IN THE SUPREME COURT
STATE OF FLORIDA

NATHANIEL JACKSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 66,671

APPEAL FROM THE CIRCUIT COURT
IN THE SIXTH JUDICIAL CIRCUIT
FOR PINELLAS COUNTY, FLORIDA

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

OTHER AUTHORITIES

SUMMARY OF THE ARGUMENT

Although appellant was not the triggerman in this murder, his sentence of death does not violate the principles espoused in Enmund v. Florida, infra. The trial judge made findings of fact which indicate appellant knew killing was contemplated. These findings satisfy the intent requirement as pronounced in Cabana v. Bullock, infra.

Appellant did not object in the trial court to the giving or failure to give instructions on how aggravating and mitigating circumstances are weighed and the quantum of proof or the use of guilt /innocence testimony at penalty. Therefore, these issues have not been preserved for appellate review. Foster v. State, infra.

The record supports the fact that appellant had been adjudicated but not sentenced for attempted armed robbery; thus, the aggravating circumstance of prior violent felony was applicable. Appellant concedes this capital murder was committed during a robbery. Additionally, the facts of this case demonstrate the aggravating factors of witness elimination and heinous, atrocious or cruel.

A review of the facts and circumstances of the crime and the defendant, reveals this case is among the range of cases where death is the appropriate sentence. There are several valid aggravating circumstances present and no mitigating circumstances. Death is the appropriate sentence. Alford v. State, infra.

ARGUMENT

ISSUE I

THE DEATH SENTENCE IS APPROPRIATE IN THIS CASE BECAUSE THE EVIDENCE ESTABLISHED APPELLANT KNEW LETHAL FORCE WAS CONTEMPLATED

As a part of his sentencing order, the trial judge made the following findings:

> The Court further finds that this defendant was not the "triggerman" in this murder. The defendant, however, clearly understood and took part in the plan to rob the victim at gunpoint. He was not a passive aider and abbettor. The plan included the carrying of a loaded gun to be held on the victim during the robbery. The gun was pointed at the victim while this defendant undertook to take money from the victim. The victim struggled with this defendant and was shot by the co-perpetrator. This defendant knew the gun was to be used in the robbery, he knew it was being used and he knew he would not escape unless it was used. A major reason for taking the gun was to eliminate a witness or to shoot the victim if he resisted. This defendant contemplated or anticipated that lethal force might be used. This use of force was at the very least a contingency of the plan. The defendant was present at the killing and was a major active participant in the crime. (R216)

Appellee respectfully submits these findings by the court satisfy the requirements of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982) and Cabana v. Bullock, 38 Cr.L. 3093 (1986).

In Enmund v. Florida, supra., the Supreme Court addressed the issue of whether or not an aider and abettor to a felony during the course of which a murder is committed can constitutionally be given a death penalty. The evidence at trial indicated Enmund was the driver of the getaway car. There was no evidence that the defendant was present at the victim's door when the robbery escalated into murder. However, based on Enmund's participation in planning and executing the robbery, the state courts held him viable for the murders as an order and abettor to the felony. Thus, the question evolved as one of the validity of a death sentence where the defendant neither killed, attempted to kill, nor intended to kill.

In vacating Enmund's death sentence, the court said:

> The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," Lockett v. Ohio, 438 US 586,605, 57 L.Ed. 2d 973, 98 S.Ct. 2954, 9 Ohio Ops 3d 26 (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." Woodson v. North Carolina, 428 US 280,304, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976). Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. (73 L.Ed. 2d at 1152)

The court's decision in Enmund left open the question of who had to make the finding of whether the felony murderer killed, attempted to kill or knew lethal force was contemplated. This issue was decided recently in Cabana v. Bullock, supra.

The Bullock defendant and a friend accepted a ride from a third party. The friend and the driver got into a fight, during which the defendant held the victim while Tucker, the friend, hit victim in the face with a whiskey bottle. Tucker beat the victim with his fists until he fell to the ground, then Tucker killed him by smashing his head with a concrete brick. Bullock and Tucker then disposed of the body.

At the conclusion of trial, the jury was instructed it could find the defendant guilty of capital murder if he was present and aided another in committing a felony. Bullock was found guilty and sentenced to death. The state courts affirmed his judgment and sentence despite a challenge based on the disproportionality of the sentence in view of his level of involvement. The case proceeded to federal court after exhaustion of state remedies. The district court denied habeas relief; the circuit court granted relief citing the Enmund decision. The court opined the defendant could have, based on the jury instructions, been found guilty solely on his participation in the robbery and without a determination of Bullock's intent to kill.

On certiorari reivew, the Supreme Court upheld the appeal's court determination that neither the verdict of guilty nor the sentence of death necessarily reflected an Enmund finding regarding intent. The court further opined, however, that the determination

of a finding of intent to kill should not be limited to jury instructions alone. A review court should look at the entire record to see if such a finding was made by the trial court or the state appeals court. The Bullock court said:

> If a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite culpability; by the same token, if a person sentenced to death lacks the requisite culpability, the Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence. At what precise point in its criminal process a State choosed to make the Enmund determination is of little concern from the standpoint of the Constitution. The State has considerable freedom to structure its capital sentencing system as it sees fit, for "[a]s the Court has several times made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme". Spaziano, supra, at ___; see also Pulley v. Harris, 465 U.S. 37 (1984); Zant v. Stephens, 462 U.S. 862 (1983); Gregg v. Georgia, 428 U.S. 153, 195 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).
> (38 Cr.L. at 3096)

It is clear from this statement that the finding that the defendant killed, attempted to kill, intended to kill or knew lethal force was contemplated, can be made by the jury, the trial judge or the state appellate court.

Sub judice, the trial judge made the findings needed to

satisfy Enmund and Cabana. These findings are fairly supported by the record and should not be disturbed on appeal. See, Tibbs v. State, 397 So.2d 1120 (Fla. 1981). Appellant's death sentence does not violate the Eighth Amendment since the evidence adduced at trial supports a finding that appellant knew lethal force might be used.

ISSUE II

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE OPERATION OF FLORIDA'S CAPITAL PUNISHMENT STATUTE

Section 921.141(2), Florida Statutes provides:

> (2) ADVISORY SENTENCE BY THE JURY. -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
> (emphasis added)

The standard jury instructions given in capital cases is a restatement of this statutory provision. A jury is told the penalty for first degree murder is life imprisonment or death. The jury is further instructed, and was so instructed here, the state must prove one or more of the statutory aggravating circumstances, beyond a reasonable doubt, before they can consider imposition of the death penalty. In other words, the state bears the burden of proving, much the same as the state has the burden of proving the substantive crime, that death is the appropriate sentence in any case.

Once the state has carried the burden of proving aggravating circumstances, the jury must look at the mitigating circumstances to determine if these circumstances warrant something less than death. This is analogous to the defendant coming forward at trial with an affirmative defense, i.e., self defense, alibi. It is only fitting that a defendant produce such mitigating evidence since it is the type of information that is peculiarly within the defendant's knowledge. See, Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982) and Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983).

Appellant now argues the court should have instructed the jury that the aggravating circumstances must outweigh the mitigating circumstances. Such an argument was rejected in Kennedy v. State, 455 So.2d 351,354 (1984). Appellee further submits appellant has misinterpreted Arango v. State, 411 So.2d 172 (Fla. 1982). This Court in Arango was concerned with what standard of proof must be met in establishing aggravating circumstances.

The above argument is being offered to this court as an alternative argument. Appellee submits this issue is not properly before the court since there was no objection to the complained of instructions nor was there a request for the type of instruction now being urged. It is well-settled law that a party may not argue on appeal the giving or failure to give a particular jury instruction unless the party objected in the trial court. See, Rule 3.390(d), Fla. R.Crim.P.; Foster v. State, 436 So.2d 56 (Fla. 1983); Timmons v. State, 448 So.2d 1048 (Fla.

1st DCA 1984) and Ford v. Wainwright, 451 So.2d 471 (Fla. 1984).

The defense in this case never objected to the standard instructions on the standard of proof in the penalty phase. Indeed, no objection was warranted since the instructions are an accurate reflection of the law, i.e., the state must prove aggravating circumstances beyond a reasonable doublt and the defendant must come forward with mitigating evidence to outweigh aggravating circumstances. Ford v. Wainwright, supra.

Appellant also complains about the instruction concerning using evidence from the guilt/innocence phase being used in the penalty phase. Again, this issue is not properly before this Court; no objection was voiced at the trial court level. Foster v. State, supra.

Appellee further submits that the instruction to the jury to consider the evidence they had already heard and the evidence in the penalty proceeding is a correct statement of the procedure in a capital sentencing hearing. Florida's capital sentencing statute, Section 921.141, allows the penalty phase juror to hear any evidence "the court deems relevant to the nature of the crime and the character of the defendant". This type of evidence, especially the nature of the crime, is generally heard during the guilt/innocence portion of the trial. It is totally illogical to require the state to recall its witness to testify to the same matters before the same jury in the penalty phase.

Contrary to appellant's assertion, the instruction was particularly appropriate under the circumstances of this case. With the exception of documentary evidence supporting prior convictions, no new evidence was presented during the penalty portion

of the trial. Both the defense and the state argued the aggravating and mitigating circumstances based on the evidence the jury heard during the first phase of the capital proceeding.

Appellant has failed to demonstrate any error in the sentencing phase instructions.

ISSUE III

THE AGGRAVATING CIRCUMSTANCES FOUND BY THE COURT ARE SUPPORTED BY THE RECORD AND WERE PROVEN BEYOND A REASONABLE DOUBT

After hearing the evidence presented during the guilt/innocence portion of the trial and the arguments during the penalty portion, the jury by a vote of 12 to 0 advised the court to impose a sentence of death. (R.147)(R.652). Almost four weeks thereafter, the trial judge sentenced appellant to death. (R.683). The trial judge filed written findings on the aggravating and mitigating circumstances on January 29, 1985. (R.211-216). Appellee submits the four aggravating circumstances were proven beyond a reasonable doubt, and no mitigating circumstances were offered to outweigh the aggravating circumstances.

The trial judge found as an aggravating circumstance, the defendant had previously been convicted of a felony involving violence or threat of violence. (R.211). During the penalty proceeding, the State presented documentary evidence of this aggravating circumstance in the form of a change of plea to nolo contendere and an adjudication of guilty. (R.615-616). Defense counsel agreed the State was legally entitled to use this crime. (R.609). Contrary to the assertion now being made, defense counsel's objection on this matter did not go to the lack of proper documentation. In fact, counsel indicated since there was no judgment and sentence at this point, the change of

plea and adjudication was the only alternative. (R.608-609).

Defense counsel objected to this aggravating factor based on the fact that he had reserved the right to appeal the denial of his motion to suppress, and the case was going to be appealed. (R.609-610). This was not a valid objection; even if the case was already being appealed, the State could use it in aggravation. Ruffin v. State, 397 So.2d 277 (Fla. 1981).

The argument now being espoused, that a prior conviction must be proven by a judgment and sentence, is not well-founded. This Court has held this aggravating factor can be proven by either entry of a plea or a find of guilt by the jury. Additionally, such a conviction can be utilized even if the judge had not yet adjudicated the defendant. McCare v. State, 395 So.2d 1145 (Fla. 1980) and Palmes v. State, 397 So.2d 648 (Fla. 1981). If there has been no adjudication or sentencing, there can be no judgment or sentence.

Appellant argues the aggravating circumstance of murder committed during a felony is applicable to this case. However, he argues, citing Rembert v. State, 455 So.2d 337 (Fla. 1984), this circumstance alone is not sufficient to support a sentence of death. This case is distinguishable from Rembert in that there are other aggravating circumstances here. As argued above, the circumstance of prior violent felony is applicable.

While appellee agrees with the basic premise that the mere fact of a death does not support the witness elimination aggravating circumstance, there is more than the death present here. As the trial judge pointed out in his sentencing order, the

defendant stated he and his brother waited until the owner of the store was alone so there wouldn't be any witnesses. (R.213). Defendant's admission is sufficient to support this aggravating circumstance. Cf. Johnson v. State, 442 So.2d 185 (Fla. 1983).

Appellee also submits the murder was heinous, atrocious or cruel. The trial judge after noting the victim was chosen at random because of his vulnerability, indicated the victim was shot with a gun directly in line with his heart. Mr. Philbert was alive for at least five minutes. When he was found, he was groaning in pain. His friends called his name, he looked up at them and could only make unintelligible sounds. The victim was shot, left alone in pain, unable to summon help, yet realizing death was imminent.

The fact that the victim lingered for several minutes, conscious of impending death, are factors the court should consider in determining heinous, atrocious or cruel. See, Funchess v. State, 341 So.2d 762 (Fla. 1976); Knight v. State, 338 So.2d 201 (Fla. 1976); Washington v. State, 362 So.2d 658 (Fla. 1978) and Phillips v. State, 476 So.2d 194 (Fla. 1985).

It is further submitted that should one or two of the aggravating circumstances be found to be inapplicable, death is still the appropriate sentence here. There were no mitigating circumstances found; there are at least two good aggravating circumstances. Under these circumstances, a sentence of death is proper. Armstrong v. State, 429 So.2d 287 (Fla. 1983) and Antone v. State, 382 So.2d 1205 (Fla. 1980).

ISSUE IV

DEATH IS THE APPROPRIATE SENTENCE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE

It is the duty of this Court to review each capital murder resulting in a sentence of death to determine if there are clear and convincing reasons warranting imposition of this penalty. Harvard v. State, 375 So.2d 833 (Fla. 1977) and Antone v. State, supra. This review is to find out whether the jury and trial judge acted with procedural rectitude and to ensure relative proportionality among death sentences. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellee submits the jury and judge followed all procedural requirements, and the facts and circumstances of this case justify imposition of the death penalty.

This Court has held on a consistent basis that death is the appropriate sentence where there is one or more aggravating circumstances and no mitigating circumstances. See, i.e., Blanco v. State, 452 So.2d 520 (Fla. 1984); Sireci v. State, 399 So.2d 964 (Fla. 1981); Alford v. State, 307 So.2d 433 (Fla. 1975). In Blanco v. State, the defendant burglarized the victim's home. When John Ryan, the homeowner, tried to take the gun away, Blanco shot him several times and fled. The trial judge found four aggravating circumstances - prior violent felony; murder committed during a burglary; heinous, atrocious or cruel and cold, calculated. On appeal this Court found the circumstances of heinous, atrocious and cold, calculated did not apply. Thus, there was found two valid aggravating and no mitigating. The sentence of death was affirmed.

This case is similiar to the situation addressed in James v. State, 453 So.2d 786 (Fla. 1984). James and his co-defendant, Larry Clark, went to a sign shop, where Clark shot the owner and robbed him. The defendants then entered the residential portion of the premises and killed the owner's wife. The evidence was clear that Clark actually did the shooting. However, James' death sentence was upheld since he intended or contemplated the use of lethal force.

In James v. State, supra, this Court said:

> We next observe that it is clear that this entire episode was a joint operation by James and Clark. The jury found that James met the Enmund test. Although Clark did the actual killing, James was present and actively participated in the events. In such a situation we have held that who is the actual killer is not determinative because each participant is responsible for the acts of the other. Hall v. State, 403 So.2d 1321 (Fla. 1981). Under these circumstances we find that the aggravating circumstances which arose because of the motive and method of the killing are equally applicable to the two participants.
> (453 So.2d at 792)[1]

The same principle is applicable here. Both this appellant and his brother Clinton were present and actively participated in the robbery. Each defendant is responsible for the robbery and the murder.

1/ The co-defendant to Hall was Mack Ruffin. See, Ruffin v. State, 397 So.2d 277 (Fla. 1981).

When this case is viewed with other equally culpable co-defendant cases, it is clear the death penalty is appropriate here. See, James v. State, supra. and Clark v. State, 443 So.2d 973 (Fla. 1984); Hall v. State, supra. and Ruffin v. State, supra.; and Barclay v. State, 343 So.2d 1266 (Fla. 1977).

CONCLUSION

Based on the foregoing arguments and authorities, appellee respectfully requests that the judgment and sentence of the trial court be affirmed.

Respectfully submitted,

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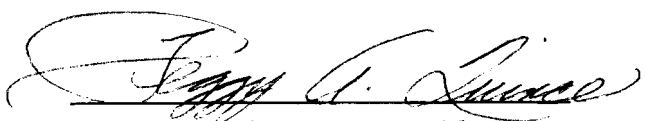
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Arthur S. Corrales, Esq., One Tampa City Center, Nineteenth Floor, Suite 9, Tampa, Florida 33602 on this 11th day of March, 1986.



Of Counsel for Appellee