 436 So.2d 44, 47 (Fla. 1983); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983);

Washington v. State, 432 So.2d 44, 48 (Fla. 1983). We also urge that the judge erred in relying on the closeness of the jury vote as a basis for disregarding the jury recommendation. The sentencing order made no showing that the jury was unreasonable. Appellant's Br. pp.8-12.

The State barely acknowledges the Tedder rule, citing Tedder only once (State Br. 11) and virtually ignoring the other cases relied on by Barclay. The State does repeatedly assert in conclusory fashion that the jury was unreasonable without addressing appellant's detailed explanations of the facts in the record which justified the jury finding that "sufficient aggravating circumstances do not exist" and that "sufficient mitigating circumstances do exist." It is not "second guessing" the jury, as the State claims, to search the record for support for a jury recommendation of life. The Tedder line of cases requires just such an examination to determine whether "a reasonable basis exists for the opinion" of the jury. Richardson v. State, supra. The State has utterly failed to show that the jury decision to differentiate between Barclay and Dougan was not reasonable. Accordingly Tedder requires that the death sentence be

reversed.

Respectfully submitted,



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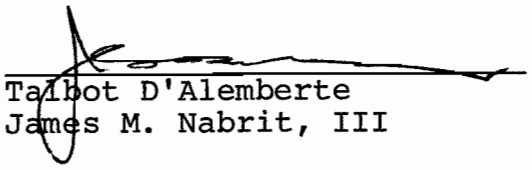
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Reply Brief of Appellant were furnished by Federal Express, this 23d day of March, 1984 to the Honorable Wallace Albritton, Assistant Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32301-8048; and by U. S. mail to T. Edward Austin, Esquire, State Attorney, 600 Duval County Courthouse, Jacksonville, Florida 32202.



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