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IN THE SUPREME COURT OF FLORIDA

JACOB JOHN DOUGAN, JR.,

Appellant,

-v-

CASE NO. 65,217

STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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TOPICAL INDEX

TABLE OF CITATIONS

Florida Statutes

Other

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BRIEF OF APPELLEE

PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE

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

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

A bifurcated sentencing hearing was held on March 5, 1975 (Post-Tr.Vol.I) with the jury rendering an advisory sentence of death for appellant by a vote of 10-2 (R 185) and life imprisonment for codefendant Barclay by a vote of 7-5 (R 186). Motions for new trial were filed and denied by the trial judge (R 190, 191, 198, 203). Judgment and sentence was entered against appellant and his codefendant (R 214, 215) by the court after having read the lengthy sentence into the record on April 10, 1975 (R 217, 247; Post-Tr.Vol.III, pp. 77-109). The trial judge

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

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

On the initial appeal appellant's conviction and sentence was affirmed. Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert.denied, 439 U.S. 892 (1978), later remanded for resentencing because of Gardner v. Florida, 430 U.S. 349 (1977). Barclay v. State, 362 So.2d 657 (Fla. 1978). On remand the trial court resentenced appellant to death and the sentence was again affirmed. Dougan v. State, 398 So.2d 439 (Fla. 1981).

In a petition for writ of habeas corpus filed March 1982 appellant challenged the effectiveness of his appellate counsel. This court granted a new direct appeal. Dougan v. Wainwright, 448 So.2d 1005 (Fla. 1984). This appeal follows.

STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

Along with the tapes explaining their involvement in the murder of Stephen Orlando, both appellant Dougan and codefendant Barclay made statements to friends admitting their part in the crime (Tr. 1182-1184, 1254-1258, 1399). The .22 caliber pistol was recovered from a creek (Tr. 530-540), and it was established that the .22 caliber shell casing found at the side of Stephen

Orlando's body (Tr. 291) came from William Hearn's .22 caliber pistol (Tr. 1548).

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

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

ARGUMENT

ISSUE I

THE DEATH SENTENCE WAS LAWFULLY IMPOSED.

A. All Aggravating Circumstances Found By The Trial Judge Were Properly Applied

Appellant paints with a broad brush in contending that all aggravating circumstances found by the trial judge were erroneously applied. As noted earlier in this brief, law changes but facts do not. Appellant's contentions under this point are diametrically opposed to the findings of this court in Barclay v. State, 343 So.2d 1266 (Fla. 1977), where this court in treating the issue now under consideration remarked as follows:

> The judge before whom these cases were tried meticulously identified in writing each aggravating and mitigating circumstance listed in the death penalty statute, and he commented with specificity as to the relevance and weight to be accorded each. He noted as to Dougan that no mitigating circumstance pertained to his benefit, and that one of those factors actually suggested an aggravation rather than mitigation of sentence. Dougan, who was age 27 at the time, had no significant history of prior criminal activity, was not (and did not claim to be) under a mental or emotional disturbance, was not (and did not claim to be) under duress or the dominance of another person and had (and did not deny having) full capacity both to appreciate the criminality of his conduct and to conform his conduct to law. The trial judge further found that Dougan's victim was not a participant in the episode and had not consented to the act, but that Dougan was an accomplice with four others in this crime and had a dominant, as opposed to minor role, in its accomplishment. It was Dougan who

> conceived and planned the events that occurred. Each of these findings is well documented in the record of Dougan's trial.
>
> As to aggravating circumstances relative to Dougan, the trial judge recited that four factors essentially had no relevance here. Four other were present to some degree, namely that Dougan's crime had created a great risk of death to many persons, had been committed while engaged in a kidnapping, had endeavored to disrupt governmental functions and law enforcement, and had been especially heinous, atrocious and cruel. These findings are also well documented in the record before us. On balance, there is no doubt that the recommendation of the jury and the sentence of the trial judge are appropriate in his case.

Id. at 1270, 1271. Following a three-day hearing granted by this court pursuant to Gardner v. Florida, 430 U.S. 349 (1977), the trial judge reimposed the death penalty. This court again affirmed the imposition of the death penalty, remarking that "[o]n the basis of a close review of the transcript of the three-day hearing and all other matters submitted to the Court in conjunction with the appeal now pending, we are satisfied that the trial judge's new sentence of death is appropriate." Dougan, 398 So.2d, at 440. As regards appellant's codefendant Barclay, this court pointedly remarked that "virtually the same considerations apply with respect to consequences of the criminal episode." Barclay, 343 So.2d, at 1271. Interestingly, in reviewing this court's decision in Barclay, 411 So.2d 1310, the United States Supreme Court in Barclay v. Florida, ___U.S.___, 77 L.Ed.2d 1134 (1983), listed the four aggravating circumstances previously approved by this court, commenting "[i]t was not irrational or

arbitrary to apply these aggravating circumstances to the facts of this case." 77 L.Ed.2d, at 1142. Thus, the application of the aggravating circumstances found by the trial judge has been twice approved by this court and once by the United States Supreme Court. It is appreciated that this court is not bound by the decision in Barclay v. Florida, supra, but it is suggested that since that decision of the United States Supreme Court puts the unmistakable stamp of approval on two decisions of this court, it would be a good precedent to follow.

While the trial judge did not find § (5)(a) to be applicable to appellant, he did mention appellant's two prior convictions of contempt of court (R 235, 236). Also, the trial judge noted the murder charge then pending against appellant. This was perfectly proper in order to negate the existence of the mitigating circumstance of no significant history of prior criminal activity. Unless a mitigating circumstance is negated, then there would be a presumption that appellant had not engaged in any previous criminal activity. Booker v. State, 397 So.2d 910 (Fla. 1981), cert.denied, 102 S.Ct. 493. And the two contempt convictions and the pending murder charge were used by the trial judge to negate the existence of the mitigating circumstances of no significant history of prior criminal activity (R 227).

The trial judge did not find § (5)(b) [previously convicted of another capital felony or of a felony involving the use or threat of violence] as an aggravating circumstance applicable to appellant. The trial judge simply noted appellant's two prior convictions for contempt of court and commented that "[a]s to both defendants there are more aggravating than mitigating circumstances." The trial judge had no way of knowing, or at least he did not know, at the time the sentencing order was entered whether the contempt convictions were for some act of violent disobedience or contempt in or out of court and so recited in the sentencing order (R 236, 237). Under the rationale of Booker v. State, supra, it was proper so to do.

Appellant challenges the applicability of § (5)(c) [a great risk of death to many persons]. Under the law as it existed in April 1975, this aggravating circumstance was properly found. True, subsequent to the decision of this court in the instant case, a body of case law has developed refining the construction of § 921.141(5)(c), F.S. (1983). Appellant naturally seeks any benefit those refinements might give him. But he should not be permitted to do so; rather, the construction placed upon this aggravating circumstance should be governed by case law in existence at the time of the original appeal. The rationale of

Witt v. State, 387 So.2d 922 (Fla. 1980), should be applied.[2] It is submitted that subsequent refinements in the construction to be placed on § 5(c) do not constitute a "jurisprudential upheaval []" required for an exception to the Witt rule. The "findings" that this court found to be "well documented in the record" are still there and should be just as persuasive now as they were then. Barclay, 343 So.2d 1271. Appellee has no problem with Mines v. State, 390 So.2d 332 (Fla. 1980), because the conduct considered by the trial judge in finding this aggravating circumstance was "conduct surrounding the capital felony for which the [appellant] is being sentenced."[3] Mines, at 337. This conduct surrounding the capital felony was indeed a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." See Barclay, 343 So.2d 1271, n. 4.

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

[3] In his sentencing order the trial judge found: "On at least two occasions the defendants parked their car--and cased areas where they had chosen potential victims--but were thwarted by the circumstances that fortuitously existed. Thus five persons were saved from their fatal plan. It was not out of concern for the lives of many persons that only a single victim was chosen, but out of concern for their own detection and capture." (R 237) It is indeed fortunate that rioting did not ensue similar to that following the death of Martin Luther King.

The trial judge properly found the existence of aggravating circumstance § (5)(d) under the facts of the instant case. Appellant seems to think that because he was not charged with kidnapping, the trial judge erred in finding this aggravating circumstance. Not so. § 921.141(1) provides in pertinent part as follows:

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

It is submitted that the trial judge was eminently correct in finding that the murder group "[a]gainst his will and over his protest drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay repeatedly stabbed him with a knife. Dougan then put his foot on Orlando's head and shot him twice--once in the cheek and once in the ear--killing him instantly." (R 221, 222). Appellant seems to contend that Stephen Orlando got into the murder group's car voluntarily, hence there was no kidnapping. Query: Would Stephen have entered the car had he known the ultimate intention of the group? We think not. Finally, appellee does not agree that the record references cited in appellant's brief on p. 15 thereof

show that the trial judge "agreed and determined not to read the felony murder charge." (Appellant's brief, p. 15.) The instructions given by the trial judge were thoroughly discussed at the charge conference and it was finally determined that the instruction on felony murder should be given (Tr. 1976, line 16--1980, line 3). There was no objection by any defense counsel. The instructions agreed upon were the ones given with no objection from any defense counsel (Tr. 2136, 2244, 2245). Appellant claims there is no difference between the elements of kidnapping as a substantive crime and the elements of kidnapping as a § (5)(d) aggravating circumstance (Appellant's brief, p. 16). This borders on the ludicrous. A person charged with the substantive crime of kidnapping may be convicted thereof and sent to prison, whereas the kidnapping mentioned in § (5)(d) may only be used as an aggravating circumstance to capital murder. Apparently the jury was of the opinion that the elements of the kidnapping as an aggravating circumstance had been proven beyond a reasonable doubt; it returned a recommendation of death for appellant.

Appellant contests the finding of § (5)(g) [disrupt or hinder the exercise of governmental functions or the enforcement of law] as an aggravating circumstance applicable to him. Frankly, if the obvious attempt of appellant and his codefendants to start a racial revolution, committing murder in furtherance thereof, isn't a sufficient basis for this aggravating

circumstance, then nothing is. Starting a race war for the purpose of killing white people is nothing short of an attack on the government of this country. It isn't necessary to mount a revolution similar to the one presently going on in El Salvador before the requirements of § (5)(g) are met. There is no Florida case parallel to the facts of the instant case and this is understandable; it isn't often that a group of persons meet together in this country for the purpose of starting a race war and commit murder in furtherance of this aim. The evidence presented at trial proves beyond any reasonable doubt that the conscienceless and pitiless murder of Stephen Orlando was committed for the direct purpose of accomplishing the desired goal, i.e., the beginning of a racial revolution. Appellant's attempt to insert a constitutional challenge to § (5)(g) is devoid of merit. In reviewing the aggravating circumstances found by the trial judge, approved by this court, the United States Supreme Court said "[i]t was not irrational or arbitrary to apply these aggravating circumstances to the facts of this case," and in footnote 5 distinguished Godfrey v. Georgia, 446 U.S. 420 (1980). Barclay v. Florida, 77 L.Ed.2d 1142.

Appellant challenges the applicability of § (5)(h) [heinous, atrocious and cruel]. Appellee says that the murder of Stephen Orlando was heinous, atrocious and cruel in every sense of the word. In fact, those adjectives seem inadequate to describe the utter depravity and degradation that is evidenced in

this atrocity. To say that the murder was beastly or animalistic is an insult to the animal kingdom. Animals kill for food. Appellant deserves to die but not in the electric chair. If true justice were done, he would suffer the same death as did Stephen Orlando. But, hopefully, in this enlightened age and with the compassion we all feel, society can rid itself of such clear and present dangers in a more humane way. Appellant contends that the trial judge erred in finding that the victim was repeatedly stabbed by codefendant Barclay as he writhed in pain begging for mercy. The basis for any such contention must be the alleged contradictory testimony of William Hearn (Tr. 1403). Pain is subjective and more often that not difficult to ascertain by another. The court can judge for itself whether being repeatedly stabbed with a knife would cause pain. And did Stephen beg for his life? Note the following quoted from Hearn's testimony:

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

(Tr.Vol.VII, pp. 1385, 1386) The court will note that it was after Barclay had repeatedly stabbed him that Stephen, still conscious and begging for his life, said: "No, I will give you a bag of reefer." Appellant's claim of "instantaneous death" (appellant's brief, p. 20) is not well taken. The cases cited by appellant can scarcely be compared to those cases where the victim has a knowledge of impending death and then tortured in the process. Sullivan v. State, 303 So.2d 632 (Fla. 1974); Knight v. State, 338 So.2d 201 (Fla. 1976); Douglas v. State, 328 So.2d 18 (Fla. 1976); Jackson v State, 366 So.2d 752 (Fla. 1978); Washington v. State, 362 So.2d 658 (Fla. 1978), cert.denied, 441 U.S. 937 (1979). If appellant and the other members of the murder group wanted to kill a "white devil", they could have done so without torturing him before the death shots were finally fired. The stabbing torture was totally unnecessary to effect the final intent of these self-styled members of the Black Revolutionary Army. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Suffice it to say that this court has upheld the application of § (5)(g) where victims have been murdered by gunshot and have died instantaneously. Smith v. State, 424 So.2d 726 (Fla. 1982); Griffin v. State, 414 So.2d 1025 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982), cert.denied, 74 L.Ed.2d 148 (1982); Routly v. State, 440 So.2d 1257 (Fla. 1983). The common thread running through these cases is that before the instantaneous

death occurred, the victims were subjected to agony over the prospect that death was soon to occur, as in Sullivan v. State, supra. Finally, in Magill v. State, 428 So.2d 649 (Fla. 1983), this court commented as follows:

> There can be no mechanical, litmus test established for determining whether this or any aggravating factor is applicable. Instead, the facts must be considered in light of prior cases addressing the issue and must be compared and contrasted therewith and weighed in light thereof. Then, if the killing and its attendant circumstances do not warrant the finding of heinousness, atrociousness, and cruelty, it will be stricken. Otherwise, assuming that it is warranted in light of earlier cases and that the trial judge used the reasoned judgment which is so necessary, the finding will not be disturbed.

Id. at 651.

Appellant next claims that the trial court improperly doubled two aggravating circumstances, citing Provence v. State, 337 So.2d 783 (Fla. 1976). It is claimed that appellant's contempt citations were used to substantiate two separate aggravating circumstances, § (5)(a) and § (5)(b). First, the trial judge did not find those aggravating circumstances applicable to appellant and neither did this court. Barclay, 343 So.2d 1271, n. 3. Secondly, appellant misreads Provence v. State, supra, in his claim that the same facts cannot support multiple aggravating circumstances. This contention was rejected in Magill v. State, supra, and Routly v. State, supra. In Routly, the court remarked as follows:

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

Id. at 1264. See also, Funchess v. State, 449 So.2d 1283, 1286 (Fla. 1984).

Next, appellant contends that the trial judge improperly considered a nonstatutory aggravating circumstance, i.e., the death of the victim was the result of racial hatred. This contention was emphatically rejected by the United States Supreme Court in Barclay v. Florida, supra. Please Note:

> We reject this argument. The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder. The judge in this case found Barclay's desire to start a race war relevant to several statutory aggravating factors. The judge's discussion is neither irrational nor arbitrary. In particular, the comparison between this case and the Nazi concentration camps does not offend the United States Constitution. Such a comparison is not an inappropriate way of weighing the "especially heinous, atrocious and cruel" statutory aggravating circumstance in an attempt to determine whether it warrants imposition of the death penalty.

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

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

We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably do precisely that. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, see Proffit

> v. Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960 (1976), and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more.

77 L.Ed.2d, at 1143, 1144.

B. The Trial Judge Properly Found That There Were No Applicable Mitigating Circumstances

Appellant contends that the trial judge erred in rejecting § (6)(a) and (g) as mitigating circumstances applicable to him. The trial judge did not err. First, findings of a trial judge are factual matters which should not be disturbed unless there is an absence or lack of substantial or competent evidence to support those findings. Sireci v. State, 399 So.2d 964, 971 (Fla. 1981), citing Hargrave v. State, 366 So.2d 1 (Fla. 1978); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Mikenas v. State, 407 So.2d 892 (Fla. 1981); Smith v. State, 407 So.2d 894, 901 (Fla. 1982); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984). For example, in Mikenas, the court remarked as follows:

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

Id. at 893. The trial judge specifically stated that § (6)(a) was "neither an aggravating or mitigating circumstance as to the defendant Dougan because the facts of the Contempt of Court are not known at this time. The additional murder charge cannot be considered because he has not yet been tried on that charge." (R 227) It is submitted that because of the contempt convictions, traffic charge, and then pending murder charge, the trial judge was not required to find § (6)(a) as a mitigating circumstance applicable to appellant.

The trial judge did not err in rejecting § (6)(g) as a mitigating circumstance applicable to appellant. This contention is totally devoid of merit. Appellant admits in his brief on p. 24 thereof that he was twenty-seven years of age at the time of his arrest. Frankly, there is no per se rule which pinpoints a particular age as an automatic factor in mitigation of sentence but, rather, the propriety of a finding with respect to this circumstance depends upon evidence adduced at trial and at the sentencing hearing. Peek v. State, 395 So.2d 492 (1980), cert.denied, 451 U.S. 964. Indeed, the trial judge found that appellant was twenty-seven years of age, had completed senior high school and had served in the military. He had held various jobs--including that of a karate instructor. He had been married, fathered two children, and was divorced. He was nine years older and larger than his eighteen-year-old victim (R 234). See Simmons v. State, 419 So.2d 316, 320 (Fla. 1982).

Next, appellant contends that the trial judge failed to consider nonstatutory mitigating circumstances. The basis for this contention is the allegation that the trial court's consideration of mitigating circumstances was limited exclusively to those enumerated in the statute. This contention has just recently been rejected by the Eleventh Circuit in Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984). Please note:

> Appellant contends that the trial judge erred in not considering non-statutory mitigating factors that were presented during the sentencing hearing. In her judgment and order of death the trial judge discusses only the statutory aggravating and mitigating factors in Fla. Stat. §921.141. **Again we cannot conclude that because the order discusses only the statutorily mandated factors that the other evidence in mitigation was not considered.** Appellant's citation to Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), in which the Court held that a trial judge may not as a matter of law refuse to consider evidence of mitigation, is not persuasive, here the trial judge patiently heard all of the evidence appellant had to offer. The weight the trial judge gave to any one factor was wholly within her discretion. See Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 3430 n.2, 77 L.Ed.2d 1134 (1983) (Stevens and Powell, JJ. concurring). Our review is completed once it is established that a full hearing was conducted in which appellant's counsel was given an opportunity to present all of the mitigation evidence. There is no indication whatsoever that the trial judge did not conscientiously consider everything presented. [Emphasis ours.]

Id. at 1523. The trial judge stated no conclusion in his sentencing order on nonstatutory mitigating circumstances because, frankly, there were none about which to state a

conclusion. Appellee does not read appellant's brief as contending that any relevant mitigating evidence was excluded from his sentencing hearing. There has been no violation of Lockett v. Ohio, 438 U.S. 586 (1978). The Florida death penalty statute permits a defendant to present evidence as to any mitigating circumstance, Lockett requires the sentencer to listen. Eddings v. Oklahoma, 455 U.S. 104 (1982), n. 10. At the sentencing hearing, appellant's trial counsel called five witnesses (Post-Tr.Vol.I, 58-71) for the purpose of putting on mitigating evidence in behalf of appellant. He had every opportunity to put on anything he so desired in the nature of mitigating evidence. Again, this is not denied in appellant's brief.

The case of Moody v. State, 418 So.2d 989 (Fla. 1982), does not support appellant's position. The reversal in Moody was mandated because the trial court erroneously considered an aggravating circumstance not supported by the evidence and there was a valid statutory mitigating circumstance. Therefore, this court could not know whether the trial judge had permitted an erroneously found aggravating circumstance to offset any nonstatutory mitigating factors in the weighing process. Accordingly, the cause was remanded for the trial judge to make additional findings if deemed appropriate and to reweigh the aggravating and mitigating circumstances. In the instant case there were no improperly found statutory aggravating circumstances that went

into the weighing process. The fact that the trial judge makes no conclusion in his sentencing order as to the existence vel non of any nonstatutory mitigating circumstance simply means, not that he did not consider the evidence presented by appellant, but only that it did not have sufficient weight to be regarded as a mitigating circumstance. Obviously, the instant case presents no problem under Elledge v. State, 346 So.2d 998 (Fla. 1977). Appellee finds it interesting that appellant while seeking to lay a predicate for a later claim of ineffective assistance of counsel, is compelled to admit on p. 26 of his brief that "some substantial non-statutory mitigating circumstances slipped into the record anyway." In truth, the trial judge did consider everything relating to appellant, even the presentence investigation report. (R 226) Of course, it is not improper for the trial judge to rely on information not available to the jury. White v. Florida, 403 So.2d 331, 339-340 (Fla. 1981); Swan v. State, 322 So.2d 485, 488-489 (Fla. 1975). In sum, the trial judge listened to appellant's counsel and all the evidence presented in his behalf and found nothing sufficient to constitute mitigating evidence. This he had every right to do. Mikenas v. State, supra; Eddings v. Oklahoma, supra; Barclay v. Florida, 77 L.Ed. 1134, 1158 (1983), Stevens, J., concurring.

ISSUE II

WHETHER ANY NONSTATUTORY AGGRAVATING CIRCUMSTANCE WAS IMPROPERLY INTRODUCED AT THE PENALTY PHASE OF APPELLANT'S TRIAL.

The claim is made that the state introduced before the jury, as an aggravating circumstance, evidence of appellant's alleged involvement in the second homicide. It is the position of appellee that the trial judge properly allowed the prosecutor to read the indictment returned against appellant and others for the Roberts' murder (Post-Tr.Vol.I, 88, 89). In the sentencing hearing, a trial judge may permit any evidence deemed relevant to the nature of the crime and the character of the defendant. § 921.141(1). Appellant's involvement in the Roberts' murder was certainly relevant to his character as well as being necessary to an individualized sentence mandated by Zant v. Stevens, ___U.S.___, 77 L.Ed.2d 235, 251 (1983). The prosecutor was not permitted to go into the details of the killing, only to read the indictment (Post-Tr.Vol.I, 104). Neither was defense counsel, Mr. Jackson, permitted to go into the details of the killing. Following the testimony of Hearn, the prosecutor specifically told the jury that such aggravating circumstances were placed before it "for the sole purpose of aggravating again murderer Jacob John Dougan. That is the reason it was put on." (Post-Tr.Vol.I, 113, lines 1-3) If appellant is heard to complain that the trial judge permitted the reading of the indictment resulting from the Roberts' murder without a limiting instruction, then

appellee answers that no such limiting instruction was requested and the issue cannot now be raised for the first time on appeal. Williams v. State, 247 So.2d 425, 427 (Fla. 1971); Rule 3.390(d), Florida Rules of Criminal Procedure. In permitting the prosecutor to read the indictment for the Roberts' murder, the trial judge relied on Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert.denied, 428 U.S. 911, reh. denied, 429 U.S. 873. (Post-Tr.Vol.I, 43, line 3--46, line 2). Following the lunch recess, the trial judge again recited his views as to the admissibility of the prosecutor's reading the Roberts' indictment (Post-Tr.Vol.I, 48, line 5--50, line 14). However, at the time the prosecutor requested the court to take judicial notice that appellant was under indictment for murder in the first degree and then read the Roberts' indictment, no objection was made by any defense counsel in the presence of the jury (Post-Tr.Vol.I, 87, line 22--89, line 10). The case of Perry v. State, 395 So.2d 170 (Fla. 1981), became final more than six years after the trial of appellant in 1975. Cf. Meeks v. State, 418 So.2d 987, 989 (Fla. 1982). This is just another reason why this court should judge the instant appeal on the basis of law as it existed when this court decided appellant's initial direct appeal in 1977. For appellant to urge the application of Perry would be comparable to appellee urging that the trial court erred in not finding § (5)(i) as an aggravating circumstance. Also, we point out that the testimony of William Hearn did not constitute a "feature" of

the penalty phase. The testimony elicited on direct examination comprises, at best, 3 pages (Post-Tr.Vol.I, 90-92). The extension of Hearn's testimony was the result of Mr. Jackson's cross-examination, nothing else. And at the conclusion of the penalty phase instructions, appellant's trial counsel made the following objection:

> MR. JACKSON: I have an objection. The one that the -- you have already made, the one about -- that Mr. Buttner raised but I'm not so certain as to whether or not the jury should have been instructed relative to the word crime, or due to the fact the State did put in evidence this other indictment. I'm not so sure that the jury was able -- or will be able to recognize that that's not a conviction.

(Post-Tr.Vol.I, 177, line 21--178, line 8) Also, it is worth noting that at the time of appellant's trial in February-March, 1975, Purdy v. State, 343 So.2d 4 (Fla. 1977), had not been decided. Consequently, even if the reading of the Roberts' indictment is viewed as a nonstatutory aggravating circumstance, the trial judge did not err. However, if this is to be viewed as error, then it was antiseptic beyond all reasonable doubt. Barclay v. Florida, 77 L.Ed.2d 1149; Hargrave v. State, 366 So.2d 1 (Fla. 1978); Proffitt v. Florida, 428 U.S. 242 (1976)(approval of death penalty based on nonstatutory aggravating factor, i.e., propensity to commit murder).

ISSUE III

THERE WAS NO ERROR IN THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AT THE PENALTY PHASE OF APPELLANT'S TRIAL.

Under this point appellant argues multiple issues, none of which have any merit. It is contended that the trial judge erred because of failure to define "heinous, atrocious or cruel." Appellant relies on Cooper v. State, 336 So.2d 1133 (Fla. 1976). However, it is obvious that Cooper was decided subsequent to appellant's trial and of course the trial judge did not have the benefit thereof. Even so, the only objection registered by appellant's trial counsel had nothing to do with any alleged failure to define terms (Post-Tr.Vol.I, 177, 178). Consequently, this issue, even if it were meritorious, could not now be raised for the first time on appeal. Vaught v. State, 410 So.2d 147 (Fla. 1982).

But there was no error. Six witnesses were called to testify at the penalty hearing, five by the defense and one by the prosecution, the indictment for the Roberts' murder was read, and the tapes made by appellant and codefendant Barclay were played (Post-Tr.Vol.I, 58-111). This was all of the evidence offered and this was the evidence that the trial judge deemed to have at least some probative value. The trial judge instructed the jury that they should consider only the evidence "the Court deems to have probative value and also the following." (Post-

Tr.Vol.I, p. 170, line 24--171, line 1). The trial judge then went on to read the mitigating and aggravating circumstances listed in the statute. Of course, the jury had already heard the facts surrounding the murder at the guilt-innocence phase of the trial. It is submitted that there is nothing vague about the aggravating circumstance "especially heinous, atrocious or cruel" and the trial judge did not err in not attempting to further describe words of plain meaning, particularly in the absence of a request so to do. In State v. Dixon, 283 So.2d 1 (Fla. 1973), this court had occasion to comment on this particular aggravating circumstance as follows:

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

Id. at 9. The court did go on to state its conception as to what those terms meant but did not say or intimate that a trial judge had to do other than read the enumerated mitigating and aggravating circumstances so that the jury could determine an advisory verdict based on the evidence adduced at the penalty phase of the trial. The recent decision of the Eleventh Circuit in Westbrook v. Zant, 701 F.2d 1487 (11th Cir. 1983), rev'd on other grounds, is informative. The court had occasion to treat the identical issue appellant raises sub judice, i.e., failure to define statutory aggravating circumstances. Please note:

> Westbrook's first challenge to the instructions--failure to define statutory aggravating circumstances--is unsupportable.

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

Id. at 1501. Westbrook was expressly reaffirmed in Moore v. Zant, 722 F.2d 640, 647 (11th Cir. 1983). Indeed, in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), en banc, the court in the course of its opinion had occasion to comment on the instructions given by the state trial judge at the penalty phase of the trial. Please note:

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

Id. at 811, 812. And again, in Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984), the above language was quoted with approval. Id. at 1299.

The sentencing instructions for use at the penalty phase of a capital trial were not adopted until February 4, 1976, almost a year subsequent to appellant's trial. In re Standard

Instructions in Criminal Cases, 327 So.2d 6 (Fla. 1976). The instructions adopted May 27, 1970 were prior to Furman v. Georgia, 408 U.S. 238 (1972), and not relevant to the issue. See also Songer v. Wainwright, ___F.2d___(Case No. 83-3500 Eleventh Circuit, opinion filed 5/18/84), slip op. at 10. Appellee points out that the process of weighing aggravating and mitigating circumstances, if any, is a matter for the judge and jury, and unlike facts, it is not susceptible to proof by either the prosecution or defense. Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982). And as noted supra, there were no capital sentencing instructions to be given at the penalty phase at the time of appellant's trial. Consequently, there was no "reasonable doubt" instruction to be used at the penalty phase. True, State v. Dixon, supra, was on the books at that time. But Dixon does not require the giving of additional instructions; it simply states "they [aggravating circumstances] must be proved beyond a reasonable doubt before being considered by judge or jury." Appellee reads Dixon as holding that evidence of aggravating circumstances submitted by the prosecution must meet the same standard of proof that any other evidence would have to meet, i.e., the evidence must be sufficient to prove the issue for which it was submitted beyond a reasonable doubt. Although a capital trial is a bifurcated one, it is still one trial. In the complete instructions given at the guilt stage of the trial, the trial judge emphasized the reasonable doubt standard twenty-seven

(27) times; in his explanation of the verdict forms it was emphasized three times; and the instructions repeated at the request of the jury, four times. The jury was never instructed as to any other standard of proof.

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

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

> On cross appeal, Henry first contends that the district judge erred in finding harmless the failure of the trial judge to instruct the jury that aggravating

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

Id. at 995.

If appellant is heard to claim that the trial judge erred in failing to instruct on nonstatutory mitigating circumstances, we answer that no such instruction was requested. As noted in Henry, 995, n.5, this is not a case in which the judge refused to give the charge; appellant's counsel never requested any such charge.

Appellant's claim of error under Lockett v. Ohio, 438 U.S. 586 (1978), seems to be based primarily on Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). But the thrust of Lockett is that the "sentencer . . . [must] not be precluded from considering, **as a mitigating factor**, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

438 U.S., at 604. As noted earlier in this brief, appellant does not claim that he was "precluded from submitting any evidence he so desired to the jury as a basis for a sentence less than death." The Eleventh Circuit in Ford, 696 F.2d 804, 811-813 (1983), rejected this issue and distinguished Washington v. Watkins, supra. See also Straight v. Wainwright, 422 So.2d 827, 829-830 (Fla. 1982), rejecting the contention that an instruction which tracked the language of § 921.141 (6), F.S. (1975), fails to apprise the jury of its right and duty to consider any factor in mitigation shown by the evidence. Indeed, this court has several times rejected the contention that Florida's capital felony sentencing law and jury instructions limit consideration to statutory mitigating circumstances. Peek v. State, 395 So.2d 492 (Fla. 1981), cert.denied, 451 U.S. 964; Songer v. State, 365 So.2d 696 (Fla. 1978)(on rehearing), cert.denied, 441 U.S. 956 (1979).

As noted earlier, the only objection raised by appellant's trial counsel had to do with the reading of the Robert's indictment to the jury at the penalty phase (Post-Tr.Vol.I, 177, 178). None of the other issues argued under this point were raised in the lower court and cannot now be raised for the first time on this appeal. Bassett v. State, 449 So.2d 803 (Fla. 1984); Maggard v. State, 399 So.2d 973 (Fla. 1981), cert.denied, 454 U.S. 1059. Incidentally, in Bassett, this court reiterated

its harmless error analysis approved by the United States Supreme Court in Barclay v. Florida, supra. Note the following:

> Although one improper aggravating factor went into the weighing process, and the trial court found appellant's age as somewhat of a mitigating factor, here, as in Brown v. State, 381 So.2d 690 (Fla. 1980), cert.denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981), "we can know" that the result of the weighing process would not have been different had the one impermissible factor not been considered. Here, the trial court has told us in its order that appellant's age, in its view, had only minor significance. As in Brown and Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979), there are ample other statutory aggravating circumstances to convince us that the weighing process has not been compromised. In Brown, we stated, "Given the imprecision of the criteria set forth in our capital statute we must test for reasoned judgment in the sentencing process rather than a mechanical tabulation to arrive at a net sum. Hargrave v. State, supra; State v. Dixon, 283 So.2d 1 (Fla. 1973)." 381 So.2d at 696 (footnote omitted). See also Vaught v. State, 410 So.2d 147 (Fla. 1982).

Id. at 808.

Appellant in his brief on p. 33 thereof cites Woodson v. North Carolina, 428 U.S. 280 (1976), for the proposition that a constitutional sentencing procedure must allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition on him of a sentence of death. Appellee agrees! This is precisely why the trial judge did not err in permitting the prosecutor to read the indictment for the Roberts' murder to the jury at the penalty

phase. But more than this, we ask: Just what "relevant aspects" of appellant's character was the penalty phase jury **precluded** from hearing? We say none. And appellant has failed to direct this court's attention to any "relevant aspects" of his character that he was not permitted to introduce before the jury at the penalty phase.

It is contended that the trial court erred in failing to define the underlying felonies enumerated in § (5)(d). Not so. The trial judge found--so did this court--that the murder was committed while appellant was engaged in the commission of a kidnapping. The instructions given by the trial judge were thoroughly discussed at the charge conference and it was finally determined that the instruction of felony murder should be given (Tr. 1976, line 16--1980, line 3). There was no objection by any defense counsel. The instructions agreed upon were the ones given and as noted earlier there were no objections from defense counsel (Tr. 2136, 2144, 2245). And of course, no requested instruction was presented to the trial judge to define any of the felonies enumerated in § (5)(d). Bassett v. State, supra. The case of State v. Jones, 377 So.2d 1163 (Fla. 1979), cited by appellant is inapposite. Jones was reversed because of the trial court's **refusal** to give any instruction on the elements of the underlying felony of robbery. This was at the guilt-innocence phase of the trial. There is a vast difference between a trial

judge refusing a requested instruction at the guilt-innocence phase and not instructing on the elements of the enumerated felonies at § (5)(d) where no request was made so to do.

ISSUE IV

NO ERROR ARISES FROM THE PROSECUTOR'S CLOSING ARGUMENT AT THE PENALTY PHASE OF APPELLANT'S TRIAL BECAUSE IT WAS A MODEL OF PROSECUTORIAL FAIRNESS AND IMPARTIALITY.

It is now contended that the prosecutor's argument at the sentencing phase (Post-Tr.Vol.I, 111, line 23--129, line 16) was inflammatory. When this court examines the prosecutor's argument, it will find that at no time was the prosecutor interrupted by any defense counsel for the purpose of lodging an objection on the ground that the argument was unduly inflammatory. It was only after completion of the prosecutor's argument that objection was raised by Mr. Buttner, trial counsel for codefendant Barclay (Post-Tr.Vol. 1, 129-131). The trial judge properly denied all motions. If it can be said that the prosecutor's argument was inflammatory, this is so only because the murder itself and the facts surrounding it are inflammatory. It is difficult to conceive of anything more inflammatory than the murder, the senseless, brutal murder of a young man, for the avowed purpose of starting a race war. And contrary to Mr. Buttner's argument--presumably concurred in by other defense counsel--the prosecutor was not required to stand

perfectly still while making his presentation to the jury. Appellee knows of no case law prohibiting a prosecutor from using gestures for emphasis and clarification during the presentation of his argument to the jury. Of course, none of the complaints now raised concerning the prosecutor's argument were timely objected to at trial. And the remarks cannot by any stretch of the imagination be viewed as fundamental error. Appellee relies on Bassett, 449 So.2d 807.

Appellant cites Hance v. Zant, 696 F.2d 940 (11th Cir. 1983), and quotes therefrom: "A dramatic appeal to gut emotion has no place in the courtroom, especially in a case involving the penalty of death." Id. at 952, 953. We have no quarrel with this proposition. We simply ask this court to compare the obviously prejudicial and inflammatory remarks of the prosecutor in Hance, 696 F.2d 951, 952 with the relatively innocuous remarks of the prosecutor in the instant case. The difference will be readily apparent. In Hines v. State, 425 So.2d 589 (Fla.3d DCA 1983), there was a timely objection and motion for mistrial; in the instant case there was nothing.

In the footnote found on p. 41 of appellant's brief it is claimed that the prosecutor during this highly emotional and inflammatory argument looked at the victim's mother seated in the courtroom and this was highly improper. The undersigned counsel for appellee was not in the courtroom at the time of appellant's

trial and has no knowledge of whether the prosecutor looked at the victim's mother seated therein. Again, we note the recurring problem of applying 1984 law to an appeal from a 1975 conviction. Obviously, all of the cases cited by appellant in his argument under this point were decided long after appellant's trial and should not now be used to undermine a conviction that was solidly supported by case law at the time this court decided the initial appeal in 1977.

ISSUE V

APPELLANT'S AUTOMOBILE WAS LAWFULLY SEIZED AND SEARCHED BY POLICE OFFICIALS AND EVIDENCE OBTAINED THEREFROM WAS PROPERLY INTRODUCED AT TRIAL.

There is no merit in appellant's argument under this point. The order of the trial judge denying the motion to suppress, § 2 thereof, points out "[t]hat attorney for defendant stipulated and agreed that defendant give written permission to the police officers to search his automobile . . . and the defense not having introduced any testimony contesting those two searches and seizures, ..." (R 75) For the circumstances surrounding the signing of the waiver and consent form to search the vehicle, please see Tr. 579, line 13--581, line 19; 585, line 16--587, line 13.

It is appellee's understanding that appellant does not challenge the fact that the waiver and consent form was in fact

voluntarily signed or the identity of the automobile. It appears that the thrust of appellant's argument under this point is directed towards challenging the search of the automobile on the ground that it was illegally seized in the first instance. Please see Pre-T Vol.V, 50, line 11--51, line 3.

Appellee rejects the contention that the seizure of the automobile was unlawful. Note the following quoted from the testimony of Officer Reeves given at the hearing on the motion to suppress:

DIRECT EXAMINATION BY MR. JACKSON

* * *

Q Directing your attention to September of 1974, did you have any opportunity to come in contact with one defendant by the name of Jacob John Dougan, Jr.?

A Yes.

Q And where was that, sir?

A Pardon?

Q Where was that? Where did you come in contact with him?

A My first contact with him was at -- I believe it was 55 Tenth Street, Atlantic Beach, Florida, the Laguna Apartments, Number 6.

Q Now, at that time and place did you place him under arrest?

A Yes, I did.

Q Was he at that time -- did he have an automobile with him?

A There was -- his automobile was parked in front of the apartment.

Q Now, Mr. Dougan was not in an automobile when you arrested him?

A No, he was not.

Q Was there any need at that time to seize the automobile in order to arrest him?

A We did seize the automobile as a result of that arrest.

Q Well, what I am saying is: Was there a need to seize the automobile?

A Yes.

Q In order for you to arrest the Defendant?

A Not in order to arrest him. The Police Department is responsible for the automobile and it was seized for that purpose.

(Pre-T Vol.V, pp. 19, 20)

CROSS EXAMINATION BY MR. BOWDEN:

Q Sergeant Reeves, you are a detective sergeant; is that correct?

A Yes, I am.

Q Sergeant Reeves, going to the automobile briefly since it still is a matter somewhat in issue, why did you take the automobile into custody at the time that Jacob Dougan, Jr. was arrested?

A Because the Police Department has an obligation and a responsibility for the -- a responsibility for the car and for that reason I took it into custody.

Q It is true that you took it into custody for safekeeping initially?

A Yes, it is.

(Pre-T Vol.V, pp. 40, 41)

Further, at the hearing on the motion to suppress, Detective Suber testified in part as follows:

(On direct examination)

Q Would you tell the Court the circumstances surrounding your being in contact with that automobile, sir?

A After getting a consent to search signed by Mr. Dougan I searched his automobile, a Ford LTD.

Q Where was the Ford LTD at the time you searched it, sir?

A On our police parking lot next to the jail.

Q Do you know how it came to be in the police parking lot, sir?

A Well, I wasn't personally in the car when it was transported, but I understand it was brought from the beach by Sergeant Reeves.

* * *

Q And was it brought to the police parking lot?

A I assume it was brought by him, yes, sir.

Q And it was put on the police parking lot; is that right?

A Yes, sir.

Q Was there any reason for placing it there, sir, to your knowledge?

A Well, it was for safekeeping.

Q Now, you got a consent to search this automobile from Mr. Dougan?

A Yes, sir.

Q Did you get it from him?

A Yes, sir.

Q All right. Now, did you explain to him what it was about?

A Yes, sir.

Q And did you tell him you had the car on the parking lot at that time?

A Yes, sir.

(Pre-T Vol.V, pp. 68, 69)

(On cross-examination)

Q Did he object at anytime to your search of the automobile?

A No, he didn't. He was very cooperative.

(Pre-T Vol.V, pp. 70, 71)

Frankly, appellee agrees with the reasoning in Chambers v. Maroney, 399 U.S. 42 (1970), that for constitutional purposes, we can find no difference between seizing and holding a car before presenting the probable cause issue to a magistrate and carrying out an immediate search without a warrant. Surely, given sufficient probable cause, it must be admitted that either course is reasonable under the Fourth Amendment. Id. at 26 L.Ed.2d 428. It simply makes no difference whatever whether the officer secured the waiver and consent to search the automobile before seizing or after the seizure when the car was parked on the police parking lot. The point is, the officer did have a valid consent to search the automobile and the fact that the consent

was secured after the automobile had been seized is completely immaterial to the validity of the search. Even in those circumstances where police officers do not have either consent, probable cause, or a warrant, it has been held that the nature of the custody would support the search of the vehicle. In Cooper v. California, 386 U.S. 58 (1967), the officer had seized petitioner's car because they were required to do so by state law. It was seized because of the crime for which petitioner had been arrested. The car was impounded and had been retained in police custody until subsequent forfeiture proceedings had been concluded. The United States Supreme Court held that it would be unreasonable to hold that the police had no right, even for their own protection, to search the automobile. And it is no answer to argue that the police could have obtained a search warrant because as held in United States v. Rabinowitz, 339 U.S. 56 (1950), the relevant test is not whether it is reasonable to procure a search warrant but whether the search was reasonable. See also Harris v. United States, 390 U.S. 234 (1968).

Finally, it is emphasized that at the hearing on the motion to suppress, appellant testified and not once during his entire testimony did he say that the police took his car without his consent. For aught the record shows, appellant may well have requested that the police impound his car for safekeeping. The only reference made to the search of the automobile is as follows:

CROSS EXAMINATION

BY MR. BOWDEN:

Q Mr. Dougan, isn't it true that you gave consent to the police officers to search your vehicle?

A Yes, sir.

(Pre-T Vol.V, pp. 74, 75)

ISSUE VI

THE TRIAL JUDGE DID NOT ERR IN PERMITTING THE VICTIM'S STEPFATHER TO IDENTIFY THE VICTIM'S BODY.

There was no objection from any defense counsel to the use of Mr. Mallory's testimony for the purpose of identifying the body of Stephen Orlando (Tr. 154-159). The only objection made was by Mr. Jackson, counsel for appellant, and this was on the basis of hearsay, not on the ground of any alleged "emotional impact" of Mr. Mallory's testimony. This issue cannot now for the first time be raised on direct appeal State v. Barber, 301 So.2d 7 (Fla. 1974); Routly v. State, 440 So.2d 1257 (Fla. 1983).

ISSUE VII

THE TRIAL JUDGE DID NOT ERR IN INSTRUCTING THE JURY ON FELONY MURDER.

Appellant states in his brief on p. 15 thereof, n. 5, that all counsel in the court had agreed that an objection by one defendant would be an objection by all unless a particular defendant specifically did not join in. Given that allegation,

then a request by one defendant for a particular instruction would be a request by all defendants for the same instruction unless the record particularly indicated to the contrary. Consequently, since one codefendant requested an instruction on third degree murder, all of them requested it. And the record clearly shows that Mr. Buttner, counsel for codefendant Barclay, refused to waive the instruction on third degree murder. The prosecutor then insisted that everything in the first degree murder statute would have to be read in order to make any sense out of third degree. The trial judge agreed. Mr. Buttner agreed (Tr.1975). Mr. Buttner again stated that he couldn't waive the instruction on third degree murder. The trial judge then read a proposed instruction on felony murder (Tr. 1976, line 21--1977, line 2) and there was no objection from any defense counsel as to the proposed instruction. In fact, Mr. Sinoff, counsel for codefendant Evans, specifically voiced his approval (Tr. 1977, line 9). Then, the trial judge gave his proposed instruction on murder in the third degree following which he defined the word "felony" (Tr. 1978, lines 13-15). Then, all parties agreed that the trial judge would stop after the word "penitentiary," including Mr. Jackson, counsel for appellant (Tr. 1979-1980). There was absolutely no objection from any defense counsel to the proposed instruction on felony murder.

The trial judge found in his sentencing order--so did this court--that the murder was committed while appellant was engaged in the commission of a kidnapping. As noted supra, the instructions given by the trial judge were thoroughly discussed at the charge conference and it was finally determined that the instruction on felony murder should be given. There was no objection by any defense counsel. The instructions agreed upon were the ones given with no objection from any defense counsel (Tr. 2136). This issue cannot now be raised for the first time on direct appeal. Routly v. State, supra.

ISSUE VIII

THE TRIAL COURT DID NOT EXCLUDE ANY RELEVANT DEFENSE EVIDENCE.

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

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

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

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

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

427 U.S., at 109-110. Consistent with Agurs, see United States v. Valenzuela-Bernal, 458 U.S. 858 (1982), rejecting the "conceivable benefit" test; and State v. Sobel, 363 So.2d 324 (Fla. 1978), citing Agurs. And for a similar holding affirming the trial court's exclusion of allegedly relevant evidence, see Moody v. State, 418 So.2d 989 (Fla. 1982).

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

ISSUE IX

THE TRIAL COURT DID NOT ERR IN EXCLUDING JURORS UNALTERABLY OPPOSED TO THE DEATH PENALTY AND APPELLANT WAS TRIED BEFORE A JURY COMPOSED OF A REPRESENTATIVE CROSS-SECION OF THE COMMUNITY.

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

It is the position of appellee that the United States District Court for the Eastern District of Arkansas erroneously concluded that the "death qualification" of prospective jurors by the state of Arkansas is unconstitutional. This attempt by a federal district judge to judicially mandate the most perfectly "representative and impartial" state jury selection process conceivable is both impractical and wholly beyond the scope of judicial authority. It effectively gives federal judges a blank check to wander the socio-psychological landscape in search of "empirical" support for expanding constitutional rights. If allowed to stand, a federal judge's decision will make it impossible for a state to receive an impartial trial in a capital

case, thereby further reducing the already low esteem in which our criminal justice system is held by the public.

Appellee does not read appellant's brief as contending that certain jurors were excused for cause in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), only that this resulted in a "death-oriented" jury. It appears that appellant does not want a constitutionally impartial jury, he wants a favorable one. This he is not entitled to. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Press-Enterprise Company v. Superior Court, ___U.S.___ 78 L.Ed.2d 629, 638, n. 9 (1984).

Appellant's failure to present evidence in support of any alleged statistical assumption that jurors who are not opposed to the death penalty are more likely to vote to convict a capital defendant than are jurors who oppose the death penalty constitutes a waiver of the right to urge the exclusion of the latter category of jurors as error upon appeal. Silva v. State, 259 So.2d 153 (Fla. 1972); Spinkellink v. State, 350 So.2d 85 (Fla. 1977); Hulsey v. Sargent, 550 F.Supp. 179 (E.D. Ark. 1982), citing to Wainwright v. Sykes, 433 U.S. 72 (1977). And see Dobbert v. Strickland, 718 F.2d 1518, 1525 (11th Cir. 1983), holding that research study on peremptory challenges completed after a defendant's trial could not obviate a procedural default on a Witherspoon issue. For similar holdings, see Graham v.

Mabry, 645 F.2d 603 (8th Cir. 1981); Bass v. Estelle, 696 F.2d 1154 (5th Cir. 1983).

But even if the Grigsby claim was properly before the court, it would be meritless. Not only is Grigsby inconsistent with decisions of the United States Supreme Court, it is repugnant to this court's earlier decisions in Riley v. State, 366 So.2d 19 (Fla. 1978), cert.denied, ___U.S.___, 74 L.Ed.2d 294 (1982), and Gafford v. State, 387 So.2d 333 (Fla. 1980), which hold that jurors who oppose the death penalty may be properly excluded from the guilt phase of a capital trial. See also Steinhorst v. State, 412 So.2d 332 (Fla. 1982). With all due respect, Grigsby's total reliance upon sociological concepts is fundamentally misplaced as a matter of law and policy. The law is clear that prospective jurors who indicate under oath their ability and willingness to perform their civic obligations as jurors and to obey the law fairly and impartially are qualified to serve on a jury. As the United States Court of Appeals for the District of Columbia Circuit found, such individuals are not prosecution prone:

> No proof is available, so far as we know, and we can imagine none, to indicate that, generally speaking, persons not opposed to capital punishment are so bent in their hostility to criminals as to be incapable of rendering impartial verdicts on the law and the evidence in a capital case. **Being not opposed to capital punishment is not synonymous with favoring it. Individuals may indeed be so prejudiced in respect to serious crimes that they cannot be impartial arbiters, but that**

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

Turberville v. United States, 303 F.2d 411, 420-21 (D.C. Cir. 1962). Appellee relies on McClesky v. Zant, ___F.Supp. (D.C.N.D. Ga. 1984), and says that the conclusion reached by the district judge therein is compelled in the instant case. Please note:

> Further, the petitioner concedes that his study is incapable of demonstrating that he, specifically, was singled out for the death penalty because of the race of either himself or his victim. Further, his experts have testified that neither racial variable preponderates in the decision-making and, in the final analysis, that the seeking or the imposition of the death penalty depends on the presence of neutral aggravating and mitigating circumstances. For this additional reason, the court finds that even accepting petitioner's data at face value, he has failed to demonstrate that racial considerations caused him to receive the death penalty.

Slip op., at 90.

Finally, we must point out that a prohibition on the death qualification of veniremen would deny the state its right to an impartial trial. As Justice Black stated in Witherspoon, "the

people as a whole, or as they are usually called, 'society' or the 'state' have as much right to an impartial jury as do criminal defendants." 391 U.S., at 535 (Black, J., dissenting). Furthermore, the United States Supreme Court has explicitly recognized that juries which are not death-qualified are not impartial. Logan v. United States, 144 U.S. 263, 298 (1892); Spinkellink v. Wainwright, 578 F.2d, at 597-98 (5th Cir. 1978). Simply stated, any individual who holds beliefs which prevent him from trying a case according to the law may properly be challenged for cause. Simply because a number of individuals hold similar beliefs does not magically transform them into a protected class, the exclusion of which violates the fair cross-section requirements of the Constitution.[4]

As noted earlier, appellant tacitly admits that the scrupled jurors were properly struck for cause, But even if his brief be read as denying this, an examination of the record will reveal that the scrupled jurors were properly struck for cause. Juror Leslie (J.S.Vol.III, 487-489); Juror Tompkins (J.S.Vol.III, 526-533); Juror Norman (J.S.Vol.III, 534-538);

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

Juror Barnes (J.S.Vol.III, 542-546); (J.S.Vol.III, p. 577-579); Juror Martin (J.S.Vol.III, 585-587); Juror Robinson (J.S.Vol.II, 591-594); Alternate Juror Smith (J.S.Vol.IV, 659-660). We think it unnecessary that a prospective juror unequivocally indicate that he or she could not subordinate personal views and do their duty to follow the judge's instruction on the law, it is only necessary to make it unmistakably clear that he or she is unalterably opposed to capital punishment and would not join a guilty verdict where the death sentence could be imposed.

CONCLUSION

The conviction and sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief of Appellee to Mr. Joseph M. Nursey, P. O. Box 1978, Atlanta, Georgia 30301, Attorney for Appellant, by U.S. Mail, this 16th day of August, 1984.

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of Counsel