IN THE SUPREME COURT OF FLORIDA

WILLIE BROWN

and

LARRY TROY,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

_____/

CASE NOS. 64,802
64,803
69,427

ANSWER BRIEF OF APPELLEE

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OTHERS

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PRELIMINARY STATEMENT

Appellants, Willie Brown and Larry Troy, the capital criminal defendants and movants for corum nobis relief below, will be designated individually as "appellant Brown" or "appellant Troy," respectively, and collectively as "appellants." Appellee, the State of Florida, the prosecuting authority below, will be designated as "the State."

References to the various records on appeal will be designated as in appellant Troy's initial brief. For the convenience of the Court, these designations are reprinted here:

R: Record on Appeal (Volumes I through III)
T: Trial Transcript (Volumes I through V)

> PT: Transcript of Penalty Phase
> ST: Transcript of Sentencing Hearing
> MNTT: Transcript of Hearing on Motion for New Trial
>
> Deposition transcripts will be identified by the name of the witness and the date the deposition was taken. Transcripts of pre-trial motion hearings will be identified by subject matter and date. With regard to all transcripts, the page number referred to will be the one appearing at the upper right hand corner of the page.

("Initial Brief of Appellant Larry Troy," p. 1).

For the sake of clarity and exposition, the State elects to file this single answer brief concerning these appeals consolidated by this Court's order of May 21, 1985, and will take the liberty of discussing appellants' interrelated, mutually adopted issues upon appeal (see R 258, 302, 351-353) in the procedurally chronological order in which they arose below.

All emphasis will be supplied by the State unless otherwise specified.

STATEMENT OF THE CASE AND FACTS

The State reluctantly rejects appellants' exhaustive statements of the case and statements of the facts, plus the factual assertions sprinkled throughout the argument sections of their briefs, insofar as these statements fail to present the legal occurrences and the evidence adduced below in the light most favorable to the judgments and sentences entered. See, e.g., Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31 (1982). The State accordingly substitutes its own statement of the case and facts necessary to resolve the narrow legal issues presented upon appeal, as follows:

Willie "Bama" Brown and Larry "Scuffy Ray" Troy, who are black, were inmates at the Union Correctional Institution ("U.C.I.") in July of 1981, the former partly for committing a strongarmed robbery in 1976 and the latter partly for committing a second degree murder in 1975 (T 434-435; R 505-507, 511-513). Earl "Fat Boy" Owens, a white U.C.I. inmate, was then nearing completion of a two year sentence for burglary (Sands Depo., p. 62-63; T 696). Owens was homicidally stabbed to death in his cell by two black men on the afternoon of July 7 (T 316, 606-607). No motive for the slaying was ever firmly establised. Owens was suspected in some prison circles of having furnished the knife used by another white inmate to cut black inmate Gerald McCloud on July 5 (Sands Depo. p. 46-47); one possibility is that he was killed in retaliation. Another theory, broached briefly

by the defense at trial, is that Owens was killed because he had "snitched" on his killers to prison authorities (T 289; Sands Depo., p. 7). Appellant Brown was later to allege in passing that inmate Anthony Andrews might have been responsible (R 260); both he and appellant Troy denied their culpability to the prison officials (Sands Depo., p. 49; Pretrial Hearing on Motion For Speedy Trial Discharge, March 7, 1983, p. 90, 105). However, appellants were charged by grand jury indictment filed in the Circuit Court of the Eighth Judicial Circuit in and for Union County, Florida, with the first degree murder of Earl Owens on October 14, 1982 (R 1). The cause was originally assigned to Circuit Judge R. A. Green, Jr., but he disqualified himself on April 12, 1983 upon motion of the defense alleging apparent bias, and was then replaced by Circuit Judge John J. Crews (R 271-278, 286-296, 312).

Meanwhile, on March 3-4, 1983, the defense had filed several motions for both constitutional and Fla.R.Crim.P. 3.191(a)(1) speedy trial discharges, averring essentially that appellants had been "arrested" by being placed in administrative confinement purportedly for the murder of Earl Owens immediately after the event on July 7-8 1981, and had been held there until their October 14, 1982 indictment allegedly unable to prepare a defense (R 141-143, 147-149, 156-157). A March 7 hearing revealed that appellants had not been formally arrested for the Owens murder in July of 1981, that their administrative confinement had its

genesis in security concerns resulting both from the McCloud and Owens stabbings rather than as a ploy to investigate the latter crime; that neither appellant requested counsel during their confinements; and that their claims of prejudice in preparation were speculative and unsubstantiated by hard facts like the traceable names of potentially exculpatory witnesses (Pretrial Hearing on Motion For Speedy Trial Discharge, March 7 1983, p. 67-68, 122-123, 132-133, 66, 95-97, 118). Judge Green denied appellants' motions for discharge on March 11, finding that they were taken into custody for the Owens murder for speedy trial purposes in October of 1982 (Pretrial Hearing on Assorted Motions, March 11, 1983, p. 50-55).

On March 31, the defense filed a "Motion To Declare Death Not a Possible Sentence," but did not specify as a component thereof the allegation that the death penalty is disproportionately applied against black males who kill white victims (R 227-230); naturally, they propounded no statistical evidence for this proposition. Judge Crews denied this motion on May 20 (R 333).

On April 1, the defense filed a motion designed in part to preclude the State from exercising its peremptory challenges to systematically exclude black jurors from sitting at appellants' trial (R 238-240). Judge Crews, although seeming to indicate a disdain for racially motivated exclusions of jurors by either side, stated that he would not "go into the reason why peremptory challenges are exercised," and formally denied appellants' motion

on May 20 (Pretrial Hearing On Assorted Motions, May 2, 1983, p. 59-64; R 333). The record does not reflect which side excused which prospective jurors during voir dire at the beginning of trial on June 13, or whether these excusals were for cause or peremptory, or even whether the prospective jurors excused were white, black or oriental (T 90-91, 128-129, 175, 201-202, 211, 219, 236, 245, 252, 259). The record does reflect that the defense never alleged that the prosecutor had employed even one peremptory challege to illicitly excuse any particular black potential juror, and also reflects that virtually every member of the venire disavowed racial prejudice (T 29-30, 99, 135, 179, 204).

Although the defense had filed a motion on April 5 reserving the right to move for a change of venue during voir dire, apparently intending to assess the impact of any unfavorable media publicity on the jurors at that time, it shifted gears by filing such a motion on June 2, alleging that local media coverage of the recent inmate murder of a U.C.I. prison guard would render empanelment of an impartial jury in Union County impossible (R 284-285, 378-288, 366-370, 392-401). At a June 8 hearing on the matter, the defense shifted gears again by presenting the testimony of statistical expert Dr. Charles Thomas, a University of Florida sociologist and criminologist, that the professed belief of prospective Union County jurors that they could decide a case on its merits alone was often

unintentionally insincere given that a large percentage of them had employment ties to the state prisons located there (Pretrial Hearing On Motion For Change of Venue, June 8, 1983, p. 11-35). Dr. Thomas conceeded that he had believed Union County jurors might display a disproportionate degree of anti-defense bias before conducting his research, and could not give "an absolute unqualified answer to the question" of whether this supposed bias would necessarily deny appellants a fair and impartial jury trial in the instant case (id., p. 41-42, 33-34). Dr. Thomas did not present any statistical evidence to support his conclusion concerning the purported biases of Union County jurors, a fact upon which the prosecutor relied in urging Judge Crews to deny a change of venue (id., p. 44-45, 50-51). Judge Crews reserved ruling on the motion at the conclusion of the hearing, but evidently denied it sub silentio insofar as the case was tried in Union County (id., p. 52, 63). Little if any pretrial publicity had reached the venire panel eventually called, and a jury was empaneled with a minimum of difficulty (T 21, 266).

Meanwhile, in late 1982 the defense had demanded discovery, and the State had duly responded by listing inmates Frank Wise, Herman Watson, and Claude Smith as prospective witnesses (R 16, 38, 20, 117).

Frank Wise, a thrice-convicted felon and the murderer of Hayward Williams, possibly appellant Troy's cousin, gave the defense a lengthy deposition on April 15, 1983 during which he

repudiated several prior sworn statements exculpating appellants, and indicated that he had seen them emerging from the victim's cell at the time of the murder (T 418-419, 406; Wise Depo., p. 16-18). Alleging that these inconsistencies would render Wise's testimony "inherently incredible," the defense unsuccessfully moved in limine that he be precluded from appearing as a witness at trial (R 320-322, 327).

Herman Watson, another felon with an evidently less than sterling record who conceededly heard noises in his head as the result of a childhood gunshot wound, also gave the defense a deposition on April 15 in which he evasively repudiated a prior statement that he had armed appellants with a knife to be used to kill Owens, and indicated that he "didn't see nothing" (T 461; Watson Depo., p. 6-9). Alleging that Watson's evasiveness amounted to a "refus[al] to answer any questions propounded by [defense] counsel," appellants moved that he be compelled to give a deposition or be precluded from appearing as a witness at trial (R 318-319). Watson did give a deposition on May 31, after which the defense unsuccessfully moved that he be psychiatrically examined with an eye towards precluding his appearance as a witness due to his asserted incompetency (R 374-377, 417; Pretrial Hearing On Motion For Change of Venue, June 8, 1983, p. 54-56; T 431-432).

Claude Smith, another inmate, appeared for his deposition on January 13 but refused to give the defense a statement for fear

of retribution from appellants' friends, even though as the defense knew he had purportedly given nonimplicatory statements to the authorities immediately after Owens' murder indicating that he had heard a scream from the victim's blanket-draped cell at the time of the murder and had seen Wise nearby (T 535; Lee Depo., p. 15; Sands Depo., p. 38-39). The prosecutor, who had just met Smith, indicated after consultaton that Smith would be willing to give a deposition upon receiving adequate promises for his security (Smith Depo., p. 6). However, although it once attempted an informal interview (T 494), the defense never sought to reschedule Smith's deposition. Nor did the defense cover itself by filing a motion to compel Smith to give a deposition or be precluded from appearing as a witness at trial as it had fruitfully done with the recalcitrant witness Watson, not even after the prosecutor had filed a praecipe on June 1 signifying that he would be calling Smith to testify for the State (R 363).

At the prosecutor's request, Lt. R. T. Lee of U.C.I. interviewed Smith on Wednesday, June 1, and Smith reiterated his earlier assertion that he had seen Wise near the scene of the crime (T 549, 551; MNTT 18). "As soon as" the prosecutor found out that the interview had been audiotaped and he had obtained the tape - either on Friday June 10 or Monday June 13 - he advised the defense of its contents and offered it a copy - "very forthrightly" in the words of counsel for appellant Troy (MNTT 39; T 496). For reasons unclear, the defense did not immediately

avail itself of this opportunity, and did not complain when the prosecutor listed Smith as a witness in open court as trial commenced with jury selection on June 13 (T 22-23). Nor did the defense complain when the prosecutor thereafter straightforwardly informed the jury in his opening address that "the two defendants were observed leaving the cell. . . by Frank Wise" and that "Claude Smith . . . will describe the same incident" (T 287), thus signifying that Smith had informally provided the State with further inculpatory information apart from that contained on the tape. Instead, defense counsel elected to wait until the State had called Smith to testify on the afternoon of Tuesday, June 14 before moving that he be excluded until he permitted himself to be deposed and/or they were furnished with the tape (T 491, 499). Judge Crews, after hearing many of the foregoing facts, expressed irritation that the defense had not filed a motion to compel Smith to give a deposition or be precluded from testifying as it had regarding Watson, but in an abundance of caution, ordered that Smith's testimony be put off until the following morning so that defense counsel could hear the tape (T 498-800; R 554). The prosecutor gave the tape to the defense (T 500); counsel for appellant Brown evidently listened to it that evening (T 552), while counsel for appellant Troy did not (MNTT 35). In any event, the judge's actions satiated the informational needs of the defense concerning Smith, for he testified on the morning of Wednesday, June 15 without objection (T 535).

At trial, Frank Wise testified for the State that he was on the B-Floor of U.C.I. shortly before 5:00 p.m. on July 7, 1981 when he heard a groan emanating from Owens' blanket-draped cell, B-3, and paused to observe the situation (T 341-346). After a few minutes, during which Claude Smith passed by, Wise saw appellants emerge from the cell carrying a towel or a shirt with something wrapped in it (T 346-348). Wise did not notice any blood on appellants and did not believe Smith could have witnessed their departure from the cell, but ultimately equivocated on both scores (T 348, 364-365). In any event, appellants walked past Wise and went downstairs to the barbershop on the A-Floor, where Wise a little later encountered appellant Troy and gave him a cigarette (T 348-349).

Claude Smith testified that he was on the B-Floor of U.C.I. shortly after 5:00 p.m. on the date in question when he passed by Frank wise, heard "hollering" coming from the victim's blanket-draped cell, turned back, and saw appellants departing from the cell with blood on them (T 535-538; 540, 543). Appellants went downstairs into the shower area; Smith followed them for awhile, then observed Owens staggering down the stairs and went back to help him (T 536-538, 544-545). Smith stated that he had then told Sgt. I.O. Blum of U.C.I. what he had seen (T 538, 519).[1]

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[1] The defense did not recall Blum, who had already testified for the State, to refute this story. The record does not reveal whether Blum was deposed by the defense.

Herman Watson testified that he had a conversation with appellant Troy on the afternoon of the murder at "the Rock" in U.C.I. during which Troy had laughingly confided that he'd just "killed the cracker" (slang for white) and expected to be confined for it (T 437-439, 452). Appellant Brown later asked Watson to see that someone got rid of his clothes and shoes, which Watson apparently did (T 440-442, 437).

Wise, Smith and Watson were all severely impeached by the defense during cross (T 349-422, 539-558, 451-490). Testimony by other State witnesses tended to establish that Earl Owens had been homicidally knifed 62 times (T 316); that it was "not impossible" that this stabbing had occurred 30 minutes before he arrived at the inmate clinic between 5:30 - 5:45 p.m. (T 333; 613, 523); that in awareness of his impending death and in obvious distress he related that two blacks whom he did not know had stabbed him (T 606-607, 614-619); that he died shortly thereafter; and that appellant Brown's bloody shirt and a towel were found charred in a wash bucket and his shoes found recently rinsed shortly after the murder (T 506-508, 518, 523-528, 562-570, 582, 607-612, 627-628). Following unsuccessful motions for judgments of acquittal (T 628-643), the defense presented its case.

John Allen, a U.C.I. inmate, testified that he had had his hair cut by appellant Troy in one of the two prison barbershops the late morning of the murder while in the company of Owens,

whose hair Troy had sometimes cut in the past (T 739-742). Allen stated that the victim would have "known" Troy but only by his nickname (T 742). Allen did not know appellant Brown (T 744).

Franklin Kelly, another U.C.I. inmate with only one felony conviction, testified that he was with appellant Troy first in the barbershop and then in the chow hall from about 4:00 to 6:00 p.m. on the day of the murder or, in essence, that Troy could not have killed Owens (T 731-734). Kelly could not explain why he did not reveal this information to the authorities until May 5, 1983 (T 734-738).

Michael Madry, yet another U.C.I. inmate, testified that he saw Owens staggering down the stairs shortly after 5:00 p.m. on July 7 bleeding and that Owens apparently got blood on appellant Brown as the latter casually emerged from the chow hall with Leon Williams or, in essence, that Brown had not murdered Owens (T 759-762, 769-770).

Besides calling several witnesses to further impeach the State's three inmate witnesses (T 648-663, 680-686, 745-750), the defense also presented the testimony of still another inmate, Noel White. White related that he was on the B-Floor of U.C.I. between 5:15 - 5:30 p.m. on July 7, 1981, when he heard "odd sounds" coming from Owens' blanket-draped cell and observed two anonymous black males, not appellants, leaving the cell with a bloody knife. Owens then emerged from his cell bleeding; Wise and Smith were not there and could not have witnessed these

events (T 692-700). After the defense had rested (T 758, 771), the State impeached White's testimony on rebuttal by demonstrating that he had previously identified appellants as the culprits to two prison officials, but had recanted these statements in spite after his request for an immediate parole release following expiration of the South Carolina sentence he was then serving was denied (T 790-793, 798-799).

Following an unsuccessful renewal of the defense motions for judgments of acquittal (T 808), closing arguments (T 811-903), and a charge conference (T 903-924), the jury retired to consider its verdicts at 3:15 p.m. on Thursday, June 16 (T 924). At 5:40 p.m., verdicts of guilty were returned (T 928; R 473-474). Following an outburst by appellant Troy proclaiming his innocence, the jury was disbursed without defense objection and ordered to reconvene to recommend sentences on Wednesday, June 22 (T 932-934).

The sentencing recommendation proceeding was relatively uneventful except for a renewed outburst by appellant Troy during which he called the jurors "dogs" and stated that he didn't "need [their] mercy" (PT 10). The State presented evidence in aggravation that both appellants had extensive prior violent criminal histories (PT 12-35), while the defense put on no evidence in mitigation (PT 40). Despite a defense argument in closing that appellant Brown deserved their mercy because he was "a child of God," the jurors recommended death for both

appellants by a 9-3 vote after more than an hour of deliberation (PT 59, 73-75; R 487-488). They were then thanked and dismissed by Judge Crews without any insinuation from the defense that they had been guilty of misconduct (PT 79-80). On July 19, following a third outburst by appellant Troy deprecating his counsel's plea for mercy, the judge followed the jury's recommendations and sentenced both appellants to death, finding four statutory aggravating factors and no mitigating factors (ST 9-23; R 505-516).

The defense on June 22, June 24, June 27, July 4 and July 15 had filed timely motions for new trials or directed verdicts, urging as grounds the alleged systematic exclusion of blacks from the jury, the alleged discovery violation concerning Claude Smith's audiotape, and the allegedly inconsistent and/or insufficient evidence (R 489-501, 517-519). Omitted were any allegations that appellants had been denied their rights to speedy trials; had been singled out for death penalty prosecution and imposition because they are black and their victim was white; had been wrongfully denied a change of venue; had been prejudiced by Judge Crews' purported sarcasm towards defense counsel in front of the jurors; and had been prejudiced by any juror misconduct. Following a November 30 hearing focusing primarily on the alleged discovery violation (MNTT 1-62), Judge Crews denied apppellants' post-trial motions on December 22 and 27, explicitly finding that "the State did not violate the rules of

discovery," while noting that as a precaution he had deferred Smith's testimony until the defense had accessed Smith's tape to ameliorate any claim of prejudice (T 554-558). Appellants timely filed their notices of appeals to this Court (T 567-569).

While these direct appeals were pending, someone connected with appellant Brown - apparently neither his lawyers nor Brown himself - retained private investigator Virginia Snyder to approach appellants' jurors and gather evidence of their purported misconduct (RCN 9-11; TCN 102-103, 106-108); although why or even if the defense suspected these jurors of misconduct has never been explained. In any event, Ms. Snyder and another investigator, Esther Litchenfields, did approach a number of appellants' jurors without prior leave of court, interviewed them, and wrote basically out-of-context affidavits which they then persuaded to jurors to sign as their own under oath (TCN 22, 39, 54, 64-65, 80-85, 106-107). Ms. Snyder then approached the defense lawyers with these affidavits, who relied upon them to petition this Court in early 1985 for leave to file a petition for writ of error corum nobis with the trial court, requesting a new trial on grounds of alleged juror misconduct. The gist of appellants' pre-appellate corum nobis allegations was that juror Joanne Hendricks had improperly discussed the case with her husband; that juror Debra Taylor had improperly discussed the case with her minister; that juror Marvin Seay had improperly concluded that appellants were guilty early in the trial; and

that juror Anita Thomas had improperly provided nonrecord information that prison barbering was done on a segregated basis, thus impeaching the aforenoted testimony of defense witness John Allen (RCN 1-4, 18-44). This Court determined that appellants' allegations should be initially passed upon by Judge Crews, and relinquished jurisdiction for this purpose on March 27, 1986. Brown v. State, 485 So.2d 413 (Fla. 1986).

Appellants thus refiled their petition with Judge Crews on May 11, 1986, essentially requesting an evidentiary hearing to prove their allegations of juror misconduct (RCN 1-4, 18-44). The State moved to dismiss with prejudice on June 26, averring that no evidentiary hearing was necessary first because appellants had not incorported their allegations of juror misconduct in their motions for new trials, thus committing an irrevocable procedural default; second because appellants' jurors had been approached by agents of the defense without prior leave of court, thus violating both applicable legal and ethical standards plus public policy; and third because appellants' allegations, taken as true, formed an insufficient predicate to upset the verdicts (RCN 5-16). Judge Crews took the State's motion to dismiss under advisement (TCN 21), and conducted an evidentiary hearing upon appellants' allegations on July 23 (TCN 1-112).

At the hearing, it was established that juror Hendricks had not improperly received advice from her husband concerning her

deliberations (TCN 43, 54); that juror Taylor had not improperly received advice from her minister concerning her penalty recommendations (TCN 73-77, 26-27, 33); and that juror Seay had not improperly concluded that appellants were guilty early in the trial (TCN 59-63, 31). It was further established that juror Thomas, whom as the defense knew from voir dire did not work at U.C.I. but rather worked at the Lake Butler Reception and Medical Center ("R.M.C.") bank in a capacity lacking any contact with inmates (T 27-28, 61-62), did not even broach the subject of whether prison barbering was done on a segregated basis, but merely stated in response to another unnamed juror's question that this was the way she thought business was done at R.M.C. (TCN 80-83, 86, 46-47). However, the jury's primary discussion of the barbershop where Troy worked concerned its location vis-a-vis the victim's cell (TCN 51-53).

Judge Crews made findings in accordance with the foregoing facts and discharged appellants' petition for corum nobis relief as unsubstantiated on August 25, 1986, indicating in the process that he believed all three of the procedural objections tendered by the State in its motion to dismiss had been well taken, but that he had elected to conduct the evidentiary hearing in an abundance of caution given that this was a death penalty case (RCN 45-51). Appellants' timely motion for rehearing was denied without comment on September 8, and this timely appeal followed (RCN 57-58), thus merging the corum nobis case with appellants' direct appeals.

SUMMARY OF ARGUMENTS

Appellants' view of this case is that they were convicted and sentenced to death because of a dishonest prosecutor, a sarcastic judge, and prejudiced jurors. The State's view is that the prosecutor, judge and jurors all did their jobs properly and that appellants' fates were sealed by their obvious guilt despite the best efforts of their competent albeit imperfect counsel.

Turning to the particular issues raised, the State would first submit that the judge below properly denied appellants' motions for speedy discharges because they were not "taken into custody" for the Owens murder when they were administratively confined shortly after its occurrence.

The question of whether the judge erred in refusing to declare death an impossible sentence in appellants' case due to its allegedly racially disparate imposition is not presented for appellate review given their failure to explicitly propound this position below; alternatively, the judge acted properly because there was no allegtion that appellants were singled out for death prosecution because they are black and their victim was white.

The question of whether the judge erred in allegedly permitting the State to systematically exclude black jurors by peremptory challenge is not presented for appellate review given appellants' failure to provide this Court with a complete record; the extant record strongly suggests no such abuse occurred.

The judge properly denied appellants' motions for a change

in venue due to the alleged inherent pro-prosecution bias of prospective Union County jurors, as such was wholly unproven.

The judge did not violate Richardson v. State, infra, in handling appellants' claim that the prosecutor had supposedly violated the rules of discovery by not furnishing them with a copy of the deposition-shy State witness Claude Smith's audiotape. There was no discovery violation because the prosecutor made defense counsel aware of the tape's existence as soon as he knew of it and it contained nothing new to the defense. The judge nonetheless conducted a Richardson hearing and imposed a remedy, deferring Smith's testimony until counsel could review the tape - an action which satisfied the defense, as attested by its failure to thereafter object to Smith's taking the stand and testifying.

Appellants are not entitled to either discharges, new trials or reductions of their death sentences to life imprisonment due to the alleged "irreconcilable conflict" in the testimonies of State witnesses Claude Smith and Frank Wise. No such conflict exists, but even if it did, such would not constitute legal grounds for relief. Tibbs v. State.

The question of whether the judge reversibly erred by refusing to declare a mistrial due to his alleged sarcasm towards defense counsel before the jury is unpreserved for appellate review given appellants' failure to complain of this supposed abuse below; alternatively, the judge committed no such impropriety.

Finally, the judge properly denied appellants' petition for writ of error corum nobis on grounds of alleged juror misconduct because any such claim should have been tendered in their motions for new trials; because agents of the defense approached the jurors without previously having obtained leave of court to do so based upon objective grounds to suspect misconduct, thus violating public policy; because the predicate allegations of misconduct were too paltry a predicate to require an evidentiary hearing; and lastly because the judge nonetheless held a hearing which revealed that these allegations were false.

ISSUE I

(Appellant Brown's Points Seven and Eight)

THE JUDGE BELOW PROPERLY DENIED APPELLANTS' MOTIONS FOR SPEEDY TRIAL DISCHARGES.

ARGUMENT

Appellants essentially allege that the judge below first reversibly erred by denying their pretrial motions for speedy trial discharges, and that they are entitled to immediate release as a result. The State disagrees.

As noted, on March 3-4, 1983, the defense filed motions for both constitutional and Fla.R.Crim.P. 3.191(a)(1) speedy trial discharges, averring essentially that appellants had been "arrested" by being placed in administrative confinement purportedly for the murder of Earl Owens immediately after the event on July 7-8, 1981, and had been held there until their October 14, 1982 indictment allegedly unable to prepare a defense. A March 7 hearing revealed that appellants had not been formally arrested for the Owens murder in July of 1981; that their administrative confinement had its genesis in security concerns resulting both from the McCloud and Owens stabbings rather than as a ploy to investigate the latter crime; that neither appellant requested counsel during their confinements; and that their claims of prejudice in preparation were speculative and unsubstantiated by hard facts like the traceable names of potentially exculpatory witnesses. Judge Green denied

appellants' motions for discharge on March 11, finding that they were taken into custody for the Owens murder for speedy trial purposes in October of 1982. Under these circumstances, the State cannot believe that the trial court was in error.

Turning first to the constitutional question, the State would contextually note that "delay during the . . . period between the occurrence of the crime and the filing of the information [or indictment] is one to be addressed under the Due Process Clause [of the Fourteenth Amendment to the United States Constitution], while the delay during the . . . period between the filing of the information and the hearing on the motion to dismiss is one to be examined under the Speedy Trial Clause of the Sixth Amendment," Howell v. State, 418 So.2d 1164, 1167 (Fla. 1st DCA 1982), citing United States v. MacDonald, 456 U.S. 1 (1982). In order to reverse Judge Green's denial of appellants' motions to dismiss on due process grounds, this Court would have to find, as a matter of law, that appellants carried their initial burden of demonstrating below that they suffered "actual prejudice" due to the fifteen month delay in the filing of formal charges. Howell v. State, 418 So.2d 1164, 1170. This the Court cannot do, insofar as "[s]peculative allegations as to faded memories simply do not suffice to prove actual prejudice," Howell v. State, 418 So.2d 1164, 1170; neither do vague insinuations concerning vanishing exculpatory evidence, State v. Parent, 408 So.2d 612, 614 (Fla. 2nd DCA 1982), review denied, 418 So.2d 1280

(Fla. 1984); see also United States v. Marion, 404 U.S. 307 (1971); State v. Breedlove, 400 So.2d 468 (Fla. 4th DCA 1981); United States v. Townley, 665 F.2d 579 (5th Cir. 1982). Obviously, the mere passage of fifteen months between commission of the murder and the filing of formal charges, without more, does not establish a due process violation. United States v. Lovasco, 431 U.S. 783 (1977); Giglio v. Kaplan, 392 So.2d 1004 (Fla. 4th DCA 1981).

Turning now to the Rule 3.191(a) question, the State would note that the Florida district courts of appeal have repeatedly held that a prisoner who has been placed in Fla.Admin.Code 33-3.081 administrative confinement even solely as the result of a prison incident is not regarded as having been "taken into custody" on any criminal charges subsequently arising from that incident under Fla.R.Crim.P. 3.191(a)(4) for purposes of triggering the right to a speedy trial guaranteed by Rule 3.191(a)(1). Powers v. State, 422 So.2d 981 (Fla. 1st DCA 1982), Lynn v. State, 436 So.2d 416 (Fla. 1st DCA 1983), Turner v. State, 442 So.2d 1064 (Fla. 1st DCA 1983), Height v. State, 459 So.2d 470 (Fla. 1st DCA 1984), Young v. State, 459 So.2d 1185 (Fla. 1st DCA 1984), and Snow v. State, 399 So.2d 466 (Fla. 2nd DCA 1981). Moreover, the majority view among the federal circuit courts of appeals is that the "segregation of an inmate from the general population does not constitute an 'arrest' for purposes of the speedy trial right," United States v. Gouveia, 467 U.S.

180, 190, note 6 (1984). This rule is eminently sensible, for the purposes behind detention by arrest and by administrative confinement are antithetical. Arrests are an integral part of the processing of criminal suspects through the criminal justice system, a process which may culminate in the imposition of punitive criminal sanctions. Administrative confinements of prisoners as authorized under Wolff v. McDonnell, 418 U.S. 539 (1974) and Parker v. Cook, 642 F.2d 865 (5th Cir. 1981), on the other hand, are "not disciplinary in the nature and inmates in administrative confinement are not being punished," Fla.Admin. Code 33-3.081(2); see Granger v. Florida State Prison, 424 So.2d 937 (Fla. 1st DCA 1983); Snow v. State. To hold that administrative confine is the functional equivalent of arrest for speedy trial purposes would thus be untenable, particularly in this case since the Owens homicide was not the sole genesis of appellants' confinements.

ISSUE II

(Appellant Brown's Point Four)

THE JUDGE BELOW DID NOT REVERSIBLY ERR IN DENYING APPELLANTS' MOTION TO DECLARE THE DEATH PENALTY INAPPROPRIATE.

ARGUMENT

As noted, on March 31 the defense filed a "Motion To Declare Death Not a Possible Sentence," but did not specify as a component thereof the allegation that the death penalty is disproportionately applied against black males who, like themselves, killed a white victim; naturally, they propounded no statistical evidence for this proposition. Judge Crews denied this motion on May 20. Conspicuously absent from any of appellants' post-trial motions is an allegation that they had been singled out for death penalty prosecution and imposition because they are black and their victim was white. On appeal, they appear to allege that the judge below secondly reversibly erred by denying their pretrial motion of March 31, and that they are entitled to be resentenced to life in prison as a result. The State disagrees.

This allegation is not presented for appellate review given appellants' failure to propound it with precision below, see e.g. Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979) and Jackson v. State, 456 So.2d 916, 919 (Fla. 1st DCA 1984); given their related failure to support this allegation with reliable statistics below, see Hulsey v. Sargent, 550 F.Supp. 179 (E.D.

Ark. 1981); and given their failure to move for a new trial or sentencing proceeding upon this basis, see generally Baxley v. State, 72 So. 677 (Fla. 1916). Besides, this Court has recently held that a circuit judge has no statutory authority to declare death an inapplicable penalty prior to a capital trial. State v. Bloom, 497 So.2d 2 (Fla. 1986); Reno v. Person, 497 So.2d 1 (Fla. 1986); State v. Donner, 12 F.L.W. 43 (Fla. 1987); contra, Reed v. State, 496 So.2d 213 (Fla. 1st DCA 1986), review pending (Fla. 1987), Case No. 69,554.

Alternatively, appellants' discrimination allegation is palpably uncompelling on the merits given their failure to plead or prove that they were personally singled out for the death penalty for racial reasons. McCleskey v. Kemp, 753 F.2d 877, 892-895 (11th Cir. 1985), cert. granted, ___ U.S. ___, 88 L.Ed.2d 43 (1986); see also Stewart v. State, 495 So.2d 164 (Fla. 1986).

ISSUE III

(Appellant Brown's Point Three)

THE JUDGE BELOW DID NOT REVERSIBLY ERR BY ALLEGEDLY PERMITTING THE STATE TO SYSTEMATICALLY EXCLUDE BLACK JURORS VIA PEREMPTORY CHALLENGE.

ARGUMENT

As noted, the defense on April 1 filed a pretrial motion designed in part to preclude the State from exercising its peremptory challenges to systematically exclude black jurors from sitting at appellants' trial. Judge Crews, although seeming to indicate a disdain for racially motivated exclusions of jurors by either side, stated that he would not "go into the reason why peremptory challenges are exercised," and formally denied appellants' motion on May 20. The record does not reflect which side excused which prospective jurors during voir dire at the beginning of trial on June 13, or whether these excusals were for cause or peremptory, or even whether the prospective jurors excused were white, black or oriental. The record does reflect that the defense never alleged that the prosecutor had employed even one peremptory challenge to illicitly excuse any particular black potential juror, and also reflects that virtually every member of the venire disavowed racial prejudice. Appellants nonetheless tendered a bald claim that the prosecutor had systematically excluded blacks from their jury as a basis for a new trial. On appeal, they appear to allege that this cause must again be remanded to the trial court for reconstruction of the

missing portions of the record to assess the veracity of their charges under, implicitly, State v. Neil, 457 So.2d 481 (Fla. 1984). The State disagrees.

Generally, "[i]n appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error," Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979). An appellant cannot carry this burden absent a complete "transcript or a proper substitute," and the failure to present one leaves a reviewing court with no choice but to affirm the ruling of the lower court, id., evidently without a remand.

In what the State would respectfully submit was clear contravention of the foregoing principles, this Court in Woods v. State, 490 So.2d 24, 25, note 2 (Fla. 1986), "in [its] discretion" granted the motion of a capital appellant tried prior to Neil to relinquish jurisdiction to reconstruct the untranscribed juror-excusal portions of the record, seemingly because Woods had objected to the prosecutor's allegedly illicit use of peremptory challenges immediately after the fact. See also Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69, 89-90, note 24 (1986). Given that appellants never specifically objected to the State's allegedly improper peremptory excusal of even a single black potential juror below, and also given that appellants failed to file a motion to relinquish jurisdiction to the trial court under Neil contemporaneously with the filing of

their successful motion for leave to file a petition for writ of error corum nobis - which would have permitted a Neil inquiry without further delaying this already much-delayed direct appeal - the State asks that this Court exercise its "discretion" to deny appellants' belated attempt to remand the case now. The extant record amply demonstrates that this cause was tried before an easily-selected jury and a judge all refreshingly free of racial prejudice.

ISSUE IV

(Appellant Brown's Point Five)

THE JUDGE BELOW DID NOT REVERSIBLY ERR IN DENYING APPELLANTS' MOTIONS FOR A CHANGE OF VENUE.

ARGUMENT

Appellants essentially allege that the judge below fourthly reversibly erred by denying their pretrial motions for a change of venue, and that they are entitled to a new trial as a result. The State disagrees.

As noted, although the defense had filed a motion on April 1 reserving the right to move for a change of venue during voir dire, apparently intending to assess the impact of any unfavorable media publicity on the jurors at that time, it shifted gears by filing such a motion on June 2, alleging that local media coverage of the recent inmate murder of a U.C.I. prison guard would render empanelment of an impartial jury in Union County impossible. At a June 8 hearing on the matter, the defense shifted gears again by presenting the testimony of statistical expert Dr. Charles Thomas, a University of Florida sociologist and criminologist, that the professed belief of prospective Union County jurors that they could decide a case on its merits alone was often unintentionally insincere given that a large percentage of them had employment ties to the state prisons located there. Dr. Thomas conceeded that he had believed Union County jurors might display a disproportionate degree of anti-

defense bias before conducting his research, and could not give "an absolute unqualified answer to the question" of whether this supposed bias would necessarily deny apellants a fair and impartial jury trial in the instant case. Dr. Thomas did not present any statistical evidence to support his conclusion concerning the purported biases of Union County jurors, a fact upon which the prosecutor relied in urging Judge Crews to deny a change of venue. Judge Crews reserved ruling on the motion at the conclusion of the hearing, but evidently denied it sub silentio insofar as the case was tried in Union County. Little if any pretrial publicity had reached the venire panel eventually called, and a jury was empaneled with a minimum of difficulty. Under these circumstances, the State cannot believe that the trial court's denial of a change of venue was error.

Generally, "[a]n application for a change of venue is addressed to a court's sound discretion, and a trial court's ruling will not be reversed absent a palpable abuse of discretion." Davis v. State, 461 So.2d 67, 69 (Fla. 1984), cert. denied, ____ U.S. ____, 87 L.Ed.2d 663 (1986). Analytically there are two types of juror prejudice upon which defense motions for a change of venue have traditionally been predicated and granted - the "actual prejudice" of a large percentage of potential jurors, and the extremely rare "presumed prejudice" of the entire pool - both of which are ordinarily based upon a well-documented massive infusion of pretrial publicity concerning the defendant's

particular crime, see Coleman v. Kemp, 778 F.2d 1487, 1489-1490 (11th Cir. 1985), on rehearing and rehearing en banc denied, 782 F.2d 896 (11th Cir. 1986), cert. denied, ____ U.S ____ (1986), 39 Crim.L.Rptr. 4068, which the appellants here did not really plead or establish. Appellants' twist on the "presumed prejudice" pitch was properly rejected by Judge Crews both because it was predicated upon the preconceived hunch of a sociologist rather than upon convincing statistical evidence, cf. Hulsey v.Sargent, and also because Florida law does not recognize the alleged "inherent . . . bias" of prison-connected potential jurors as grounds for their disqualification from service in cases involving inmates, State v. Williams, 465 So.2d 1229, 1230 (Fla. 1985). Indeed, at least one veteran criminal defense lawyer has commented that among prison-community juries trying inmate crimes "there exists almost a 'defense bias' . . . so long as no prison guards were injured." Lusk v. State, 11 F.L.W. 615, 617, note 1 (Fla. 1986).

In summary, Judge Crews' denial of appellants' motions for a change of venue did not prejudice the defense.

ISSUE V

(Appellant Brown's Point One;
Appellant Troy's Issue I)

THE JUDGE BELOW DID NOT VIOLATE RICHARDSON V. STATE, 246 So.2d 771 (Fla. 1971).

ARGUMENT

With much misguided passion, appellants vehemently allege that the judge below fifthly reversibly erred by purportedly failing to conduct a Richardson v. State, 246 So.2d 771 (Fla. 1971) inquiry when confronted with their claims that the prosecutor had supposedly violated the rules of discovery by not furnishing them with a copy of the deposition-shy State witness Claude Smith's audiotape; they seek a new trial as a result. Because there was no discovery violation, but a Richardson hearing and remedy nonetheless, and thereafter no defense objection to Smith's taking the stand and testifying, the State emphatically disagrees. These points will be developed sequentially, integrated with the salient facts.

In late 1982, as noted, the defense had demanded discovery, and the State had duly responded by listing inmate Smith as a prospective witness. Smith appeared for his deposition on January 13 but refused to give the defense a statement for fear of retribution from appellants' friends, even though as the defense knew he had purportedly given nonimplicatory statements to the authorities immediately after Owens' murder indicating

that he had heard a scream from the victim's blanket-draped cell at the time of the murder and had seen Wise nearby. The prosecutor, who had just met Smith, indicated after consultation that Smith would be willing to give a deposition upon receiving adequate promises for his security. However, although it once attempted an informal interview, the defense never sought to reschedule Smith's deposition. Nor did the defense cover itself by filing a motion to compel Smith to give a deposition or be precluded from appearing as a witness at trial as it had fruitfully done with the recalcitrant witness Herman Watson, not even after the prosecutor had filed a praecipe on June 1 signifying that he would be calling Smith to testify for the State.

The prosecutor's actions to this point were undeniably proper, for "it is not the responsibility of the prosecution to produce the State's witnesses for depositions." State v. Valdes, 443 So.2d 302 (Fla. 3rd DCA 1983).

At the prosecutor's request, Lt. R. T. Lee of U.C.I. interviewed Smith on Wednesday, June 1, and Smith reiterated his earlier assertion that he had seen Wise near the scene of the crime. "As soon as" the prosecutor found out that the interview had been audiotaped and he had obtained the tape - either on Friday June 10 or Monday June 13 - he advised the defense of its contents and offered it a copy - "very forthrightly" in the words of counsel for appellant Troy. For reasons unclear, the defense

did not immediately avail itself of this opportunity.

The prosecutor's actions at this point were still undeniably proper, for the State's Fla.R.Crim.P. 3.220(f) continuing duty to reveal audiotaped statements of its witnesses discoverable under Fla.R.Crim.P. 3.220(a)(2)(ii) to the defense is fulfilled when the prosecutor "promptly disclos[es] or produce[s] such . . . material." Compare Cooper v. State, 336 So.2d 1133, 1137-1138 (Fla. 1976), cert. denied, 431 U.S. 925 (Fla. 1977). This obligation to "disclose" such information plainly does not mean that the prosecutor must personally hand-deliver the material to defense counsel; his duty is done once he "disclose[s the material and makes it] available for inspection or copying by the defense." Denny v. State, 404 So.2d 824, 825 (Fla. 1st DCA 1981). Defense counsel's failure to "contact . . . the prosecutor to exercise his right to copy or inspect" such material does not render the prosecutor guilty of a discovery violation. Id. Moreover, Smith's statements on the audiotaped would not have told the defense anything it did not already know, and "[p]rejudice does not result where the defendant obtains the information through other means." State v. Banks, 418 So.2d 1059, 1060 (Fla. 2nd DCA 1982), review denied, 424 So.2d 760 (Fla. 1982); see also Matheson v. State, 12 F.L.W. 67, 68 (Fla. 1987).

The defense did not complain when the prosecutor listed Smith as a witness in open court as trial commenced with jury

selection on June 13. Nor did the defense complain when the prosecutor thereafter straighforwardly informed the jury in his opening address that "the two defendants were observed leaving the cell . . . by Frank Wise" and that "Claude Smith . . . will describe the same incident," thus signifying that Smith had informally provided the State with further inculpatory information apart from that contained on the tape.

The prosecutor's actions at this point were still undeniably proper, for the State's Fla.R.Crim.P. 3.220(a)(1)(ii) obligation to provide the defense with the "statement[s]" of its prospective witnesses pertains only to "written" or "contemporaneously . . . recorded . . . oral statement[s]." Under Fla.R.Crim.P. 3.220 (a)(1)(iii), the only unrecorded "oral statements" the State is required to disclose are those "made by the accused." In other words, an attorney is not required to inform the other side of new information he orally receives in preparing his witnesses for trial if he does not contemporaneously record it, see State v. Rabin, 495 So.2d 257 (Fla. 3rd DCA 1986) and Mathews v. State, 44 So.2d 664 (Fla. 1950); and a "prosecutor's failure to inform the defense of [even a] change of testimony is not a discovery vioaltion." Bush v. State, 461 So.2d 936, 938 (Fla. 1984), cert. denied, ___ U.S. ___, 106 S.Ct. 1232 (1986).

Defense counsel elected to wait until the State had called Smith to testify on the afternoon of Tuesday, June 14 before moving that he be excluded until he permitted himself to be

deposed and/or they were furnished with the tape. Judge Crews, after hearing many of the foregoing facts, expressed irritation that the defense had not filed a motion to compel Smith to give a deposition or be precluded from testifying as it had regarding Watson, but in an abundance of caution, ordered that Smith's testimony be put off until the following morning so that defense counsel could hear the tape. The prosecutor gave the tape to the defense; counsel for appellant Brown evidently listened to it that evening, while counsel for appellant Troy did not. In any event, the judge's actions satiated the informational needs of the defense concerning Smith, for he testified on the morning of Wednesday, June 15 without objection.

The judge's actions were undeniably proper. Axiomatically, a Richardson hearing is "not required . . . [w]ithout a showing of some wrongdoing on the part of the State." Marshall v. State, 413 So.2d 872, 873 (Fla. 3rd DCA 1982), quashed in part on other grounds, 445 So.2d 355 (Fla. 1984); see also Jones v. State, 477 So.2d 26 (Fla. 3rd DCA 1985); Borges v. State, 459 So.2d 459 (Fla. 3rd DCA 1984). Although he believed that "the State did not violate the rules of discovery," Judge Crews conscientiously deferred Smith's testimony to ameliorate any defense claim of prejudice, thus unnecessarily fulfulling both the letter and spirit of Richardson. Appellants' failure to thereafter object to Smith's taking of the stand, or to thereafter move to strike his allegedly unexpected testimony, both demonstrates that

appellants were contemporaneously satisfied with the judge's actions, cf. Henderson v. Kibbe, 431 U.S. 145, 155, note 12 (1977), and estops them from fruitfully attacking them later. See e.g., Lucas v. State, 376 So.2d 1149, 1151-1152 (Fla. 1979); Cooper v. State, 336 So.2d 1133, 1137-1179; Matheson v. State, 12 F.L.W. 67, 68; § 90.104(1)(a), Fla. Stat.; cf. Henderson v. Kibbe, 431 U.S. 145, 155, note 12. For the defense to accept a certain turn of events with the intention of complaining later when correction is impossible constitutes the rankest form of sandbagging, and should not be tolerated. State v. Jones, 204 So.2d 515, 518 (Fla. 1967).

This Court in Richardson v. State itself proclaimed that its rules of discovery were "never intended to furnish a defendant with a procedural device to escape justice." Id., 246 So.2d 771, 774. The State trusts that the Court will not countenance appellants' fervid attempt to do so here.

ISSUE VI

(Appellant Troy's Issue II)

APPELLANTS ARE NOT ENTITLED TO EITHER DISCHARGES, NEW TRIALS OR REDUCTIONS OF THEIR DEATH SENTENCES TO LIFE IMPRISONMENT DUE TO THE ALLEGED WEAKNESS OF THE EVIDENCE AGAINST THEM.

ARGUMENT

Appellants sixthly essentially allege that they are alternatively entitled to either outright discharges, or to new trials, or to reductions of their death sentences to life imprisonment via proportionality review solely because the incriminating testimony of the two State witnesses who put them at the scene of the murder, Frank Wise and Claude Smith, "was in . . . hopeless and irreconcilable conflict" with itself and with the State's other evidence ("Initial Brief of Appellant Larry Troy," p. 71-72). The State disagrees.

Appellants' novel legal theories are interesting, to say the least, but they are wholly inapplicable to this case, for the testimonies of Wise and Smith were, in the main, mutually consistent and also consistent with the remainder of the State's case. As noted, Wise testified that he was on the B-Floor of U.C.I. shortly before 5:00 p.m. on the afternoon of the murder when he heard a groan emanating from Owens' blanket-draped cell and paused to observe the situation, during which time he saw Smith pass by. Smith compatibly testified to the same basic turn of events, albeit that he fixed the time at shortly after 5:00

p.m. Wise further testified that he next saw appellants emerge from the victim's cell carrying a towel or a shirt with something wrapped in it; he did not notice any blood on appellants and did not believe Smith could have witnessed their departure from the cell, but ultimately equivocated on both scores. Smith testified, not necessarily inconsistently, that he did see appellants departing the cell and that they did have blood on them. Both Wise and Smith agreed that appellants then headed downstairs, albeit that the former believed they went into the barbershop while the latter thought they went into the shower area. Testimony by other State witnesses tended to establish that it was "not impossible" that Owens had been stabbed 30 minutes before he arrived at the inmate clinic between 5:30 - 5:45 p.m. and died shortly after claiming that two blacks had stabbed him; that appellant Troy laughingly confided to Herman Watson that he'd "just killed the cracker" and expected to be confined for it; that appellant Brown later asked Watson to see that someone got rid of his clothes and shoes, which Watson apparently did; and that appellant Brown's bloody shirt and a towel were thereafter found charred in a wash bucket and his shoes found recently rinsed.

Assuming quite arguendo that the testimonies of Wise and Smith were inherently inconsistent, it would not follow that the State failed to present "substantial, competent evidence to support the verdict[s] and judgment[s]" under Tibbs v. State, 397

So.2d 1120, 1123 justifying appellants' outright discharges, notwithstanding their contention to the contrary. In the State's view the Tibbs requirement that a guilty verdict must be based upon "substantial competent evidence" means only that each element of the offense charged must have been proved to the satisfaction of the jury by admissible evidence, regardless of how allegedly "weak" it may retrospectively appear. See Huff v. State, 495 So.2d 145 (Fla. 1986); Toole v. State, 472 So.2d 1174 (Fla. 1985); Lincoln v. State, 459 So.2d 1030 (Fla. 1984); Heiney v. State, 447 So.2d 710 (Fla. 1984), cert. denied, ___ U.S. ___, 83 L.Ed.2d 237 (1984); Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983). In Tibbs itself, this Court affirmed a rape conviction which "rested primarily upon the uncorroborated testimony of the rape victim," Id., 397 So.2d 1120, 1126. This Court has moreover held that a defendant accused of murder "may be convicted upon the uncorroborated testimony of an accomplice," Peterson v. State, 117 So. 227 (Fla. 1928), see also Downs v. State, 386 So.2d 789 (Fla. 1980), cert. denied, 449 U.S. 976 (1980) and Barfield v. State, 402 So.2d 377 (Fla. 1981), while the Third District has held that the evidently uncorroborated testimony of a single witness that the defendant committed the crime charged was sufficient despite a demonstrable inaccuracy, Stuckey v. State, 199 So.2d 137 (Fla. 3rd DCA 1967). It follows that the State's presentation of even inherently contradictory incriminating testimony from two

witnesses can constitute ample proof of guilt under Tibbs, and would not be cause for an outright discharge.

Perhaps realizing that their prospects of selling this Court on the foregoing argument are thin, appellants alternatively and forthrightly ask that the Court recede from Tibbs and essentially establish an ad hoc rule that appellate courts may order criminal appellants discharged if the testimony upon which their convictions were predicated is, in the eyes of the appellate court, unbelievable despite the jury's finding to the contrary. The criminal defense bar has indeed enjoyed some recent success in convincing the district courts of appeal to adopt such a standard, albeit circuitously, see e.g. Huggins v. State, 453 So.2d 835 (Fla. 5th DCA 1984), review denied, 456 So.2d 1182 (Fla. 1984); Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984), review denied, 471 So.2d 44 (Fla. 1985); Fox v. State, 469 So.2d 800 (Fla. 1st DCA 1985), review denied, 480 So.2d 1296 (Fla. 1985); and Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986), review denied (Fla. 1987), Case No. 69,432. The reasons against affording the appellate judiciary such power, implicit in both this Court's decision in Tibbs and in the dissents of Judge Cowart in Huggins and of Judge Booth in Fox, were perhaps best expressed by the Supreme Court of Missouri many years ago when it wrote that a live observer. . . .

> . . . sees and hears much we cannot see and hear. We well know there are things of pith that cannot be preserved in or shown by the written page of a

> bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to who tries the case. To [the finder of fact] appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by [the finder of fact]. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angle of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify. Therefore, where an issue in equity rests alone on the credibility of witnesses, the upper court may with entire propriety rest somewhat on the superior advange of [the finder of fact] in determining a fact.

Creamer v. Bivert, 113 S.W. 1118, 1120-1121 (Mo. 1908).

Appellants also alternatively asks this Court to order them new trials under Fla.R.App.P. 9.140(f) "in the interest of justice" even though Tibbs implies that this rule should only be so employed "to correct fundamental injustices, unrelated to evidentiary shortcomings." Tibbs v. State, 397 So.2d 1120,

1126. The State trusts that this Court will also decline this invitation to overrule Tibbs.

Appellants finally in the alternative essentially ask this Court to reduce their death sentences to life imprisonment, in consideration of the perceived weaknesses in the State's evidence, in the exercise of its proportionality review, see e.g. Caruthers v. State, 465 So.2d 496 (Fla. 1985). If the Court does so it will be effectively granting appellants a "free kill" insofar as, from all appearances, they were U.C.I. "lifers" before murdering Owens. The State's research did not reveal any cases wherein this Court has found death sentences imposed based upon four statutory aggravating factors and no mitigating factors disproportionate. As for appellants' claim that "no man should be put to death on this kind of evidence" ("Initial Brief of Appellant Larry Troy," p. 73), they elected to commit the murder with fellow inmates rather than guards witnessing the crucial events. What right do appellants have to insist that the witnesses against them come from backgrounds better than their own?

ISSUE VII

(Appellant Brown's Point Six; Appellant Troy's Issue IV)

THE TRIAL JUDGE DID NOT REVERSIBLY ERR BY FAILING TO DECLARE A MISTRIAL SUA SPONTE DUE TO HIS ALLEGEDLY SARCASTIC TREATMENT OF DEFENSE COUNSEL.

ARGUMENT

As noted, this cause was originally assigned to Union County Circuit Judge R. A. Green Jr., but he disqualified himself on April 12, 1983 upon motion of the defense alleging apparent bias, and was then replaced by Circuit Judge John J. Crews. Never during trial did either appellant allege, either by motion for a mistrial, a motion to strike, or even a garden variety contemporaneous objection, that they had been prejudiced by Judge Crews' purported sarcasm towards defense counsel in front of the jurors, and such allegation was conspicuously absent in their motions for new trials. Yet now, appellants essentially allege that the trial judge committed a seventh reversible error by failing to declare a mistrial sua sponte due to his allegedly abusive treatment of defense counsel, and that they are entitled to a new trial as a result. The State disagrees.

Appellants' failure to contemporaneously challenge the allegedly untoward conduct of the judge below absolutely precludes fruitful litigation of the matter upon appeal, insofar as the purported "error" was clearly "not such as to undermine the fundamental fairness of the trial and contribute to a mis-

carriage of justice," United States v. Young, 470 U.S. ____, 84 L.Ed.2d 1, 13 (1985); cf. Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982).[2] Judge Crews did not appeal to racial prejudice, accuse counsel of unethical conduct, or even remotely imply that he felt their clients were guilty. Compare Powell v. Alabama, 287 U.S. 45 (1932); Mathews v. State; and Roberson v. State, 24 So. 474 (Fla. 1898). Absent a defense objection and consequent development of the record, this Court is in no position to ascertain whether the judge's remarks were sarcastic as appellants claim, or perhaps wry, jocular, benignly chiding, or even merely earnest, as appears possible; this Court should assume the best of the judge below, not the worst. Lucas v. State, 376 So.2d 1149, 1152. Off the cold record, it appears to the State that this judge did nothing more egregious than occasionally urge defense counsel to steamline their presentations, which was certainly his judicial prerogative. Blake v. State, 336 So.2d 454, 455 (Fla. 3rd DCA 1976), cert. denied, 344 U.S. 323 (Fla. 1977); Baxley v. State.

In sum, appellants have woefully failed to establish that Judge Crews conducted himself in a reversibly erroneous manner.

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[2] Appellants may seek to excuse their default by claiming that they were too intimidated by the judge to object and/or that such would have been a futility given his alleged intransigence. Any claim that counsel was intimidated is belied by their successful dispatching of Judge Green, and the alleged futility of objecting does not excuse the failure to try. Engle v. Isaac, 456 U.S. 107, 130 (1982).

ISSUE VIII

(Appellant Brown's Point Two;
Appellant Troy's Issue III)

THE JUDGE BELOW PROPERLY DENIED APPELLANTS' PETITION FOR WRIT OF ERROR CORUM NOBIS DUE TO ALLEGED JUROR MISCONDUCT.

ARGUMENT

Again with much misguided passion, appellants adamantly allege that the judge below committed his final reversible error by denying their petition for writ of error corum nobis due to the purported misconduct of their jurors; they seek a new trial as a result. For the four alternative reasons which follow, the State vigorously disagrees.

I. PROCEDURAL DEFAULT

As noted, the defense on June 22, June 24, June 27, July 4 and July 15, 1983 timely filed motions for new trials or directed verdicts. These motions did not include alleged juror misconduct as grounds for relief and were never amended to encompass same prior to their denials by Judge Crews on December 22 and 27. While their direct appeals were pending, someone connect with appellant Brown - apparently neither his lawyers nor Brown himself - retained private investigator Virginia Snyder to approach appellants' jurors and gather evidence of their purported misconduct; although why or even if the defense suspected these jurors of misconduct has never been explained. The defense lawyers thereafter relied upon the fruits of Ms.

Snyder's labors and those of her colleague, Esther Litchenfields, to petition this Court in early 1985 for leave to file a petition for writ of error corum nobis with the trial court on grounds of alleged juror misconduct. This Court determined that appellants' allegations should be initially passed upon by Judge Crews, and relinquished jurisdiction for this purpose on March 27, 1986. Brown v. State.

Fla.R.Crim.P. 3.600(b)(2) and (4) provide in pertinent part that "[t]he [trial] court shall grant a new trial if . . the jury received any evidence out of court . . . [or if] any of the jurors was guilty of misconduct . . . [and] substantial rights of the defendant were prejudiced thereby." See, e.g., State v. Ramirez, 73 So.2d 218 (Fla. 1954), McGowan v. State, 102 So. 890 (Fla. 1925), Powell v. State, 414 So.2d 1095 (Fla. 5th DCA 1982) and White v. State, 462 So.2d 52 (Fla. 1st DCA 1984), review denied, 472 So.2d 1182 (Fla. 1985). Fla.R.Crim.P. 3.590(a) provides in pertinent part that "[a] motion for new trial . . . may be made within ten days after the rendition of the verdct or the finding of the court . . . [, and] may be amended to state new grounds... before the motion is determined." If appellants had sought to amend their motions for new trial on December 28, 1983 by incorporating allegations of juror misconduct, Judge Crews would have had no choice but to have refused to consider such allegations as untimely filed. See, e.g., Hogwood v. State, 175 So.2d 817 (Fla. 3rd DCA 1965). As the State urged below, the

procedurally defaulted nature of these allegations was not vitiated merely because they came before the lower court in an "application for corum nobis relief" filed on May 11, 1986, a fact Judge Crews recognized in denying appellants relief on August 25. The reason that appellants' presumably competent trial counsel, Strickland v. Washington, 466 U.S. 668, 689-691 (1984) failed to preserve this claim by including it in their motions for new trials - and the State strongly suspects it was the ethical proscription against attorneys approaching jurors without prior leave of court, as will be explained more fully in due course - is simply not germane at this point. Unless this Court's rules of criminal procedure do not mean what they say, appellants are in irrevocable procedural default on their claim that they are entitled to new trials by virtue of the alleged misconduct of their jurors.

The State would respectfully request that this Honorable Court hold that appellants are in procedural default upon this claim without proceeding to reach the merits in the alternative. As the Court surely knows, many of the criminal defendants whose claims it rejects continue litigation in the federal courts by filing petitions for writ of habeas corpus under 28 U.S.C. § 2254, recasting their claims as federal constitutional violations. If this Court has rejected a defendant's claim sub silentio, as it occasionally does, or has affirmed in writing totally upon procedural grounds, a federal

reviewing court is required to regard such affirmance as an acceptance of any procedural default argument the State has made vis-a-vis a given claim, and cannot award federal habeas corpus relief thereupon. See Martinez v. Harris, 675 F.2d 51 (2nd Cir. 1982); Hockenbury v. Souders, 620 F.2d 111 (6th Cir. 1980), cert. denied, 450 U.S. 933 (1981); Brown v. Reid, 493 F.Supp. 101 (S.D.N.Y. 1980). If this Court has affirmed in a written opinion upon both procedural and substantive grounds, a federal reviewing court may or may not regard such action as an acceptance of the State's procedural default arguments, compare Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984), cert. denied, ____ U.S. ____, 85 L.Ed.2d 862 (1985) with Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985), cert. denied, ____ U.S. ____, 91 L.Ed.2d 565 (1986); however, if the Court has ignored or rejected the State's procedural default arguments and has proceeded to reach the merits of a given claim, a federal reviewing court is definitely entitled to reach the merits of that claim and award relief thereupon, see County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979); Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), vacated on other grounds, 463 U.S. 1223 (1983); Booker v. Wainwright, 703 F.2d 1215 (11th Cir. 1983); Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981). Therefore, this Court should protect the integrity of its judgments by basing same upon either unwritten implicit or written explicit acceptance of the State's procedural default arguments whenever legally possible, as it certainly is here.

II. PUBLIC POLICY

As noted, when Ms. Snyder and Ms. Litchenfields approached a number of appellants' jurors unbeknownst to counsel while this case was pending on direct appeal, interviewed them, and wrote affidavits which they then persuaded the jurors to sign as their own under oath, they acted without leave of court. As the State urged below to the concurrence of Judge Crews, public policy requires that no petition for writ of error corum nobis may be supported by "evidence" of alleged juror misconduct obtained by the defense without prior judicial authorization.

Juror deliberations and verdicts have traditionally been afforded "great sanctity" by the courts of this state. Cummings v. State, 404 So.2d 147, 148 (Fla. 2nd DCA 1981). Accord, Velsor v. Allstate Ins. Co., 329 So.2d 391 (Fla. 2nd DCA 1976), cert. dismissed, 336 So.2d 1179 (Fla. 1976); Dover Corp. v. Dean, 473 So.2d 710 (Fla. 4th DCA 1985). Such sanctity has been codfied by the Legislature in the form of § 90.607(b)(2), Fla. Stat:

> Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.

See also Songer v. State, 463 So.2d 229 (Fla. 1985); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, 454 U.S. 1000 (1981) and Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), cert. denied, 464 U.S. 865 (1983), upholding the inviolability of this Court's practice of considering nonrecord information in evaluating the propriety of capital sentences; and

Harris v. Rivera, 454 U.S. 339 (1981), upholding the inviolability of a state trial judge's reasons for reaching inconsistent verdicts. In Marks v. State Road Dept., 69 So.2d 771, 774-775 (Fla. 1954), this Court quoted the Supreme Court of Iowa's opinion in Wright v. Illinois & Mississippi Telegraph Co., 20 Iowa 195, 210 (Iowa 1866) in defining what types of matters inhere in juror deliberations and hence are inviolable, as follows:

> . . . that the juror did not assent to the verdict; that he misunderstood the instructions of the court, the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast.

The Court used the same source to define what types of matters do not inhere in such deliberations and hence are facially discoverable:

> . . . that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, game or chance or other artifice or improper manner.

Id. Ethical Consideration 7-29 of the Code of Professional

Responsibility of The Florida Bar[3] establishes procedures which lawyers representing litigants must follow for discovering such noninhering factors in conjunction with appropriate motions:

> Both before and during the trial, a lawyer should avoid conversing or otherwise communicating with a juror on any subject, whether pertaining to the case or not. Subject to any limitations imposed by law it is a lawyer's right, after the jury has been discharged, to interview the jurors solely to determine whether their verdict is subject to any legal challenge provided he has reason to believe that grounds for such challenge may exist, and further provided that prior to any such interview made by him or under his direction, he shall file in the cause, and deliver a copy to the trial judge and opposing counsel, a notice of intention to interview such juror or jurors setting forth in such notice the name of each such juror. The scope of the interview should be restricted and caution should be used to avoid embarrassment to any juror and to avoid influencing his action in any subsequent jury service.

See also Disciplinary Rule 7-108 of the Code of Professional Responsibility of The Florida Bar. The Third District in Pix Shoes of Miami, Inc. v. Howarth, 201 So.2d 80, 82-83 (Fla. 3rd DCA 1967) expounded at length upon the subject of post-verdict investigation of jurors, as follows:

> It apparently has become the custom in the Circuit Court in Dade County for

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[3] All references to the Code of Professional Responsibility are in the style employed prior to its amendment effective January 1, 1987 insofar as the conduct at issue in this case occurred well before that date. The substance of all the ethical provisions cited appears unchanged.

> certain practitioners, upon the conclusion of a trial, to commence an exhaustive investigation and interrogation of the jury room, the jurors and their reasons for arriving at their verdict [citations omitted]. The code of ethics provides that counsel should not accost a juror following a trial unless "he has reason to believe that grounds" for a challenge of the verdict exists and then only after notice to the trial judge and opposing counsel of such intentions, and any such interview should be limited in the scope of its inquiry. See: Canon 23, Code of Ethics Governing Attorneys, 31 F.S.A. [later EC 7-29; footnote omitted]. It appears in order to escape the prohibition of this code of ethics, counsel have attempted to avoid its effect by having this interrogation or investigation made by their investigators. This should be just as reprehensible if performed by an investigator as if performed by the attorney because, in fact, the investigator is the agent for his principal: the attorney.
>
> Undoubtedly, there are cases where through appropriate means post-trial investigations as to the conduct of the trial should be conducted. But this, it would appear, under canon 23, Code of Ethics Governing Attorneys, supra, should be with the consent of the trial court or at least with his knowledge [footnote omitted]. It is difficult enough, in our modern complex society, to secure good jurors. It will be even more difficult if jurors are to be subjected to harassment, investigation and interrogation subsequent to each time they perform their public duty.

See also Brassell v. Brethauer, 305 So.2d 217, 219 (Fla. 4th DCA 1974), holding that counsel must obtain leave of court by showing "reasonable grounds" to suspect misconduct before conducting

juror interviews. § 918.12, Fla. Stat., presumably would preclude illicit attempts to "influence" the recollective "judgment" of jurors during such interviews.

Appellants argued below, and can be expected to argue in rebuttal here, that the foregoing restrictions upon attorneys and their agents do not apply in the instant "criminal" case; that in any event counsel did not direct Ms. Snyder and Ms. Litchenfields to procure the instant evidence of alleged juror misconduct; and that as nonlawyers they were free to gather and the defense is thereafter free to use such evidence without restriction.

The foregoing restriction upon attorneys and their agents in gathering evidence of alleged juror misconduct do apply to the instant case. DR 7-108(D) commands that a lawyer must follow the juror interview techniques "provided for in EC 7-29." EC 7-29 provide that "it is a lawyer's right . . . to interview the jurors . . . after the jury has been discharged . . . [s]ubject to any limitations imposed by law." Fla.R.Civ.P. 1.431(g) provides that "a party may move for an order permitting a [post-verdict] interview of a juror or jurors" which the trial judge may "deny . . . or permit . . . ." Fla.R.Civ.P. 1.010 provides that Rule 1.431(g) applies "to all actions of a civil nature." This very Court has held that "collateral post-conviction remedies such as those provided by [Fla.R.Crim.P.] 3.850, . . . writs of error corum nobis and habeas corpus . . . are in the nature of independent collateral civil actions." State v. White, 470 So.2d 1377, 1378 (Fla. 1984); see also Jackson v. State, 452

So.2d 533, 536-537 (Fla. 1984). It is therefore the State's position that the defense must obtain leave of court by showing objective grounds to suspect misconduct before interviewing jurors after the entry of judgment, just as it must prior to the entry of judgment under Zeigler v. State, 402 So.2d 365, 374 (Fla. 1981), cert. denied, 455 U.S. 1035 (1982) and Cave v. State, 476 So.2d 180, 186-187 (Fla. 1985); see also DR 7-108(B)(1); EC 7-29. If the State is incorrect, it would inexorably follow that agents representing Mr. Zeigler and Mr. Cave are now free to approach their jurors in an effort to impeach their capital convictions and sentences despite this Court's affirmance of lower court orders denying them leave to do so. Certainly nothing could be more illogical.

In stark contrast to appellants' position concerning the prosecutor's conduct regarding their claim under Richardson v. State, the State accepts in good faith appellants' representations that Ms. Snyder and Ms. Litchenfields gathered the instant evidence of alleged juror misconduct without the knowledge or consent of defense counsel. However, the argument that Ms. Snyder and Ms. Litchenfields as nonlawyers were free to gather such evidence and the defense was thereafter free to use such evidence without restriction simply does not follow. It appears that when nonlawyers perform acts which would be unethical if done by a lawyer, such may constitute the unauthorized practice of law in violation of § 454.23, Fla. Stat. See, e.g., The Florida Bar v. Furman, 376 So.2d 378 (Fla.

1979), appeal dismissed, 444 U.S. 1061 (1980); The Florida Bar v. Furman, 451 So.2d 808 (Fla. 1984). Public policy requires the suppression of evidence possibly obtained in such a manner, see e.g. United States v. Leon, 468 U.S. 847 (1984) and Massachusetts v. Sheppard, 468 U.S. 981 (1984), even if gathered by a private party. Moreover, even if Ms. Snyder's and Ms. Litchenfields' actions were totally proper, public policy simply cannot permit defense counsel to use information on their clients' behalf which they cannot ethically cause to be procurred. The intrusion into the sanctity of juror processes is the same whether done by a lawyer or a nonlawyer, see Florida Standard Jury Instructions In Criminal Cases § 3.07 (1981) and Fla.R.Crim.P. 3.570, and the temptation for lawyers less ethical than current counsel to circumvent the Code by surreptitiously encouraging their nonlawyer agents to pry would be too great to resist.

In sum, public policy requires that the evidence of alleged juror misconduct gathered by Ms. Snyder and Ms. Litchenfield not be considered because it was obtained without leave of court.[4]

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[4] The State is not interested in seeing anyone connected with the defense in this cause called to task for his or her actions, and would ask that this Court take no action to such end. The State's interest here is only in protecting its lawfully obtained judgments and sentences. For future reference, the State would ask that the Court make it clear that jurors are never to be approached by anyone connected with a party either before or after their discharge without prior leave of court based upon objective grounds to suspect them of misconduct upon pain of criminal, contempt, or disciplinary prosecution; and that evidence obtained in violation of this procedure can never be used to impeach a verdict.

III. INSUFFICIENCY OF THE PLEADINGS

As noted, the gist of appellants' pre-appellate corum nobis allegations, upon which they essentially sought an evidentiary hearing, was that juror Joanne Hendricks had improperly discussed the case with her husband; that juror Debra Taylor had improperly discussed the case with her minister; that juror Marvin Seay had improperly concluded that appellants were guilty early in the trial; and that juror Anita Thomas had improperly provided nonrecord information that prison barbering was done on a segregated basis, thus impeaching the aforenoted testimony of defense witness John Allen. As the State urged below to the agreement of Judge Crews, these allegations formed an insufficient predicate upon which to order an evidentiary hearing even taken as true.

In order to merit an evidentiary hearing, a petition for writ of error corum nobis must allege in detail facts surrounding the discovery and existence of the purported noninhering juror misconduct which, if proven, prejudiced the defense in the sense that if known during trial they would have conclusively precluded entry of the challenged judgment, see collectively State v. Ramirez, Songer v. State, Russ v. State, 95 So.2d 594 (Fla. 1957), Hallman v. State, 371 So.2d 482 (Fla. 1979), Rolle v. State, 475 So.2d 210 (Fla. 1985) and White v. State; cf. State v. Barton, 194 So.2d 241, 243-244 (Fla. 1967). Such is an exceedingly heavy burden to shoulder. See Hallman v. State; Rolle v. State; White v. State. Thus in McGowan v. State, 102

So. 890, 891-892 did this Court hold that a noncapital murder defendant's allegation that one of his jurors had opined pretrial that he "was guilty and should be hanged" was not thereby entitled to a new trial because defense counsel could "by due diligence have discovered the fact of the alleged expressions before the jury was impaneled" and moved for corrective action at that time. Thus in Rembert v. State, 445 So.2d 337, 339 (Fla. 1984) did this Court hold that a capital defendant's supported allegation that his jurors considered penalty alternatives while deliberating his guilt or innocence was not thereby entitled to a new trial. Thus in State v. Ramirez did the Court hold that a rape defendant's supported allegation that one of his jurors had consistently believed him innocent but had not spoken up, due to an erroneous belief that only a majority need vote guilty to convict, was similarly not thereby entitled to a new trial. Only in Russ v. State, where the capital murder defendant's supported allegations were that his jury resolved his fate based upon extensive information concerning his prior mistreatment of the victim which was never introduced at trial, has this Court explicitly ordered further inquiry. And it is interesting to note that upon the evidentiary hearing held in that case, there was such a "complete failure of proof" that fraud was suggested and the defendant's petition for writ of error corum nobis was held properly denied, Russ v. State, 110 So.2d 11 (Fla. 1959).

If juror Hendricks had discussed the case with her husband and received guidance from him, or juror Taylor had gone through

the same process with her minister, would the jury's guilt and penalty verdicts have been impeachable? Given the pressures of capital jury service and the fact that we are always influenced by the perceptions of those with whom we associate, the State says no. See §§ 90.504 and 90.505, Fla. Stat., which render discussions of the foregoing natures privileged. If juror Seay had concluded that appellants were guilty early in the trial, would the jury's guilt and penalty verdicts have been impeachable? Given that criminal defendants are not entitled to ignorant jurors, see Murphy v. Florida, 421 U.S. 794, 800-801 (1975), the State says no. Cf. Rembert v. State, holding that the fact that jurors considered penalty alternatives while deliberating that capital defendant's guilt or innocence was not grounds for a new trial.

Even assuming arguendo that the foregoing alleged juror actions did not inhere in their verdicts and were improper - which the State does not conceed at all - appellants' complete and utter failure to allege HOW these actions caused them prejudice, in the sense that they would have otherwise avoided their convictions and death sentences, compelled a summary denial of the relief requested on these grounds. See collectively State v. Ramirez, Songer v. State, Russ v. State I, Hallman v. State, White v. State, and State v. Barton.

Now, suppose juror Thomas had informed other jurors that the white victim, Mr. Owens, might have had trouble identifying appellants as his black assailants, despite defense witness

Allen's testimony as to appellant Troy's purported encounter with Owens in one of the prison barbershops earlier in the day, because prison barbering at U.C.I. was done on a segregated basis. Would the jury's guilt and penalty verdicts have been impeachable? The State says no. Earl Owens had just been stabbed 62 times and was bleeding to death at the time of this failure to identify appellants; he probably wouldn't have recognized his own mother. Moreover, Allen didn't even know appellant Brown.

Appellants argued that Ms. Thomas' innocuous alleged sharing of the foregoing information with her partners in deliberation could have critically torpedoed a strong defense of misidentification. However, the record reveals and the Court will no doubt recall that defense witness Noel White's misidentification testimony that he saw two other unnamed black men leaving Owens' cell about the time of the murder was impeached as spitefully perjurious by two prison officials, who related that White had actually implicated appellants. Defense witness Franklin Kelly's misidentification testimony that appellant Troy was with him most of the day and that they ate dinner together about the time of the murder was impeached on cross-examination by his evasiveness as to why he failed to come forward with this "evidence" for well over a year. The defense of misidentification in this case was, in truth, pathetically anemic; while the State's evidence of appellants' guilt, heretore summarized, was quite strong.

In sum, neither appellant could have been prejudiced by Ms. Thomas' purported statement, so there was no need for an evidentiary hearing to pursue the veracity thereof. Compare Russ v. State I, in which the alleged sharing of specific nonrecord information concerning that capital murder defendant's prior mistreatment of his victim was held sufficient to warrant an evidentiary hearing; see also United States v. Conover, 772 F.2d 765 (11th Cir. 1985), cert. granted sub. nom. Tanner v. United States, ___ U.S. ___ (1986), 40 Crim.L.Rptr. 4073.

IV. INSUFFICIENCY OF THE PROOF

As noted, although Judge Crews ultimately indicated his affinity with all three of the State's aforedescribed procedural objections, he elected to conduct an evidentiary hearing upon appellants' allegations of juror misconduct in an abundance of caution given that this was a death penalty case. At this July 23, 1986 hearing, it was established that juror Hendricks had not improperly received advice from her husband concerning her deliberations; that juror Taylor had not improperly received advice from her minister concerning her penalty recommendations; and that juror Seay had not improperly concluded that appellants were guilty early in the trial. It was further established that juror Thomas, whom as the defense knew from voir dire did not work at U.C.I. but rather worked at the Lake Butler Reception and Medical Center ("R.M.C.") bank in a capacity lacking any contact with inmates, did not even broach the subject of whether prison

barbering was done on a segregated basis, but merely stated in response to another unnamed juror's question that this was the way she thought business was done at R.M.C. However, the jury's primary discussion of the barbershop where Troy worked concerned its location vis-a-vis the victim's cell. Judge Crews made findings in accordance with the foregoing facts and discharged appellants' petition for corum nobis relief as unsubstantiated on August 25.

The State here merely submits that these findings, which appellants virtually ignore in favor of re-arguing the "facts" as purportedly established by Ms. Snyder's and Ms. Litchenfields' discredited, out-of-context affidavits, were within the judge's vast discretion under the aforediscussed standards. Compare Russ v. State II. Appellants simply failed to overcome the presumption that their jurors behaved rationally, see Paramore v. State, 229 So.2d 855 (Fla. 1969), modified on other grounds, 408 U.S. 935 (1972), and hence failed to establish that they did not receive the fair trials to which they were entitled.

CONCLUSION

WHEREFORE appellee, the State of Florida, respectfully submits that this Honorable Court must AFFIRM the judgments and sentences under review.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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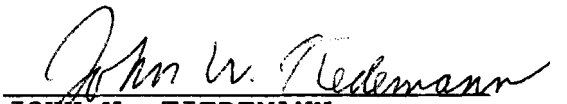

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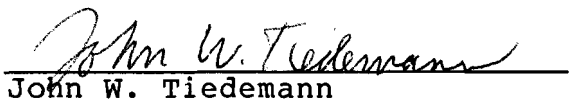
CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been forwarded by U.S. Mail to Mr. Patrick D. Doherty, Esq., 619 Turner Street, Clearwater, FL 33516, and Mr. Philip J. Padovano, Esq., P.O. Box 873, Tallahassee, FL 32302, Attorneys for Appellant Brown; and to Mr. Steven L. Bolotin, Assistant Public Defender, P.O. Box 671, Tallahassee, FL 32302, Attorney for Appellant Troy, by hand delivery, this 23rd day of February, 1987.



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