IN THE SUPREME COURT OF FLORIDA

FILED
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CLERK, SUPREME COURT
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JACOB JOHN DOUGAN, JR. :

Appellant :

-vs- :

STATE OF FLORIDA, : CASE NO. 65,217

Appellee :

_______________________________:

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

INITIAL BRIEF OF APPELLANT

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Preliminary Statement

The Appellant, Jacob Dougan, will be referred to herein by name or as "Appellant". The Appellee, State of Florida, will be referred to herein as the "State".

The Records on Appeal and transcripts of Appellant's trial in 1975 and 1979 resentencing hearing are contained in this Court in the file of Appellant's original appeal styled Barclay & Dougan v. State, No. 47,260. That record, insofar as it relates to Jacob Dougan, is incorporated by reference.

References to the Record on Appeal of Appellant's trial will be designated "RT"; references to the transcripts of the guilt/innocence phase of Appellant's trial will be designated "T Trial"; references to the transcript of the penalty phase of trial will be designated "T Trial Penalty Phase"; references to the six (6) volume Record on Appeal of Appellant's Gardner resentencing hearing will be designated "RG" followed by the appropriate volume number; references to the transcript of the motion to suppress evidence held in the trial court on November 8, 1974 will be designated "TMS"; references to the Presentence Investigation Report of Appellant will be designated "P.S.I.".

STATEMENT OF THE CASE

Appellant, Jacob John Dougan, Jr., was convicted of first degree murder and sentenced to death in the Circuit Court, Fourth Judicial Circuit, Duval County. On direct appeal, the judgment and sentence were affirmed by this Court. Barclay & Dougan v. State, 343 So.2d 1266 (Fla. 1977). Subsequently, this Court vacated Appellant's death sentence and remanded the case to the trial court for a Gardner resentencing proceeding. Barclay & Dougan v. State, 362 So.2d 657 (Fla. 1979).

On remand, the trial court resentenced Appellant to death; this Court affirmed Dougan v. State, 398 So.2d 439 (Fla. 1981).

On March 1, 1982, Appellant filed a Petition for Writ of Habeas Corpus with this Court alleging, among other things, that he was denied the effective assistance of counsel on direct appeal to this Court. This Court held that Appellant was indeed denied the effective assistance of counsel on direct appeal and ordered that Appellant be granted a new direct appeal. Dougan v. Wainwright, 448 So.2d 1005 (Fla. 1984).

It is from that order of this Court that this appeal ensues.

STATEMENT OF THE FACTS

On June 17, 1974, the body of Stephen Orlando, a young white person, was found off a dirt road near the beach in St. Johns County, Florida. (T Trial 169). Stephen Orlando had died from a bullet wound to the head. (T Trial 133). A note was found on Mr. Orlando's body containing statements concerning the oppression of black persons and stating that "the revolution" had begun. (T Trial 317-324).

The State's version of the facts surrounding Mr. Orlando's death were provided by a codefendant, William Hearn, who testified under a deal for leniency. Hearn ultimately received a sentence of fifteen (15) years on a plea of guilty to second degree murder.

Under the State's version of the facts, as supplied by Hearn, on June 16, 1974, Appellant met with Hearn and three other persons, Elwood Barclay, Dwyne Crittendon and Brad Evans on a basketball court in Jacksonville (T Trial 1352-1353). Later that evening they met again at Elwood Barclay's home (T Trial 1356).

All five then rode in Hearn's car with Hearn driving. After a couple of hours of driving in Jacksonville, they began driving towards Jacksonville Beach.

At Jacksonville Beach they picked up Stephen Orlando who was hitchhiking. (T Trial 1369-1370). On the pretense of driving Mr. Orlando to get some drugs, they drove to a dirt road near the beach.

When the car was stopped, Mr. Orlando was told to get out of the car. Almost immediately thereafter, he was knocked to the ground. Elwood Barclay started to stab Mr. Orlando and Appellant shot him in the head with a .22 caliber pistol, killing him instantly. (T Trial 1372-1386).

Appellant and Barclay were found guilty of first degree murder; Evans and Crittendon were found guilty of second degree murder.

At the penalty phase of trial, Jacob Dougan's counsel presented four witnesses who essentially testified that Jacob Dougan had a good reputation for truth and veracity in the community (T Trial Penalty Phase 58-71). There was some additional evidence in mitigation that Jacob Dougan was an outstanding high school student, an honor student, altar boy at St. Pius Church, an Eagle Scout, a member of the high school year book staff, student council and band. (T Trial Penalty Phase at 59; P.S.I. at p. 4). Jacob Dougan honorably served in the military (P.S.I. at p.5). Jacob Dougan served on the community Board of Directors with the Neighborhood Services Center, working for the community. (T Trial Penalty Phase at 65).

At Jacob Dougan's Gardner resentencing hearing, the State presented no additional evidence, relying on that evidence previously presented at trial.

Twenty-six (26) witnesses testified on behalf of Jacob Dougan at his resentencing hearing. Among these twenty-six witnesses were two attorneys and members of the Bar of this Court, the

Executive Director of the Northeast Florida Community Action Agency, an administrator and planner for the Jacksonville area Agency on the Aging, the Staff Director of Jacksonville's Neighborhood Resource Center, a grant writer with the Greater Jacksonville Consultants, Inc., the President of the Jacksonville branch of the N.A.A.C.P., a correctional counselor with the State of Florida Department of Corrections, a high school principal, a Duval County school teacher, a program developer for Florida Junior College and other civic minded members of the Jacksonville community (RG Vol. III 14, 31, 40, 47 89, 96, 107, 139; RG Vol. IV 58, 63, 95, 139, 140).

The testimony of these witnesses outlined Jacob Dougan's life from his high school days to the present, showing the overwhelming positive contributions made by Jacob Dougan to the Jacksonville community.

Jacob Dougan attended a segregated high school in Jacksonville; at his high school, he was a student leader and member of the student council. He was also an active participant in the Boy Scouts, earning the coveted rank of Eagle Scout; he displayed all of those positive character traits expected of an Eagle Scout (RG Vol. III 139, 140; RG Vol. IV 79, 96, 98).

After high school, Jacob Dougan briefly attended college at Florida A & M University in Tallahassee; he then joined the United States Air Force where he served his country in the Vietnam War (RG Vol. III 127, 130).

After he returned from the service in the late 1960's, until his arrest in this case in 1974, Jacob Dougan contributed a large portion of his time to numerous social programs in the Jacksonville area.

Jacob Dougan was actively involved in directing the Meals on Wheels program, a program set up to provide free hot meals to the low-income elderly and disabled persons of his community. Appellant personally went to groceries and other business in the community to solicit donations of food and clothing for the poor people served by the program; he personally assisted in serving the meals. When an elderly or disabled person served by the Meals on Wheels program was without transportation to reach the place where the food and clothing was distributed, Jacob Dougan would personally arrange for transportation for that person (RG Vol. III 15, 31, 52, 65, 76, 121, 122, 128; RG Vol. IV 122).

Jacob Dougan was also an active participant in the Senior Protection Program, a program established to check with the senior citizens of the neighborhood daily to see that they were okay and were receiving the basic necessities of life (RG Vol. III 110).

He was actively involved in obtaining adequate health care for the low-income people of the Jacksonville community. He personally recruited volunteer doctors and nurses to provide free health care services at the Neighborhood Health Center on Jacksonville's Eastside (RG Vol. III 49-50).

He was one of the founders of the Sickle Cell Anemia Detection Program which was involved in providing screening and medical treatment services as well as community education concerning this dangerous disease. Appellant was actively involved both in securing volunteer doctors and nurses for the medical services provided by the program and with the community education aspect (RG Vol. III 32, 48, 49, 50, 63, 75).

Jacob Dougan was a member of the board of directors of the Neighborhood Services Program on Jacksonville's Eastside. This was a federally funded program established to assist in running social services programs on a neighborhood level. As a member of the board of directors, Appellant was actively involved with the social services programs in his community. He was elected to the board of directors by the black and white citizens of the community (RG Vol. III 40, 42, 54, 90, 97; RG Vol IV 64, 140).

Appellant made a positive contribution to the lives of children and young people in the Jacksonville area. He worked as a coach for Little League teams in the community. He was actively involved with the Sheriff's Department Youth Program which was established to promote a better relationship between young people and the law enforcement agencies in Jacksonville. He helped recruit children for the local Head Start program. He donated money to sponsor children so they could attend the Young Life Christian organization summer camps; he always contributed to help the most needy child. He helped to take children on educational field trips (e.g., trips to the newspaper, food

processing plant, etc.). He assisted the director of the Drug Alternative Center with his program. (RG Vol. III 63, 64, 77, 78, 92, 98, 119, 121, 135, 136, 137; RG Vol. IV 141, 142).

Jacob Dougan helped low-income kids seek out grants and scholarships for college. At Christmas time, he helped collect toys for Christmas presents for poor children (RG Vol. III 53, 127).

Jacob Dougan was also involved in various other community programs such as Walnut House, a halfway house for paroled prisoners, the ex-offenders program, urban renewal committee, etc. (RG Vol. III 31, 40, 63, 75, 91; RG Vol. IV 65, 66, 122, 141).

Jacob Dougan was never paid for any of his contributions to the community. These programs benefitted both the black and white citizens of the community; Jacob Dougan always worked as a partner with the black and white people of the community and was respected by both. (RG Vol. III 17, 35, 42, 54, 66, 78, 98, 100, 110; RG Vol. IV 141, 142).

Since his conviction, Appellant has been an excellent prisoner on death row. He interacts well with both guards and other prisoners, black people and white people. He helps write letters for illiterate death row prisoners (RG Vol. IV 58-61).

As Appellant's death row counselor testified:

> "Well, I thought [Appellant] was a very good [inmate] because in the prison system you don't have a person for every man that's incarcerated and a lot of times those people that are incarcerated, some help out on various --in various situations and [Appellant] was one of those that did. He showed -- had a leadership role and it was a positive one." (RG Vol. IV 60).

I.

APPELLANT'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE PROVISIONS OF FLA. STAT. §921.141, IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER AND DEPRIVED APPELLANT DUE PROCESS AND EQUAL PROTECTION OF LAW AS GUARANTEED BY FLA. CONST. ART. I, SECS. 2, 9 AND 17 AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Appellant's death sentence must be reversed because aggravating circumstances were erroneously applied

1. Fla. Stat. §921.141(5)(a) is inapplicable to Appellant

Jacob Dougan was not "under sentence of imprisonment" at the time of the alleged commission of the capital felony. Nevertheless, the trial court found this aggravating circumstance applicable stating, "[t]he two criminal contempt convictions of the defendant, Dougan, are aggravating circumstances . . ." (RT 235-236). The trial court repeated this finding in its resentencing order after Jacob Dougan's Gardner resentencing hearing (RG Vol. I at 145).

The capital felony for which Jacob Dougan was convicted occurred in 1974; Jacob Dougan's one (1) day sentence for contempt was served completely in 1971 (PSI at p. 4); this was the only time Jacob Dougan had ever been incarcerated prior to his arrest in this case.

This Court has limited the application of Fla. Stat. §921.141 (5)(a) to persons in fact imprisoned at the time of the offense charged, persons on parole, Aldridge v. State, 351 So.2d

942 (Fla. 1977), persons on weekend furlough, Darden v. State, 329 So.2d 287 (Fla. 1976) and to escapees, Adams v. State, 341 So.2d 765 (Fla. 1977). This aggravating circumstance either facially or as applied is in no way applicable to persons without any restraint on liberty at the time of the offense charged.

Jacob Dougan was not under sentence of imprisonment either at the time of the crime's alleged commission or at the time of sentencing in this case; he was not an escapee; he was not on probation, parole or furlough. Simply stated, "[h]e was not confined in prison at the time [of the offense], nor was he supposed to be." Ferguson v. State, 417 So.2d 631, 636 (Fla. 1982). The evidence was not only insufficient to sustain this aggravating circumstance beyond a reasonable doubt, the evidence was wholly non-existent. No rational trier of fact could find the aggravating circumstance proven beyond a reasonable doubt.[1]

This improper consideration of a non-statutory aggravating circumstance alone is grounds for reversal of Appellant's sentence of death:

> The imposition of this non-statutory aggravating circumstance indicates that the weighing process dictated by statute was not followed . . .

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1. There was no evidence of Appellant's contempt of court citations introduced at Appellant's trial; the sole reference in the record to the contempt citations is contained in the Presentence Report. (PSI at p. 4). Since aggravating circumstances must be proven beyond a reasonable doubt and cannot be based solely on information contained in the presentence report, even if Appellant's contempt citations could be used as aggravating circumstances, the proof beyond a reasonable doubt standard was not met. Williams v. State, 386 So.2d 538, 542-543 (Fla. 1980).

> It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence." Mikenas v. State, 367 So.2d 606, 610 (Fla. 1979). See Elledge v. State, 346 So.2d 998 (Fla. 1977).

As this Court recognized in Menendez v. State, 368 So. 2d 1278 (Fla. 1979), where the trial court has considered in aggravation matters outside the specific aggravating circumstances detailed in Fla. Stat. §921.141(5), it becomes impossible to evaluate the weight given by the trial court to the impermissible factors vis-a-vis the factors properly considered in imposing the death sentence. 368 So.2d at 1282.

2. Fla. Stat. §921.141(5)(b) is inapplicable to Appellant

Jacob Dougan had not been "previously convicted of another capital felony or of a felony involving the use or threat of violence." Furthermore, Jacob Dougan had not been previously convicted of any felony. Nevertheless, the trial ocurt found this aggravating circumsatnce to exist on the basis of Jacob Dougan's "prior convictions of Contempt of Court" (RT 236-237). This finding was repeated in the trial court's Gardner resentencing order. (RG Vol.I at 146).

The aggravating circumstance set out in 921.141(5)(b) properly applies only "to life-threatening crimes in which the perpetrator comes in direct contact with a human victim." Lewis v. State, 398 So.2d 432, 438 (Fla. 1981).[2]

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2. Lewis v. State, supra, involves an improper finding of the §(5)(b) aggravating circumstance by the same trial judge as in this case, Honorable R. Hudson Olliff.

The power of contempt is given to courts to enforce their lawful orders and punish refusals to obey. Fla. Stat. §§38.23, 900.04. There is no indication under Florida law that contempt is even a crime, much less a "capital felony" or a "felony involving the use of threat of violence to the person."

Also, the trial court expressly stated that there was no evidence that the contempt citation involved any act or threat of violence to a person (RT 236). This hardly rises to the level of proof beyond a reasonable doubt required in the finding of an aggravating circumstance. State v. Dixon, 283 So.2d 1 (Fla. 1973). No rational trier of fact could have found Fla. Stat. §921.141 (5)(b) to exist beyond a reasonable doubt.

As with the previous aggravating circumstance, the trial court's use of Appellant's contempt of court citations as an aggravating circumstance under Fla. Stat. §921.141 (5)(b) can only be viewed as the application of an aggravating factor not permitted by the statute. Again, reversible error was committed.

3. Fla. Stat. §921.141(5)(c) is inapplicable to Appellant

The crime for which Jacob Dougan was convicted did not involve "a great riak of death to many persons". The trial court found this aggravating circumstance to exist based on two factors: a) the tape recordings made by Appellant after the allged commission of the offense which the trial court speculated endangered one half million persons in Jacksonville, Florida; b) the trial court made reference to the number of "potential victims" considered by Appellant prior to the death of the victim

in this case. (RT 237-238). These findings were reiterated in the trial court's Gardner resentencing order. (RG Vol. I 146-147).

"Great risk of death" means not a mere possibility but a likelihood or high probability of death. Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979). "[A] person may not be condemned for what might have occurred." White v. State, 403 So.2d 331 (Fla. 1981).

The words on the tapes, as inflammatory as they may be, could not create a "high probability" of death to many persons. Even assuming, solely for the sake of argument, that the tapes could be interpreted as a call to others to commit acts of violence[3], for these other acts of violence to occur would require the independent action of persons who were complete strangers to the crime for which Appellant was convicted. This could hardly be seen as a "highly probable" occurrence.

The trial court makes reference to the number of "potential victims" considered by Appellant prior to the death of the victim in this case (RT 237). The evidence presented by the State at Appellant's trial indicates that only one victim was sought regardless of the number of "potential victims" considered or attempts to find a victim (T Trial 1361, 1363). The relevant distinction here is between attempted murders and attempts to find what was intended to be a single victim.

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3. No speaker on the tapes at any time asks anyone to participate in acts of violence.

Finally, any risk presented did not come within the res gestae of the instant offense. The acts said to create the "great risk" must come within the res gestae of the death for which Appellant has been convicted. Elledge v. State, 346 So.2d 998, 1004 (Fla. 1977); Dobbert v. State, 375 So.2d 1069, 1070 (Fla. 1979).[4]

> "It is only conduct surrounding the capital felony for which the defendant is being sentenced which properly may be considered in determining whether the defendant 'knowingly created a great risk of death to many persons.'"
> Mines v. State, 390 So.2d 332, 337 (Fla. 1980).

This aggravating circumstance was obviously intended to cover situations where a defendant commits a murder in such a manner as to create a great risk of death to other persons present at the scene. According to the State's evidence, only the victim, Appellant and the co-defendants were present at the scene (T Trial 1380).

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4. Dobbert v. State, supra, involoved an erroneous finding of the §(5)(c) aggravating circumstance by the same trial judge, Honorable R. Hudson Olliff.

4. Fla. Stat.§921.141(5)(d) is inapplicable to Appellant

The trial court found the §(5)(d) aggravating circumstance to exist based on its conclusion that "all of the elements of kidnapping or false imprisonment were certainly present in this case." (RT 239). This finding was reiterated in the trial court's Gardner resentencing order. (RG Vol. I at 148).

Appellant was not charged with kidnapping in this case. At trial, at the charge conference to determine the instructions to be given to the jury at the guilt/innocence phase, counsel for Appellant and his co-defendants argued against the trial court giving the charge on First Degree Felony Murder on the ground that there was no evidence of kidnapping or any other enumerated felony (T Trial 1912-1913).[5] After some discussion, the trial court agreed and determined not to read the felony murder charge (T Trial 1914-1915); there was no objection by the State (T Trial 1916).

Later in the charge conference, the trial court agreed to read the felony murder charge solely for the purpose of making sense to the jury of the charge on Third Degree Murder (T Trial 1921-1927, 1975-1977). The trial court did not change its previous ruling that the evidence did not justify the felony murder charge.

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5. Early in the trial, all counsel and the court agreed that an objection by one co-defendant was an objection by all unless a particular defendant opted out of a particular objection. (T Trial 109).

The trial court, at the charge conference, made a judicial determination that there was insufficient evidence to show that a kidnapping occurred; his later finding of kidnapping as an aggravating circumstance violated Appellant's right against double jeopardy.

> . . . what constitutes an 'acquittal' is not to be controlled by the form of the judge's action [cites omitted]. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

By its ruling at the charge conference, the trial court finally "resolved" the issue of kidnapping favorably to Appellant. An "acquittal" of kidnapping occurred. There is no difference between the elements of kidnapping as a substantive crime and the elements of kidnapping as the §(5)(d) aggravating circumstance.

Further, the evidence presented by the State at trial indicated that the victim had consented to his being transported by Appellant and the co-defendants up to the moment of his death. The State's evidence indicated that this consent continued even after the driver of the vehicle had deviated from the victim's intended route. (T Trial 1370-1373; 1376-1381). It was not proven that the victim revoked his consent at any time prior to death.

The evidence was insufficient to prove beyond a reasonable doubt the aggravating circumstance Fla. Stat. § 921.141 (5)(d);

no rational trier of fact could find this aggravating circumstance proven beyond a reasonable doubt.

5. Fla. Stat. §921.141(5)(g) is inapplicable to Appellant

The capital felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. The trial court found this aggravating circumstance on the basis that "the messages and actions" of Appellant were part of an effort to start a racial revolution (RT 243). This finding was repeated in the trial court's Gardner resentencing order (RG Vol. I at 152).

On its face, §921.141 (5)(g) requires that the capital felony be the prohibited vehicle of disruption or hindrance. However, the factual basis relied on below, as indicated by the trial court's recounting (RT 240-243), was not the capital felony but the tapes issued by Appellant and the co-defendants subsequent to the alleged capital felony. Since the tapes were not part of the res gestae of the capital felony, they are not an appropriate basis for application of this aggravating circumstance. In fact, according to the State's evidence, the idea of making the tapes was not formulated until several days after the capital felony was committed (T Trial 1399).

Fla. Stat. §921.141 (5)(g) states that the capital felony "was committed to" accomplish the disruption or hindrance. That is, the capital felony must have been committed for the direct purpose of accomplishing the prohibited ends. Here, this nexus does not exist.

The trial court's bases for finding the §(5)(g) aggravating circumstance are inconsistent with the decisions of this Court applying §(5)(g). All decisions of this Court upholding a finding of §(5)(g) have involved murders committed for the specific purpose of eliminating witnesses or informants or murders of law enforcement officials.[6]

If §(5)(g) can be applied on the basis of the rhetoric contained in the tapes made by Appellant, then this section of the statute suffers from an unconstitutional vagueness and overbreadth and violates due process of law in contravention of the First and Fourteenth Amendments to the United States Constitution. Cf. Godfrey v. Georgia, 446 U.S. 420 (1980).

6. Fla. Stat. §921.141(5)(h) is inapplicable to Appellant

The trial court found the capital felony for which Appellant was convicted to be "especially heinous, atrocious and cruel" (RT 243-244). This finding was repeated in the Gardner resentencing order. (RG Vol. I at 153).

The trial court essentially cited two separate factors in determining that this aggravating circumstance applied: 1) the capital felony itself; 2) the tapes made after the victim's death. The second of these factors will be discussed first.

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6. E.g. Gilvin v. State, 418 So.2d 996 (Fla. 1982); White v. State, 403 So.2d 331 (Fla. 1981); Antone v. State, 382 So.2d 1205 (Fla. 1980); Raulerson v. State, 358 So.2d 826 (Fla. 1978).

The trial court stated in support of its finding of §921.141 (5)(h), "[i]n addition to an unprovoked, premeditated murder -- it was a declaration of war against a racial group -- with the promise of more violence, death and revolution to come" (R 244).

Any alleged conduct or rhetoric by the Appellant after the death of the victim is clearly inappropriate for consideration under §921.141 (5)(h). This aggravating circumstance applies only to capital crimes where the _actual commission_ of the capital felony was unnecessarily tortuous to the victim. _State v. Dixon_, 283 So.2d at 9. Acts taking place after the death of the victim cannot be considered in aggravation under §921.141 (5)(h). _Halliwell v. State_, 323 So.2d 557 (Fla. 1975). This Court has clearly limited the application of §921.141 (5)(h) to acts done to the victim, not acts which may be considered as atrocious against others. _Riley v. State_, 366 So.2d 19, 21 (Fla. 1979). _Cf_. _Lucas v. State_, 376 So.2d 1149 (Fla. 1979), where this Court held that the heinous nature of two attempted murders committed _at the same time_ as the capital felony could not be considered in applying the §(5)(h) circumstance.

The capital felony in this case is also an improper basis for §921.141 (5)(h). The trial court found this aggravating circumstance to apply because it saw the alleged murder to be premeditated and deliberate (RT 243). All first degree murders are premeditated and deliberate; that does not make a murder _especially_ heinous, atrocious and cruel. _State v. Dixon_, _supra_. The fact of premeditation or its length cannot be considered as an aggravating circumstance. _Riley v. State_, _supra_.

Finally, the trial court found §921.141 (5)(h) to be applicable because the victim was writhing in pain, begging for mercy (RT 243). This finding is simply not supported by the facts.

The trial court drew this description of the alleged murder from the tapes made by Appellant and his co-defendants (RT 224). At Appellant's trial, the State presented the testimony of one of the co-defendants, William Hearn; according to the State's evidence, William Hearn was an eyewitness and one of the participants in the alleged offense.

William Hearn, the State's sole eyewitness, clearly testified that the victim was killed almost immediately after he left the car at the scene; the State's evidence alleged that the victim was thrown to the ground, a co-defendant, Elwood Barclay attempted to stab him and Appellant killed him instantly with two gunshots to the head (T Trial 1384-1386). According to the State's evidence, the victim was aware of impending death for only a very brief period before his death.

William Hearn clearly testified that the victim did not beg for mercy (T Trial 1403); that statement was added to the tapes by a co-defendant, Elwood Barclay, solely to increase the level of rhetoric (T Trial 1403).

This case falls into the category of instantaneous death by gunshot where <u>Fla. Stat.</u> §921.141 (5)(h) does not apply. <u>See</u>, <u>e.g.</u>, <u>Cooper v. State</u>, 336 So.2d 1133, 1141 (Fla. 1976); <u>Kampf v. State</u>, <u>supra</u>; <u>Fleming v. State</u>, 374 So.2d 954, 959 (Fla. 1979).

The facts of this case are less aggravated than the facts of several cases in which this Court held the evidence insufficient to prove the §(5)(h) circumstance. See, e.g., Clark v. State, 443 So.2d 973, 975-977 (Fla. 1983) (murder not 'heinous, atrocious and cruel" where victim was shot in head after the defendant had shot victim's husband in her presence and wounded husband pled for victim not to be harmed); Demps v. State, 395 So.2d 501, 503-506 (Fla. 1982) (death by multiple stab wounds not "heinous, atrocious and cruel"); Lewis v. State, 377 So.2d 640, 641-642 (Fla. 1979) (§(5)(h) not applicable where victim was shot once and wounded and then shot several more times as he attempted to flee); Halliwell v. State, supra (§(5)(h) not applicable where the victim was beaten to death with a breaker bar).

The evidence in Appellant's case was insufficient to prove the §(5)(h) aggravating circumstance.

7. The trial court improperly "doubled" aggravating circumstances

The trial court used Appellant's contempt citations to substantiate two separate aggravating circumstances, §921.141 (5)(a) and (5)(b) [RT 235-237]. Although as discussed supra, the contempt citations cannot properly support either aggravating circumstance, the trial court committed further error when it used the single factual situation as the basis for two separate aggravating circumstances. Provence v. State, 337 So.2d 783 (Fla. 1976); Clark v. State, 379 So.2d 97 (Fla. 1980).

The trial court used the tapes made by Appellant, which the trial court referred to as a call to revolution, as the basis for three (3) aggravating circumstances: §921.141 (5)(c), (g), and (h). Assuming for the sake of argument that these tapes could constitute an aggravating circumstance, this single fact in aggravation cannot act as a basis for three aggravating circumstances. Provence v. State, supra.

8. The trial court improperly considered nonstatutory aggravating circumstances

The trial judge, in his sentencing order, makes it clear that the primary basis for the imposition of the death sentence was his announced perception that the death of the victim was the result of racial hatred. (RT 219-221, 245-246). The weight the trial court gave to this nonstatutory aggravating factor is shown by the following "Comments of [the] Judge":

> "To attempt to initiate such a race war in this country is too horrible to contemplate. . . Such an attempt must be dealt with by just and swift legal process and when justified by a Jury verdict of guilty -- then to terminate and remove permanently from society those who would choose to initiate this diabolical cause." (RT 245-246).

Even assuming, for the sake of argument, the correctness of the trial court's characterization of the murder as a racially motivated act, this cannot act as an appropriate basis for the death sentence.

> "This court has held that aggravating considerations must be limited to those provided for by the statute, and information

> must relate to one of the statutory aggravating circumstances in order to be considered in aggravation." Odum v. State, 403 So.2d 936, 942 (Fla. 1981). Accord, Drake v. State, 441 So.2d 1079, 1082 (Fla. 1984); Miller v. State, 373 So.2d 882 (Fla. 1979).

Nowhere does Fla. Stat. §921.141, or any other provision of Florida law provide for the racial motivation of a capital felony to act as an aggravating factor.

B. Appellant's death sentence must be reversed because applicable mitigating circumstances were improperly rejected or not considered at all.

1. Fla. Stat. §921.141(6)(a) is applicable to Appellant

Jacob Dougan "had no significant history of prior criminal activity". The State Attorney admitted this in his closing argument at the penalty stage of trial (T Trial Penalty Phase at 114). In the original direct appeal of this case, this Court expressly found that Jacob Dougan had no significant history of prior criminal activity. Barclay & Dougan v. State, 343 So.2d at 1270.

The trial court refused to find this mitigating factor and thus refused to consider it in the weighing process in determining sentence. The trial court's sole reason for rejecting this mitigating factor was "because the facts of the Contempt of Court are not known at this time" (RT 227). This finding was repeated in the trial court's Gardner resentencing order. (RG Vol. I at 139). Even if the contempt citation can be considered a crime (see discussion of this issue, supra) it

certainly cannot be considered a "significant history" of criminal activity.

2. Fla. Stat. §921.141(6)(g) is applicable to Appellant

The mitigating circumstance Fla. Stat. §921.141 (6)(g) should have been found by the trial court. This is not the usual case when §(6)(g) is applicable due to a defendant's youth. Rather, this is a case for the alternate application of this mitigating circumstance because of the length of time Jacob Dougan acted as a law abiding citizen.

> Finally, the age of the defendant may be considered pursuant to Fla. Stat. §921.141 (7)(g), F.S.A. This allows the judge and jury to consider the effect that the inexperience of the defendant on the one hand or, in conjunction with subsection (a), the length of time that the defendant has obeyed the laws in determining whether or not one explosion of total criminality warrants the extinction of life.
> State v. Dixon, 283 So.2d at 10. (emphasis supplied).

Jacob Dougan was 27 years of age at the time of his arrest. As the evidence presented at his Gardner resentencing hearing as outlined in the Statement of Facts, supra, shows, he has lived an exemplary life devoted to helping his fellow persons. Appellant was convicted for acts committed in the summer of 1974; one summer sandwiched in a life of otherwise exemplary conduct. Dixon's comments concerning "one explosion" being outweighed by the length of time lived as a law abiding citizen could never be more applicable than in this case.

3. The trial court failed to consider applicable non statutory mitigating circumstances

The trial court failed to consider non statutory mitigating circumstances. The trial court's consideration of mitigation was limited exclusively to the enumerated statutory mitigating circumstances (RT 226-234).[7] This limitation was continued in the trial court's Gardner resentencing order. (RG Vol. I at 138-144). Under the Eighth and Fourteenth Amendments to the United States Constitution, mitigating circumstances cannot be limited to those enumerated in the statute. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

This Court has found error where the trial court does not make it clear that non statutory mitigating factors were considered in the sentencing determination.

In Moody v. State, 418 So.2d 989 (Fla. 1982), the jury recommended the death sentence which was imposed by the trial court. In its sentencing order, the trial court properly found two aggravating circumstances but improperly found one other; the trial court did not clearly state that non statutory mitigating circumstances were considered. In reversing the death sentence, this Court stated:

> "It is not clear, however, from the trial court's sentencing order that it considered non statutory mitigating circumstances."

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7. The trial court's failure to consider non statutory mitigating circumstances is emphasized by its instructions to the jury at the penalty phase of trial where the trial court allowed the jury to consider non statutory aggravating factors but restricted consideration of mitigating circumstances to those enumerated by statute. (T Trial Penalty Phase 170-172). See Issue III, infra.

* * * * * *

> "Since the trial court erroneously considered an aggravating circumstance not supported by the evidence, since there was a valid statutory mitigating circumstance, and since the trial court may not have considered non statutory mitigating factors, we set aside the death sentence . . ."
> Moody v. State, 418 So.2d at 995 (emphasis added). Accord, Herzog v. State, 439 So.2d 1372, 1380-1381 (Fla. 1983); Lewis v. State, 398 So.2d 432, 438 (Fla. 1981).

Although Appellant's trial counsel was under the erroneous impression that all he could introduce at the penalty phase was traditional character evidence [the reputation for truth and veracity (T Trial Penalty Phase 58-71)], some substantial non-statutory mitigating circumstances slipped into the record anyway:

Jacob Dougan was an outstanding high school student, an honor student, altar boy at St. Pius Church, an Eagle Scout, a member of the high school year book staff, student council and band. (T Trial Penalty Phase at 59; PSI at p. 4). Jacob Dougan honorably served in the military (PSI at p. 5). Jacob Dougan served on the community Board of Directors with the Neighborhood Services Center, working for the community. (T Trial Penalty Phase at 65).

None of these mitigating circumstances were considered by the trial court in the sentencing weighing process.

At Jacob Dougan's Gardner resentencing hearing, a substantial showing of mitigating circumstances was made.

The evidence of mitigation presented by Jacob Dougan at his resentencing hearing has been more fully discussed in the

Statement of Facts, supra; it will be only briefly summarized here:

Jacob Dougan has built an impressive record of prior good behavior. He was an excellent student and an Eagle Scout (RG Vol. III 139, 140; RG Vol. IV 79, 96, 98).

Appellant served his country in the United States Air Force during the Vietnam War (RG Vol. III 127, 130). The fact that the trial court ignored Appellant's military service is evidenced by this comment in the resentencing order:

> "Had the defendant been exposed to the carnage of the battlefields . . . instead of movies, television programs and revolutionary tracts . . . then perhaps his thoughts and actions would have taken a less violent course."
>
> (RG Vol. I 156).

After he returned from the service, until his arrest in this case, Jacob Dougan contributed much of his time to numerous social programs in the Jacksonville area. His activities, more fully explained in the Statement of Facts, supra, included hot meal programs for the elderly and disabled, Senior Protection Program for the elderly, health care programs for the poor, Sickle Cell Anemia Detection Program, board of directors of the Neighborhood Service Program, Little League coach, Sheriff's Department Youth Program, Head Start program, collecting toys for poor children at Christmas, ex-offenders program and many others. (RG Vols. III and IV, passim).

The trial court refused to even consider any of these positive contributions as possible non statutory mitigating circumstances.

C. Conclusion

The trial court in this case improperly applied the statutory aggravating circumstances, applied unauthorized non statutory aggravating circumstances, rejected applicable statutory mitigating circumstances and failed to even consider applicable non statutory mitigating circumstances.

Stripped of the fear and anger generated by the racial rhetoric, this case is no more aggravated than the other cases, cited supra, where death occurred by gunshot instantaneously.

The mitigating circumstances in this case are great and overwhelming; this crime simply does not fit with the rest of Jacob Dougan's life. If ever the State v. Dixon, supra, principle of one explosion of criminality in an otherwise exemplary life applied, this is the case.

This Court has held that in determining the propriety of the death sentence in a particular case, the facts and circumstances of the case should be compared with other first degree murder cases. Rembert v. State, 445 So.2d 337, 340 (Fla. 1984). Assuming for the sake of argument that the trial court properly described the crime for which Appellant was convicted as racially motivated; racially motivated killings historically have not been punished by death. Consider the sorry history of lynchings. Which perpetrator of a lynching ever received the death sentence?

As a more recent example, we can look to the cases of King v. State, 355 So.2d 931, 935 (Fla. 3d DCA 1978) and Courtney v. State, 358 So.2d 1108 (Fla. 3d DCA 1978). King and Courtney had gone out with shotguns to (as they described it) "go shoot some

Niggers". King fired his shotgun into a group of black youngsters gathered on a front porch; two persons were killed, others wounded. King v. State, 355 So.2d at 835. Sentences of life imprisonment rather than death were imposed.

Of course, King and Courtney were white, the slain children were black. Jacob Dougan is black, the deceased victim in this case was white.

Why life imprisonment in one case and death in the other? Is this not an arbitrary application of the death penalty?

II.

THE STATE AT THE PENALTY PHASE OF APPELLANT'S TRIAL INTRODUCED BEFORE THE JURY EVIDENCE OF A NON STATUTORY AGGRAVATING CIRCUMSTANCE IN VIOLATION OF FLA. STAT. §921.141 AND IN VIOLATION OF RIGHTS GUARANTEED BY FLA. CONST. ART. I, SECS. 2, 9 AND 17, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At the penalty phase of Appellant's trial, the State introduced, before the jury, as an aggravating circumstance, evidence of Appellant's alleged involvement in a second homicide for which Appellant had been indicted but not convicted. Subsequent to Appellant's trial, this indictment was nol prossed.

Under Florida law, aggravating circumstances are limited to those enumerated by the statute, Fla. Stat. §921.141. Evidence presented by the State in aggravation must relate to one of the statutory aggravating circumstances. E.g. Elledge v. State, 346 So.2d 998 (Fla. 1977); Miller v. State, 373 So.2d 992 (Fla. 1979); Odum v. State, 403 So.2d 936 (Fla. 1981); Drake v. State, 441 So.2d 1079 (Fla. 1984).

The aggravating circumstance enumerated in Fla. Stat. §921.141(5)(b) applies only if "[t]he defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person" (emphasis added). "[P]rior convictions [is] the essential element of that aggravating circumstance." Elledge v. State, 346 So.2d at 1001. (emphasis in the original). As this Court held in Odum v. State, 403 So.2d at 942:

> ". . . aggravating considerations must be limited to those provided for by the statute,

> and information must relate to one of the statutory aggravating circumstances in order to be considered in aggravation. Evidence of past criminality, offered by the state for the purpose of aggravating the crime is inadmissible unless it tends to establish one of the aggravating circumstances listed in section 921.141(5). Therefore consideration of mere arrests and accusations as aggravating circumstances is precluded."

See also, Perry v. State, 395 So.2d 170, 174 (Fla. 1981) (error to present as evidence of aggravation the existence of pending criminal charges of which the defendant had not been convicted).

In Elledge v. State, supra, the State, without objection by the defendant, introduced at the penalty phase of trial testimony concerning the defendant's confession to another murder for which he had been charged but not yet convicted. Elledge's death sentence was reversed based on the State's use of this non statutory aggravated factor. 346 So.2d at 1002-1003.

At the penalty phase of Jacob Dougan's trial, the State introduced, over Appellant's objection, an indictment charging him with another murder and the testimony of William Hearn detailing the facts of this alleged homicide.[8]

Immediately after the admission of this evidence, the State Attorney began his closing argument on punishment urging the

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8. Appellant's counsel was in no position to properly confront or cross examine Hearn's testimony since at the pretrial deposition of William Hearn, Hearn invoked his Fifth Amendment privilege against self incrimination and refused to answer any questions concerning the alleged second homicide. E.g., Transcript William Hearn deposition of January 31, 1975 at pp. 77-78, 121-122, 135, 172, 176-177.

jury to consider the evidence of the second homicide as an aggravating circumstance:[9]

> "Now, ladies and gentlemen, the law provides that you may consider certain things that the Court will let you consider in his discretion. You have just heard one of the things [evidence of the alleged second homicide] that Judge Olliff has determined that you could hear in your discretion -- in his discretion that he could permit you to hear in aggravation in this case. That is one of the things that you may consider, or you would not have heard it because that is within the discretion of the Court as to whether you can hear it or not, and what was put on there was put on for the sole purpose of aggravating again [sic] murderer Jacob John Dougan. That is the reason it was put on.
>
> "Now, of course, you're going to get the heartrendering [sic] statement that Barclay -- murderer Barclay wasn't there on that one. [the alleged second homicide]. But he convinced you with that tape and with the stabbling [sic] of Orlando that he was guilty of that murder, and you just heard his voice again filled with hatred, and because he wasn't there at the second one doesn't excuse him for the first one . . ."
>
> (closing argument of the State Attorney, T Trial Penalty Phase 112-113) (emphasis added).

As in Elledge, reversible error was committed. The prosecutor used this error as his primary argument in favor of sentencing Jacob Dougan to death.

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9. The error of admitting this non statutory aggravating factor was compounded by the trial court's instructions to the jury at the penalty phase of trial where the trial court instructed the jury to consider non statutory aggravating factors. In his instructions to the jury the trial court instructed: "Now in considering whether aggravating circumstances exist to justify a sentence of death, you shall consider only the evidence the Court deems to have probative value and also the following [the court then reads the statutory aggravating circumstances]" (T Trial Penalty Phase 170-171) (emphasis added). See Issue III, infra.

III.

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AT THE PENALTY PHASE OF APPELLANT'S TRIAL IMPROPERLY RESTRICTED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES, INSTRUCTED THE JURY TO CONSIDER NON STATUTORY AGGRAVATING CIRCUMSTANCES, FAILED TO INSTRUCT THE JURY ON THE STATE'S BURDEN TO PROVE AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT AND FAILED TO DEFINE THE STATUTORY AGGRAVATING CIRCUMSTANCES IN VIOLATION OF FLA. STAT. §921.141, FLORIDA LAW, FLA. CONST. ART. I SECS. 2, 9 AND 17, AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The trial court's instructions to the jury at the penalty phase of Appellant's trial improperly limited the jury's consideration of mitigating circumstances, directed the jury to improperly consider non statutory aggravating circumstances, failed to adequately define the statutory aggravating circumstances and failed to inform the jury of the State's burden to prove aggravating circumstances beyond a reasonable doubt.

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" Woodson v. North Carolina, 428 U.S. 280, 303 (1976) "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record . . ." Lockett v. Ohio, 438 U.S. 586, 604 (1978). Cf. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

Under Florida law, only those aggravating circumstances enumerated in Fla. Stat. §921.141(5) may be considered as

aggravating circumstances. E.g. Elledge v. State, 346 So.2d 998 (Fla. 1977); Miller v. State, 373 So.2d 882 (Fla. 1979); Odum v. State, 403 So.2d 936 (Fla. 1981).

A proper jury instruction at the penalty phase of a capital trial should inform the jury that aggravating circumstances are limited to those enumerated in the statute while mitigating circumstances are not so restricted. Cf. Peek v. State, 395 So.2d 492, 496 (Fla. 1981). The trial court's jury instructions at the penalty phase of Jacob Dougan's trial did the exact opposite. The jury was told that aggravating circumstances were not limited by the statute but that mitigating circumstances were so limited.

The trial court instructed the jury as follows:

> Now, in considering whether aggravating circumstances exist to justify a sentence of death, You shall consider only the evidence the Court deems to have probative value and also the following: [the court then read the statutory aggravating circumstances]. . .
>
> Now in considering whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death, you shall consider the following: [the court then read the statutory mitigating circumstances].
> (T Trial Penalty Phase 170-172)(emphasis added).

Contrast this jury instruction with the instruction reviewed by this Court in Peek v. State, supra, where the trial court instructed the jury that aggravating circumstances "are limited to such of the following [statutory aggravating circumstances] as may be established by the evidence." No such limitation was placed upon mitigating circumstances. 395 So.2d at 496.

> [The] constitutional requirement to allow consideration of mitigating circumstances would have no importance, of course, if the sentencing jury is unware of what it may consider in reaching its decision. We read Lockett and Bell, then to mandate that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death. Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Circuit 1978).

See also, Spivey v. Zant, 661 F.2d 446 (5th Cir. 1981); Washington v. Watkins, 655 F.2d 1346, 1376 (5th Cir. 1981) ("In short under Lockett, the error in the trial court's proscription of jury consideration of non statutory mitigating circumstances was one of constitutional proportions. . . ").

In addition to the trial court's failure to properly instruct the jury on the range of aggravating and mitigating circumstances, the trial court also failed to inform the jury that aggravating circumstances must be proven beyond a reasonable doubt and failed to define the statutory aggravating circumstances.

Under Florida law, any aggravating circumstance must be proven beyond a reasonable doubt before it may be considered in the sentencing determination. State v. Dixon, 283 So.2d 1 (Fla. 1973); Williams v. State, 386 So.2d 538, 542-543 (Fla. 1980). The trial court never informed the jury at the penalty phase of Appellant's trial of this proof beyond a reasonable doubt standard. Consequently, the jury was provided with no guidance whatsoever concerning how to weigh the evidence received in aggravation.

Finally, the trial court in its instructions to the jury at the penalty phase of Appellant's trial, merely read the text of the statutory aggravating circumstances. (T Trial Penalty Phase 170-171). No attempt was made to explain or define any of the elements of the aggravating circumstances.

Especially harmful was the trial court failure to define the facially ambiguous terms of the aggravating circumstance enumerated in _Fla. Stat_. §921.141(5)(h). As was noted by this Court in _Cooper v. State_, 336 So.2d 1133, 1140 (Fla. 1976): "Of course, a proper instruction defining the terms 'especially heinous, atrocious or cruel', _or any other listed circumstance_ must be given." (emphasis added).

Since "[t]o a layman, no capital crime might appear to be less than heinous . . ." _State v. Dixon_, 283 So.2d at 9, n.8, it is critical that the jury be adequately informed of the definition of the terms of §(5)(h). Since the language of §(5)(h) fails to imply "any inherent restraint on the arbitrary and capricious infliction of the death sentence", the trial court has a constitutional responsibility to provide the jury with "specific and detailed guidance" as to its meaning. _Godfrey v. Georgia_, 446 U.S. 420, 428 (1980). Without such detailed guidance, the jury's interpretation of §(5)(h) "can only be the subject of sheer speculation". _Id_. at 429.

Equally erroneous was the trial court's failure to define the underlying felonies enumerated in the §(5)(d) aggravating circumstance. This failure to define the underlying felonies in §(5)(d) is analogous to the failure to define the underlying

felonies in a felony murder charge. "It is essential to a fair trial that the jury . . . not be left to its own devices to determine what constitutes an underlying felony." State v. Jones, 377 So.2d 1163, 1165 (Fla. 1979).

Cf. Gregg v. Georgia, 428 U.S. 153, 193 (1976):

> The idea that a jury should be given guidance in its decision-making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a law suit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations. (citations and footnotes omitted).

IV.

THE PROSECUTOR'S CLOSING ARGUMENT AT THE PENALTY PHASE OF APPELLANT'S TRIAL WAS IMPROPER, PREJUDICIAL AND INFLAMMATORY IN VIOLATION OF FLORIDA LAW AND DENIED APPELLANT DUE PROCESS OF LAW, A RELIABLE SENTENCING DETERMINATION AND FUNDAMENTAL FAIRNESS IN VIOLATION OF FLA. CONST. ART. I SECS. 2, 9 AND 17 AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The prosecutor's closing argument to the jury at the penalty phase of Appellant's trial improperly called upon the jury to return a death sentence based upon non statutory aggravating circumstances, aroused racial prejudice, made untrue and prejudicially irrelevant statements concerning conditions of incarceration in Florida and raised fear and prejudice against Appellant unsupported by any evidence in the record.

The sentencing process in a capital case must be free of passion, prejudice or other arbitrary factors; "[w]ith a man's life at stake, a prosecutor should not play on the passions of the jury." Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983). In a prosecutor's closing argument, "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.

The State Attorney began his closing argument at the penalty phase of Jacob Dougan's trial by explicitly and improperly calling on the jury to impose the death sentence based on the non statutory aggravating circumstance of the alleged second homicide for which Appellant had been indicted but not convicted. (T Trial Penalty Phase 112-113). The State nol prossed this indictment soon thereafter.

The State Attorney then moved on to arguing against finding any of the statutory mitigating circumsatnces. In this argument he appealed to racial prejudice, referring to adult black men as "black boys" (T Trial Penalty Phase 114) and then, incredibly, argued that "[Jacob Dougan] [a]n Eagle Scout who has been taught right from wrong, <u>who understands it better than other people of his race</u> . . ." (T Trial Penalty Phase 115) (emphasis added). Such argument is suited more to a Klan rally than a courtroom.

The prosecutor used only two and one half (2½) transcript pages (T Trial Penalty Phase 121-123) of his closing argument urging the jury to find the sole statutory aggravating circumstance he alleged to exist -- <u>Fla</u>. <u>Stat</u>. §921.141 (5)(h). He then moved on to irrelevant prejudical matters.

The prosecutor improperly argued to the jury:

> "Now they [sic] going to tell you probably -- they usually do -- that you can lock them up for life and they'll be secure, you can take them down to Raiford and all you have to do is send them to prison for life. Ladies and gentlemen, people don't do things because they're going to go down and <u>eat well and sleep well in an air conditioned modern jail</u>."
> (T Trial Penalty Phase 124) (emphasis added).

Besides being out-and-out false, this type of argument is wholly irrelevant to a determination of sentence. As Judge Hatchett, writing for the court, held in <u>Brooks v. Francis</u>, 716 F.2d 780, 789 (11th Cir. 1983), <u>r'hrg en banc granted</u>, 728 F.2d 1358 (1984): "[i]t is, however, improper to discuss [in closing argument at sentencing in a capital case] <u>whether or not jails are run properly</u>, have adequate security, or allow for multiple escapes." (emphasis added).

The prosecutor used the final three (3) transcript pages of his closing argument for a rousing rendition of the often condemned "war on crime / conscience of the community" argument. The prosecutor argued as follows:

> I ask you that the people -- to remember that the people of the City of Jacksonville have some rights. I think that you will agree that they have a right to have their children walk down the streets at night in their neighborhood without an armed guard or to go shopping, maybe even go down to the Howard Johnson's Motel at the game room and shoot a game of pool and get home safely. That's a right that the people of the City of Jacksonville and the State of Florida have a right to demand. Ladies and gentlemen, the predators and I'm not trying to be -- I'm just trying to tell you how I see it; I'm not trying to be articulate, I don't know how -- but I'm telling you that the predators that stalk the streets at night and make people afraid and fearful have taken the liberties of people and have taken the freedom away from people and sometime at some place it's got to stop. Now, the police did their job in this case. I hope the prosecutors have done their job. The Court, Judge Olliff, has certainly done his job to assure both sides a fair trial in this case. Now we're back to you again, and I'm going to ask you as the conscience of this community, when you go back there and deliberate, that you give Judge Olliff some help in this decision because these streets and these people of this community have got to be made safe and we have got to start somewhere, and the only way you are going to stop it is for the people to also speak out, and you are now the people. So, the police, the prosecutor, the Judge just can't do it all. We're asking you again as the conscience of the community one more time to put it on the line. I ask you, please don't shirk that responsibility, please don't put it all on the shoulders of the man in the black robe. I'm going to ask you ladies and gentlemen to vote for the death penalty on behalf of the State of Florida and the people of the State of Florida. I'm going to ask you to vote for the death peanlty for murderer Barclay and

> for murderer Dougan. You have already determined their definition. Now you can assist in determing [sic] the fate.
>
> * * * * * *
>
> . . . some place, sometime, somebody's got to say, "Don't come to the City of Jacksonville, anybody get killed [sic], because if you come to the City of Jacksonville and you kill our innocence citizens, you take our innocent citizens, you take our innocent people off the streets and you murder them and kill them, we're going to kill you." That's where the gauntlet goes down, and that's what society's got to start facing up to and that's what jurors have got to start facing up to.
>
> * * * * * *
>
> . . . ladies and gentlemen I request you, I beg you, I plead you, I ask you to go back there and to come back and vote to put them in the electric chair because that's the only way we're going to stop this kind of nonsensible [sic] killing. That's why I ask you to send the message out loud and clear . . ."
>
> (T Trial Penalty Phase 126-129).

Much milder forms of this "war on crime/conscience of the community" argument have been condemned by the courts.[10] In Hines v. State, 425 So.2d 589 (Fla. 3d DCA 1983), the court found reversible error based on the following argument:

> "Close on this thought. I am asking you here to return a verdict in this case that you can feel good about it [sic] and be proud of. I am asking you to tell the community that you are not going to tolerate the violence that took place. . ."

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10. During this highly emotional and inflammatory portion of his argument, the prosecutor referred to Mrs. Orlando, the mother of the victim, looking at her seated in the courtroom (T Trial Penalty Phase 128, 130). Such references to the victim's family have been condemned by this Court. Johnson v. State, 442 So.2d 185, 188 (Fla. 1984); Grant v. State, 171 So.2d 361 (Fla. 1965).

Cf. Brooks v. Francis, 716 F.2d at 788 where the court found constitutional error in an argument at the penalty phase of a capital trial that "invited the jurors to use the death peanlty as a solution to crimes in the street." Specificially, the prosecutor in Brooks argued, "[w]ell, you have the opportunity to do something about it [crime] right now . . . The buck stops with you today." See also, Hance v. Zant, supra.

The prosecutor's closing argument in this case was far beyond the bounds of proper and ethical courtroom behavior and deprived Jacob Dougan a fundamentally fair trial.

V.

APPELLANT'S AUTOMOBILE WAS UNLAWFULLY SEIZED AND SEARCHED BY POLICE OFFICIALS AND EVIDENCE OBTAINED FROM THAT UNLAWFUL SEARCH AND SEIZURE WAS INTRODUCED AGAINST APPELLANT AT TRIAL IN VIOLATION OF FLORIDA LAW, FLA. CONST. ART. I SEC 12 AND THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant, Jacob Dougan, was arrested in this case on September 17, 1974. Jacob Dougan was arrested in a private residence in an apartment complex in Atlantic Beach, Florida. (TMS 19-20). Jacob Dougan's automobile was legally parked at this private residence; he was not in or near his automobile at the time of his arrest (TMS 20-21). The seizure of the automobile was not necessary to effectuate the arrest. (TMS 20).

After Jacob Dougan's arrest, his automobile was seized, without a warrant, by officers of the Jacksonville Sheriff's Office and taken to the police parking lot next to the Duval County Jail. (TMS 20, 40, 68).

The sole stated reason given by police officers for the seizure of Appellant's automobile was to take the car "into custody for safekeeping" (TMS 40-41, 69).

Only after the car was unlawfully seized and impounded was a consent to search obtained from Appellant (TMS 69); Appellant never consented to the unlawful seizure of his automobile. During the search of the car, police seized a legal pad allegedly containing Appellant's handwriting (TMS 69-70).

At trial, the State's expert witness testified that the handwriting on the seized legal pad was probably written by the same person who wrote the note found on the body of the body of the victim, Stephen Orlando. This was the sole piece of physical evidence admitted at trial linking Appellant to the victim's death, which did not require the corroborative testimony of co-defendant William Hearn, who testified pursuant to a deal made with the State.

An automobile inventory search, "is not an investigative search but is allowed because it is a necessary part of the caretaking function of the police when an impoundment occurs." Miller v. State, 403 So.2d 1308, 1311 (Fla. 1981). There is no justification for an inventory and such a search is unlawful, "unless there is sufficient reason for the police to impound and take responsibility for the vehicle in the first instance." Id. Cf. South Dakota v. Opperman, 428 U.S. 364 (1976).

> "We emphasize that in considering the admissibility in a criminal trial of evidence discovered in an inventory search after impoundment, the trial court must first determine whether the impoundment was lawful, reasonable, and necessary."
> Miller v. State, 403 So.2d at 1312 (emphasis added).

If the primary purpose of impoundment is for the safekeeping of the vehicle, the owner, if reasonably available, must be consulted concerning the impoundment and available alternatives must be considered. Id. at 1313. Cf. State v. Jenkins, 319 So.2d 91, 94 (Fla. 4th DCA 1975): impoundment is of questionable value where the location of the automobile does not create a hazard and the owner, after being advised of the choice, chooses not to have his car impounded.

In Appellant's case, impoundment was not reasonable, necessary or lawful. Jacob Dougan was arrested in a private residence; he was never advised of alternatives concerning his car; no consent for impoundment was given; his automobile was lawfully parked and created no traffic hazard. A consent to search obtained the day following the unlawful seizure does not change the illegality of the seizure. The fruits of this illegal seizure should have been suppressed.

VI.

THE PROSECUTOR'S INTENTIONAL USE OF THE VICTIM'S STEP-FATHER AS A WITNESS TO IDENTIFY THE VICTIM'S BODY WAS IN VIOLATION OF WELL SETTLED FLORIDA LAW AND DENIED APPELLANT THE RIGHT TO A RELIABLE SENTENCING DETERMINATION FREE OF PASSION, PREJUDICE AND ARBITRARY FACTORS AND DENIED DUE PROCESS OF LAW, IN VIOLATION OF FLA. CONST. ART. I SECS. 2, 9 AND 17 AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At the guilt/innocence phase of Appellant's trial, the State called Mr. Vincent Mallory, the step-father of the victim, Stephen Orlando, as a witness. The sole testimony given by Mr. Mallory was to identify the body of his deceased step-son. (T Trial 154-159).

Several other witnesses were available to accomplish this technical task of identifying the deceased person. For example, Stephen Orlando's next door neighbor, William Colley or Bobby Langston, a schoolmate of Stephen Orlando who discovered the body, could have identified Mr. Orlando. (T Trial 161, 225).

The only purpose the State could have had for calling Mr. Mallory as a witness would be to create prejudice against Appellant by emphasizing to the jury the grief of Mr. Orlando's family.[11] This prejudice was heightened when Mr. Mallory emotionally asked the judge to order Appellant's counsel to call his stepson "Stephen" rather than "Orlando". (T Trial 162-163).

This improper conduct by the prosecutor was clearly intentional. Well settled precedents in Florida prohibit the prosecutor from using a close family member to identify the victim in a murder case. E.g. Melbourne v. State, 51 Fla. 69, 50 So. 189 (1906); Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Ashmore v. State, 214 So.2d 67 (Fla. 1st DCA 1968); Scott v. State, 256 So.2d 19 (Fla. 4th DCA 1971).

11. Cf. Johnson v. State, 442 So.2d 185, 188 (Fla. 1984); Grant v. State, 171 So.2d 361 (Fla. 1965).

VII.

THE TRIAL COURT ERRED IN GIVING A JURY INSTRUCTION ON FELONY MURDER AFTER THE COURT DETERMINED THAT THE EVIDENCE DID NOT SUPPORT A FINDING OF ANY OF THE UNDERLYING FELONIES; THIS INSTRUCTION DEPRIVED APPELLANT DUE PROCESS OF LAW, RELIABLE FACT FINDING, AND PROTECTION AGAINST DOUBLE JEOPARDY AS GUARANTEED BY THE FLA. CONST. and the FIFTH, EIGHTH and FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At the charge conference at the guilt/innocence phase of Appellant's trial, Appellant and his co-defendants objected to the trial court giving the jury instruction on First Degree Felony Murder on the ground that there was no evidence of any of the underlying felonies (T Trial 1912-1913). After some discussion, the trial court agreed and determined not to read the felony murder instruction to the jury (T Trial 1914-1915); there was no objection by the State (T Trial 1916).

Later, when counsel for a co-defendant requested an instruction on Third Degree murder, the trial judge agreed with the State's request to read the Felony Murder instruction purportedly to make the Third Degree Murder instruction comprehensible (T Trial 1921-1927, 1975-1977). The trial court did not change its previous ruling that the evidence did not justify the felony murder instruction.

The instruction on felony murder was improper and unnecessary. The jury could have been informed of the relevant list of enumerated felonies, so as to make third degree murder understandable, without allowing the jury to consider a first degree felony murder charge, judicially determined to be without an evidentiary basis.

There is no way of knowing upon what basis the jury made its verdict of first degree murder. The death sentence can be imposed only after a reliable fact finding procedure at both the guilt/innocence and sentencing phases. Beck v. Alabama, 447 U.S. 625 (1980). A verdict which may have rested on a felony murder charge unsupported by the evidence cannot stand.

VIII.

THE TRIAL COURT IMPROPERLY EXCLUDED RELEVANT DEFENSE EVIDENCE DEPRIVING APPELLANT DUE PROCESS OF LAW IN VIOLATION OF FLA. CONST. AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellant's primary defense at the guilt/ innocence phase of trial was that he had not committed the murder but had made tapes emphasizing the plight of black persons and in the tapes claimed responsibility for a murder committed by others.

In support of this defense, at the guilt/innocence phase of trial, Appellant attempted to present the testimony of Sgt. Butch Gavin of the Jacksonville Sheriff's Office. Sgt. Gavin was in charge of the investigation of a Jacksonville area murder during August 1974 where a victim was found with the initials "BLA" on his body. A man named John Paul Knowles, who had no connection with Appellant, was charged with that crime.

This evidence would have shown that a murder with no possible connection to Appellant had also used the "Black Liberation Army" initials. This evidence would have supported Appellant's defense.

The trial court sustained the State's objection to Sgt. Garvin's testimony as irrelevant and refused to even allow Appellant to call Sgt. Garvin to the witness stand. (T Trial 1756-1760).

This evidence was supportive of Appellant's defense and it was a jury question to determine its weight and credibility. The trial court's ruling deprived Appellant the opportunity to fully present his defense. Cf. Huff v. State, 437 So.2d 1087, 1091 (Fla. 1983).

IX.

THE VOIR DIRE OF THE JURY AND THE EXCLUSION OF JURORS OPPOSED TO THE DEATH PENALTY DENIED APPELLANT A JURY COMPOSED OF A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY, A RELIABLE DETERMINATION OF GUILT AND PUNISHMENT AND DUE PROCESS OF LAW AS GUARANTEED BY THE FLA. CONST. AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the voir dire examination of the potential jurors at Appellant's trial, eight venire members were excused for cause, upon motion of the prosecutor, for their attitudes against the death penalty.[12] This jury selection process was improper on three bases: a) the questioning of the excused jurors was insufficient to determine if they were properly excused for cause and misled the jurors about their role in the sentencing determination; b) the process of questioning the jurors about their views on the death penalty was prejudicial and implied

12. The eight "death scrupled" venirepersons excused for cause were Venirepersons Leslie (T Voir Dire 489), Tompkins (T Voir Dire 533), Norman (T Voir Dire 538), Barnes (T Voir Dire 546), WIlder (T Voir Dire 579), Martin (T Voir Dire 587), Robinson (T Voir Dire 594), Smith (T Voir Dire 660).

Appellant's guilt; c) "death qualification" of jurors creates a jury biased in favor of the prosecution on the issue of guilt/innocence.

a) None of the eight excused venirepersons were asked questions or gave responses which unequivocally indicated that they could not subordinate their personal view and follow the judge's instructions on the law. Boulden v. Holman, 394 U.S. 478, 483 (1969); Maxwell v. Bishop, 398 U.S. 262, 265 (1970). The questioning of the potential jurors by the prosecutor, left uncorrected by the court, led the jurors to believe they would have no influence in the sentencing process and that sentencing was solely the function of the judge. Appellant's counsel repeatedly objected to this misleading questioning. E.g., T Voir Dire 492-493, 496-499, 526-528, 535, 538, 544-545, 579, 587, 593-594, 660.

Nowhere was the jury informed of the great weight its sentencing verdict would have on the sentencing determination. Tedder v. State, 322 So.2d 908 (Fla. 1975).

b) The process of questioning jurors about whether they could vote for the death penalty implied that reaching the sentencing phase of the trial was a foregone conclusion. Focusing on the penalty issues leads jurors to infer guilt. Grigsby v. Mabry, 569 F.Supp. 1273, 1302-1305 (E.D. Ark. 1983).

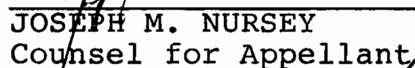
c) Excusing jurors for cause based solely upon opposition to the death penalty creates a jury biased in favor of the prosecution on the guilt/innocence issue. As jurors in favor of the death penalty are also those jurors most likely to resolve

issues of doubt in the guilt/innocence determination in favor of the State, the process of "death qualification" creates a "prosecution prone" jury, unrepresentative of a true cross-section of the community. Grigsby v. Mabry, supra.

CONCLUSION

Based on the foregoing, Appellant's conviction and sentence should be reversed.

Respectfully submitted,



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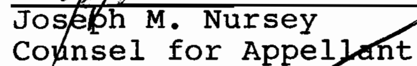
CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party with a copy of the foregoing Initial Brief of Appellant, by placing same in the U.S. Mail with adequte first-class postaged annexed thereto, addressed to Mr. Wallace Allbritton, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301-8048.

This 1st day of July, 1984.



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