IN THE FLORIDA SUPREME COURT

HOWARD VIRGIL LEE DOUGLAS, :

Appellant, :

vs. : Case No. 67,603

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The record on appeal in this case consists of two parts. The prior record (containing the trial transcript) in Fla.S.Ct., Case No. 44,864 is designated by "T" and the appropriate page number. The record (containing the resentencing hearing) in Fla.S.Ct., Case No. 67,603 is designated by "R" and the appropriate page number.

STATEMENT OF THE CASE

On August 7, 1973, the grand jurors of Polk County returned an indictment charging Howard Douglas, Appellant, with first-degree murder. (R1-2) Trial was before the Honorable William K. Love and a jury on September 25 through 28, 1973. (T8-633)

Following the jury verdict of guilty of first-degree murder as charged (T604,668), a penalty phase hearing was held. The jury found that the mitigating circumstances outweighed the aggravating circumstances and returned an advisory sentence of life imprisonment. (T630,672)

The trial court conducted a sentencing hearing December 4, 1973. (T710-755) Overriding the jury, the trial judge found no mitigating circumstances to exist, found the murder especially heinous, atrocious or cruel, and imposed a sentence of death. (T754-761)

On direct appeal to the Florida Supreme Court, the conviction and sentence were affirmed. Douglas v. State, 328 So.2d 18 (Fla.), cert.den., 429 U.S. 871, 97 S.Ct. 185, 50 L. Ed.2d 151 (1976), reh.den., 429 U.S. 1055, 97 S.Ct. 770, 50 L. Ed.2d 771 (1977). Subsequently, the trial court denied Douglas's motion for post-conviction relief and this Court affirmed. Douglas v. State, 373 So.2d 895 (Fla.1979).

Douglas then petitioned for federal habeas corpus relief which was denied by the federal district court. Douglas v. Wainwright, 521 F.Supp. 790 (M.D. Fla. 1981). On appeal, the 11th Circuit Court of Appeal affirmed the denial of habeas

corpus relief with respect to the conviction but reversed in part because of ineffective assistance of counsel in the penalty phase. Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983). A new sentencing hearing was ordered.

The United States Supreme Court, on cross petitions for certiorari, vacated the judgment of the 11th Circuit and remanded the case for further consideration. __U.S.__, 104 S.Ct. 3575, 82 L.Ed.2d 874 (1984); __U.S.__, 104 S.Ct. 3580, 82 L.Ed. 2d 879 (1984). The 11th Circuit Court of Appeal abided by its previous decision. 739 F.2d 531 (11th Cir. 1984). Cross petitions for certiorari were denied by the United States Supreme Court. __U.S.__, 105 S.Ct. 1170, 84 L.Ed.2d 321 (1985).

A resentencing hearing was held in the Tenth Circuit Court, Polk County, before the Honorable William A. Norris on July 26, 1985. (R92-164) Testimony was taken from numerous witnesses and the imposition of sentence was continued until August 2, 1985. On this date, the trial judge imposed a death sentence on Douglas. (R172)

Written "Findings of Fact" were entered which listed as aggravating circumstances that the murder was especially heinous, atrocious or cruel and that it was committed in a cold, calculated and premeditated manner. (R178-179) As non-statutory mitigating circumstances, the trial court found that prior to the murder, Douglas had a reputation for being a non-violent person and that he had a good record of conduct while in prison. (R180)

A timely notice of Appeal was filed on August 26, 1985. (R184) The Public Defender for the Tenth Judicial Circuit was appointed to represent Douglas on appeal. (R188)

Pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Fla.R.App.P. 9.030(a)(1)(A)(i), Douglas now takes appeal to this Court.

STATEMENT OF THE FACTS

On July 21, 1973, three men were exercising their hunting dogs near a dirt road in a rural area of Polk County when they noticed a flock of buzzards surrounding a wooded area. Upon investigation, they discovered the naked body of a dead man. Lying next to the body, looking "like it had been taken off and dropped" (T178), was a wedding band. (T176-190)

The Polk County Sheriff's Department was notified and they removed the badly decomposed body. The deputies noted that the name "Jay" was tattooed on one of the arms. The wedding band was also retrieved. The dead man was not identified until five days later, July 26, when Helen Atkins came to the Hall of Justice, produced a wedding band of similar design and acknowledged that the body was that of her late husband, Jessie (Jay) Atkins. (T196-211)

Helen Atkins testified at trial that her next-door neighbor, Patsy Spivey, had suggested to her that the unidentified body might be that of Jay Atkins. (T323) Later that day, Helen Atkins telephoned the Sheriff's Office and arranged for Patsy Spivey to drive her and her two children there. (T274) She told Sergeant Watts that she and Jay had quarrelled because Jay wanted to return to Arkansas and she didn't. (T275) The last she saw of her husband, he was walking down the road in the direction of Arkansas. (T275) Upon further questioning, Helen Atkins changed her story and stated that she had been an eyewitness to the murder of her husband in the early morning of July 17.

Helen Atkins was the prosecution's chief witness at trial. She recounted how she had met both Howard Douglas and Jay Atkins at approximately the same time two to three years ago when she was seventeen. (T219) Her first child had been born out of wedlock in 1970; the father being Stephen Branch. (T218) Helen Atkins lived with Howard Douglas for approximately one year. (T220-221) Then she left Florida with Jay Atkins and they married in Arkansas, August 1972. (T217,221) Helen and Jay Atkins returned to Fort Green, Florida in October 1972, but they mostly lived apart after their return. (T222)

In May 1973, Helen Atkins was eight months pregnant and had no home--she and her 2 1/2 year old child were sleeping in her car. (T224,306) She went to Howard Douglas asking for assistance and he located a trailer for her on Reynolds Road. (T305-306) Although Howard Douglas did not live with her at the trailer, he would come by to check on her and the baby. (T305, 307) Around this time Douglas also paid the bus fare for her to visit her father in Wabasso. (T326)

The baby, fathered by Jay Atkins, was born June 25, 1973. (T226) Nine or ten days after the birth, Helen Atkins happened to encounter Jay and the two of them started living together again. (T226) They were still living together on the afternoon of July 16, 1973 when Helen Atkins received a phone call from her mother telling her that the landlord of the trailer on Reynolds Road wanted Helen's property removed so that the trailer could be rented to another tenant. (T227)

Leaving the children with Jay's mother, Helen and Jay Atkins went to the trailer to retrieve her possessions. (T228)

A t.v. set belonging to Howard Douglas was still in the trailer and they left it there. (T229) They removed household items, noting that clothes belonging to Helen Atkins and her children were missing. (T229-230)

About an hour later as they were driving back to Fort Green, Howard Douglas pulled alongside of them in his pickup truck, motioning them to pull over. (T230-235) Jay Atkins told his wife that he had a premonition that something bad was going to happen as Howard Douglas walked over to their car carrying a .22 caliber rifle. (T236) Douglas told them that he had the missing clothes in the trunk of his car which was back in Lakeland. (T237) Douglas got in the front seat of the Atkins' station wagon, holding the rifle between his legs. (T238) According to Helen Atkins, Douglas said that he felt like blowing their brains out and proceeded to give Jay Atkins, who was driving, directions on where to turn. (T238-239)

The station wagon was following tire tracks in the vicinity of a phosphate mine when it got stuck. (T240-241) Leaving the rifle in the back seat of the station wagon, Howard Douglas and Jay Atkins got out and tried to push the car free while Helen Atkins was operating the vehicle. (T241) Their efforts were unsuccessful, so the three of them walked to the nearby mine station. (T241-242) The rifle remained in the back seat of the station wagon. (T318)

At the mine office, Howard Douglas asked if there was an employee available to pull their car free. (T242) Soon after that, an employee arrived and was told to pull them out with

his truck. (T242) The three rode to the site in the employee's truck. (T242) Helen Atkins got in the station wagon to steer while Jay Atkins and Howard Douglas pushed. (T244,445) The mine employee hooked a chain onto the bumper of the station wagon and pulled the vehicle free with his truck. (T243-244) Then the mine employee led them to the exit from the mine property. (T244)

At trial, Helen Atkins testified that she and her husband were frightened at this time but said nothing to the mine personnel because Howard Douglas had told them that he was carrying a pistol. (T318) They never saw this alleged pistol however. (T318) The mine employee who pulled the station wagon free, Leroy Marshal, Jr., also testified at trial. (T443-460) Marshal identified Howard Douglas as one of the group whose car he had pulled out. (T453) Marshal said that everyone seemed to be getting along and that no one seemed frightened or tried to say anything to him. (T455) He didn't see a gun at any time. (T459)

Once the station wagon had been freed and escorted off the mine property, Howard Douglas resumed directing Jay Atkins who was driving. (T245) Douglas had the rifle between his legs. (T244) Eventually they came to a wooded area on a dirt road where Douglas ordered Jay Atkins to stop the car. (T246-247) Douglas told Helen and Jay Atkins to get out and to spread a blanket in front of the car. (T247-248) Next, Helen Atkins was threatened and both she and Jay were ordered to take off their clothing. (T251-252) The car headlights were turned on and Helen and Jay were required to perform oral sex, vaginal and simulated anal intercourse. (T252-254) Saying "did you

enjoy it you son-of-a-bitch," Douglas hit Jay Atkins with the stock of his rifle. (T255) The force of the blow shattered the rifle stock and knocked Jay Atkins unconscious. (T255-256) Then Douglas told Helen Atkins to get back and he proceeded to shoot Jay Atkins three times in the head, according to her testimony at trial. (T258-260)

D. Richard Jones, a pathologist, testified that he examined the body of Jay Atkins and determined that a blow to the head with a blunt instrument could have caused death. (T427) Also, either of two gunshot wounds in the head could have caused death. (T426)

After the shooting, Howard Douglas and Helen Atkins attempted to drive away in the station wagon, but it stalled and wouldn't start. (T262) Douglas then allegedly forced Helen Atkins to engage in oral sex, vaginal and anal intercourse. (T263) Leaving the gun in the station wagon, the two walked approximately twelve miles to where Douglas had left his pickup truck. (T264,321)

It was around 5 a.m. when they reached the truck and they then proceeded to the residence of Helen Atkins' in-laws to pick up Helen's two children. (T264-265) Helen Atkins spoke briefly with her father-in-law and departed with the children. (T265-266) She testified that she didn't say anything about the murder of Jay Atkins because she was afraid that Howard Douglas would kill them all. (T265-266) However, she never saw any firearm since they had left the station wagon. (T321)

They returned to the site where Jay Atkins had been killed and Helen Atkins assisted Howard Douglas in dragging the

body into a more concealed area. (T267-268) They jump started the station wagon and proceeded in tandem to the trailer on Reynolds Road. (T269-272)

From the morning of July 17 until July 26, Howard Douglas, Helen Atkins and her two children lived in the trailer. (T273) Helen Atkins stated at trial that she said nothing because Douglas had threatened to kill her children in front of her if she breathed a word about the incident. (T273) At the preliminary hearing, Helen Atkins had claimed that Howard Douglas had been around her all of this time. (T315) At trial, she admitted that she had driven by herself to a 7-11 store where she had been involved in a minor accident. (T315-316) She never saw a gun in the trailer during this period. (T316)

Helen Atkins also admitted on cross-examination that during this period she had applied for food stamps and was inside the agency with her two children. (T328-329) Howard Douglas had remained outside the building. (T329) Two defense witnesses, J.L. and Catherine Hart also testified that they saw Howard Douglas alone at his mother's house on July 25. (T466-471)

Howard Douglas did not take the stand at his trial. Arthur Edward Miller, Jr., also known as "Rabbi," testified that Douglas had been with him at all relevant times in question on the night of July 16. (T471-476)

The jury returned a verdict of guilty of first-degree murder as charged. (T604)

In the penalty phase, neither the State nor the defense presented additional evidence. (T609-610) The jury re-

turned an advisory sentence of life imprisonment. (T630) This was a unanimous verdict. (R21)

The original sentencing where the trial court overrode the jury recommendation and imposed a death sentence was nullified by the federal courts. Accordingly, a hearing regarding the resentencing was held before Circuit Judge William A. Norris on June 6, 1985. (R39-63)

At this hearing, the trial judge noted that no official document from Federal District Court ordering the resentencing had been received by the court. (R59) The trial court discussed his decision to handle the resentencing himself, observing that the original sentencing judge was still available, although retired. (R41-43)

Defense counsel filed a Motion to Preclude Reading of Transcript (R30), arguing that the testimony at trial should not be admissible in evidence unless it could be shown that the witnesses were unavailable to testify in person. (R46) The State, while recognizing that the sentencing judge had an obligation to become familiar with the facts of the case, argued that the court was not precluded from reading the transcript of the trial instead of taking live testimony. (R46-49) The court denied the Motion to Preclude Reading of Transcript. (R50) The court did agree not to read any of the proceedings in the penalty phase of the trial. (R53,67)

At the resentencing hearing held July 26, 1985 (R92-164), the State presented only one witness, George McClelland. (R99-101) He had taken photographs at the crime scene which were introduced into evidence. (R100-102)

The defense called as character witnesses Patricia Neal (R103-106), Richard Douglas (R108-109), Shirley Spivey (R109-110), Mervin Douglas (R110-112), Barbara Van Winkle (R112-113), Margaret Green (R114-115), Margaret Price (R116-117), Eloise Barwick (R118-120) and Thelma Douglas (R121-122). The witnesses all agreed that Howard Douglas had a reputation for being a non-violent person who did not assault people or use force against them prior to his conviction for murder.

Eloise Barwick further testified that she was aware of the relationship between Howard Douglas and Helen Atkins and thought that "he was in love with her" (R120). Douglas was always talking about how much he loved Helen's child (R120). Thelma Douglas also agreed that Howard Douglas loved Helen Atkins and her child (R122). He would take the little boy places and treat him like a father would (R122).

John Dayan and Randall Scoggins, Department of Corrections officials at Florida State Prison testified that Howard Douglas had not been a disciplinary problem during his incarceration on death row since 1973 (R123-133). Douglas was described as a quiet person who got along with both inmates and guards (R133).

An affidavit from the foreman of the jury stating that the jury had unanimously recommended a life sentence for Douglas was received into evidence (R135).

In arguing for a jury override and reimposition of a death sentence, the prosecutor contended that the testimony at trial of Helen Atkins established that the homicide was especially heinous, atrocious or cruel and committed in a cold,

calculated and premeditated manner without any pretense of moral or legal justification (R138). No mitigating circumstances were established in the prosecutor's view (R141-144). Over defense counsel's objection, the prosecutor quoted extensively from this Court's opinion on Douglas's first appeal, Douglas v. State, 328 So.2d 18 (Fla.1977) (R162-163).

Defense counsel had waived consideration of the statutory mitigating circumstance "no significant history of prior criminal activity" (R71). He also moved to waive consideration of the aggravating circumstance found in Section 921.141(5)(i), Florida Statutes (1983) (R90). As grounds, defense counsel noted that this aggravating circumstance was not in existence when Douglas was convicted (R144). Application of this aggravating circumstance would be in violation of ex post facto principles if it operated to the detriment of the defendant (R145). But since this Court held in Combs v. State, 403 So.2d 418 (Fla.1981) that application of this aggravating circumstance is not ex post facto because it enures to the benefit of the defendant, defense counsel reasoned that the defendant should be able to waive its application (R145-146). The court deferred ruling on the motion (R146).

Besides arguing that the aggravating circumstances were not established, defense counsel asked the court to consider the emotional involvement of Howard Douglas with Helen Atkins and the love triangle involving the victim, Jay Atkins, as the third party (R152-154). It was argued that the events surrounding this relationship gave rise to a mitigating circum-

stance and provided a rational basis for the jury's recommendation of life imprisonment (R157).

The court continued sentencing until August 2, 1985 (R164). On this date, the court imposed a sentence of death (R172). Written findings of fact were filed in conjunction with the sentence (R176-182).[1/]

The court found two aggravating circumstances applied, Section 921.141(5)(h), and Section 921.141(5)(i), Florida Statutes (1983). The court found no statutory mitigating circumstances, specifically noting that Section 921.141(6)(b), Florida Statutes (1983)(extreme mental or emotional disturbance) was considered and rejected. As non-statutory mitigating circumstances, the court found Douglas "was not known, prior to the instant case, to be a violent person" and that he "has had an excellent institutional record in the Florida State Prison" (R180-see Appendix). The court rejected as a non-statutory mitigating circumstance the defendant's emotional involvement with Helen Atkins and hatred for the victim (R180-181, see Appendix).

The court found that the aggravating circumstances outweighed the mitigating circumstances (R181). Purporting to follow the Tedder standard, the court found "no reasonable basis discernable from the record to support the jury's recommendation of life" (R181, see Appendix).

[1/] The court's "Findings of Fact" appear in the appendix to this brief.

SUMMARY OF ARGUMENT

Prior to resentencing, defense counsel urged the court to hear live testimony and not to rely on the transcript from trial absent a showing of witness unavailability. The resentencing judge erred by denying this Motion to Preclude Reading of Transcript because he was thereby unable to judge the demeanor and credibility of the witnesses. A careful reading of the court's "Findings of Fact" will show that the resentencing judge did not play the role assigned to the trial judge by this Court's decision in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert.den., 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

At resentencing, Appellant also contended that the aggravating circumstance of Section 921.141(5)(i), Florida Statutes (cold, calculated and premeditated) should not be considered because when he was tried and originally sentenced, this aggravating factor was not yet part of the capital sentencing statute. Recognizing that this Court has allowed retroactive application of this aggravating fact to defendants who committed a capital offense prior to the enactment but were tried after its effective date, Appellant moved the resentencing court to allow him to waive any benefit he might receive from this aggravating circumstance. The trial court should not have considered the cold, calculated and premeditated circumstance or should have allowed Appellant to waive its consideration . Review of the resentencing shows that the resentencing judge's finding that this aggravating circumstance was proved, affected the weighing and consequently operated to Appellant's detriment. Hence, the ex post facto provisions in the United States and Florida constitutions were violated.

The homicide was not especially heinous, atrocious or cruel because the evidence shows the victim met an instantaneous death. It was not established beyond a reasonable doubt that the victim was aware of his impending death. Although the sexual acts which the victim and his wife were required to perform were degrading, the likelihood that the jury found that the circumstances did not reach the level of especially heinous, atrocious or cruel should be given deference by this Court.

The resentencing judge also erred when he found that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Although the facts showed a deliberate killing, this was not a contract murder or witness-elimination murder. This aggravating circumstance is not applicable in a romantic triangle setting where jealous rage is the motivating factor.

Finally, the unanimous jury recommendation of life imprisonment should not have been overridden by the resentencing judge. The only evidence considered by the judge but not the jury was of a mitigating nature. There was a rational basis for the jury's recommendation either from the possibility that the jury found no aggravating circumstance to be proved beyond a reasonable doubt or from the possibility that the jury found the personal emotional entanglement between Douglas, his victim and Helen Atkins supported mitigating evidence which outweighed any aggravating factor. Comparison with other cases decided by this Court supports the conclusion that a life sentence was warranted and that the resentencing judge merely disagreed with the jury's recommendation.

ARGUMENT

ISSUE I.

THE RESENTENCING JUDGE ERRED BY DENYING APPELLANT'S MOTION TO PRECLUDE READING OF TRANSCRIPT AND FAILING TO REQUIRE THE PRESENTATION OF LIVE TESTIMONY BECAUSE HE WAS NOT THE ORIGINAL TRIAL JUDGE AND HAD NO OPPORTUNITY TO EVALUATE THE DEMEANOR AND CREDIBILITY OF THE WITNESSES.

The judge who presided over the resentencing, Circuit Judge William A. Norris, Jr., was not the judge who presided over Douglas' trial in 1973. Although substitution of the sentencing judge was not required within the scope of Fla.R.Crim. P. 3.231, Judge Norris noted that the original sentencing judge, Judge Love, was retired and might not be available in future years if collateral proceedings were to occur (R42). Defense counsel did not object to having Judge Norris conduct the resentencing. He did however, move that live testimony be presented absent a showing of witness unavailability within the requirements of the Florida Evidence Code (R30,46). Circuit Judge Norris denied this motion, apparently in agreement with the prosecutor's argument that the Court need only become familiar with the facts of the case through reading the transcript (R50). Consequently, Judge Norris never had the opportunity to evaluate the credibility and demeanor of the witnesses.

Regarding the importance of this aspect of the trial court's role and the consequent deference given by appellate courts to the trial court's findings, the United States Supreme Court quoted an observation from the N.Y. Court of Appeals:

> Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth.... How can we say the judge is wrong? We never saw the witnesses....To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.

United States v. Oregon Medical Society, 343 U.S. 326 at 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952). Certainly this same observation was inherent in this Court's opinion, Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert.denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), which distinguished the role of the trial judge as imposer of sentence from that of the appellate court as reviewer of sentence. The trial court must evaluate and weigh the evidence relevant to the aggravating and mitigating circumstances. By contrast, the appellate court only reviews the record to determine whether there was sufficient competent evidence to support the trial court's findings.

In the case at bar, the State's case rested almost exclusively on the testimony of Helen Atkins. Her credibility as a witness was the essential question to be determined by both the jury and the trial court. Moreover, she was extensively impeached in regard to statements about her opportunities to report the murder of Jay Atkins (T314-315,467-470). The triers of fact might well have concluded that Helen Atkins had been an accomplice to the homicide and that her testimony was both exaggerated and designed to exculpate herself. Therefore,

in order to decide whether any aggravating circumstance was present, it was first necessary to judge the credibility of Helen Atkins. This appraisal should have been made with the benefit of personal observation of her demeanor. By relying only on the cold transcript of the trial, the resentencing judge did not adequately prepare himself to impose sentence.

The sentencing order issued by Judge Norris reflects the insufficiency of imposing a sentence without hearing live testimony. Judge Norris quoted extensively from Helen Atkins' testimony to support his findings of two aggravating circumstances (R177-179, see Appendix). This order shows that Judge Norris in fact acted as a reviewing court (determining whether sufficient evidence was contained in the record) rather than the sentencing court which must evaluate and weigh the testimony.

Although retired Circuit Judge Love once heard the live testimony and found an aggravating circumstance this does not remedy the problem. Judge Love's sentence was vacated by the federal courts. Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984), cert.denied, __U.S.__, 105 S.Ct. 1170, 84 L.Ed.2d 321 (1985). Only Judge Norris' sentence, not a prior sentence, may be carried out. See Lucas v. State, 417 So.2d 250 (Fla. 1982). Clearly, Judge Norris should not have relied in any way upon the demeanor evaluation of witnesses which Judge Love conducted before imposing the prior sentence of death. The jury recommendation of life further amplifies the necessity to hear live testimony before imposing sentence.

The sentencing judge had options open to him. If he felt that producing live witnesses would have been burdensome, he could have requested Judge Love to return for resentencing. Indeed, Judge Norris specifically noted that Judge Love was "still available to us to handle the resentencing" (R41-42). Since he decided to impose sentence himself, Judge Norris should have proceeded in accordance with Section 90.-804(2)(a) of the Florida Evidence Code which admits former testimony of a witness only upon a showing that the witness is now unavailable. The denial of Douglas' Motion to Preclude Reading of Transcript was error which reaches the level of a denial of due process under the Fourteenth Amendment to the United States Constitution and the sentence accordingly violates the Eighth Amendment prohibition against infliction of cruel and unusual punishments.

ISSUE II.

THE RESENTENCING JUDGE ERRED BY CONSIDERING THE AGGRAVATING CIRCUMSTANCE OF SECTION 921.141(5)(i), FLORIDA STATUTES (COLD, CALCULATED AND PREMEDITATED) BECAUSE THIS AGGRAVATING CIRCUMSTANCE WAS NOT IN EXISTENCE AT THE TIME OF APPELLANT'S TRIAL AND ORIGINAL SENTENCE.

On July 1, 1979, by action of the Florida legislature, paragraph (i) of Section 921.141(5), Florida Statutes became effective. The provision reads:

> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

This Court has previously decided that this aggravating circumstance may be applied where a defendant committed the homicide prior to the effective date of the provision but the provision had become law when the defendant was tried and sentenced. Combs v. State, 403 So.2d 418 (Fla.1981), cert.denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). Accord, Smith v. State, 424 So.2d 726 (Fla.1982), cert.denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983); Justus v. State, 438 So.2d 358 (Fla.1983), cert.denied, __U.S.__, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984); Preston v. State, 444 So.2d 939 (Fla. 1984). However, this Court has not decided whether this aggravating circumstance may be applied when a defendant is resentenced following vacation of his original death sentence imposed prior to the effective date of Section 921.141(5)(i), Florida Statutes.

A.

Appellant's "Motion To Waive Aggravating Circumstance And To Exclude Evidence" Should Have Been Granted.

This Court has upheld retroactive application of the cold, calculated and premeditated aggravating circumstance on the basis that it does not change the substance of the capital sentencing statute to the detriment of defendants. Preston v. State, supra. Indeed, in Combs v. State, supra, this Court held that this aggravating circumstance was really a limitation on the use of premeditation as an aggravating factor "which inure[s] to the benefit of a defendant." 403 So.2d at 421.

In Maggard v. State, 399 So.2d 973 (Fla.), cert.den., 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981), this Court held that a capital defendant can waive the applicability of the mitigating circumstance regarding whether he has a significant history of prior criminal activity and also exclude any evidence the State might present to rebut the circumstance. This decision was premised upon the fact that mitigating circumstances are listed in the statute for the defendant's benefit, and consequently, a defendant should be allowed to waive that benefit.

Consequently, the resentencing judge should have permitted Douglas to waive consideration of Section 921.141(5)(i), Florida Statutes (R90,146). Since the substance of the amended capital sentencing statute does not operate to his detriment (Preston), but "inures" to his benefit (Combs), where a defend-

ant is being resentenced he should be able to waive consideration of benefits conferred by the legislature during the interim between his original sentence and the resentencing. By analogy, the sentencing guidelines procedure, which is designed to be neither beneficial nor detrimental to offenders, can only be applied to offenses committed before its effective date if the defendant "affirmatively selects" guidelines sentencing. Section 921.001(4)(a), Florida Statutes (1983); Cochran v. State, 476 So.2d 207 (Fla.1985). Douglas was entitled to have the resentencing judge weigh the aggravating and mitigating evidence under the standard which applied at his trial and original sentencing.

Johnson v. State, 438 So.2d 774 (Fla.1983), cert.den., __U.S.__, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984) is not apposite here. In Johnson, the crime was committed in 1981, well after the effective date of paragraph (i) of Section 921.141(5). Johnson simply had no legitimate expectation that his sentence would be determined under the prior capital sentencing statute.

B.

The Finding Of The Aggravating Circumstance Cold, Calculated And Premeditated Was In Violation Of Ex Post Facto Provisions Found In Article I, Section 10 Of The United States Constitution And Article X, Section 9 Of The Florida Constitution.

In Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), the United States Supreme Court set forth a test to determine when a law violates the ex post facto provision of the U.S. Constitution. The statute must apply to events which occurred before its enactment and it must also disadvantage the defendant affected by it.

In the case at bar, the aggravating factor Section 921.141(5)(i) was not effective until July 1, 1979. Since it was applied to an offense occurring July 17, 1973, the retroactive prong of the Weaver test is clearly shown.

As to whether Douglas was disadvantaged by a finding that Section 921.141(5)(i) was applicable as an aggravating circumstance, it must be noted that at Douglas's original sentencing, one aggravating circumstance was found. See Douglas v. State, 328 So.2d 18 (Fla.1976). That two were found at his resentencing is not alone determinative because reasoned judgment rather than a mere counting process determines whether the death penalty should be imposed. State v. Dixon, 283 So.2d 1 at 10 (Fla.1973), cert.den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The resentencing judge, however, found two non-statutory mitigating circumstances which were entitled to some weight (See Appendix). In addition, the jury recommendation of life imprisonment was entitled to great weight. Richardson v. State, 437 So.2d 1091 at 1095 (Fla.1983). It is unlikely that the resentencing judge would have found that the aggravating factors outweighed the mitigating, had there been but one aggravating circumstance. Accordingly, Douglas was disadvantaged by application of the cold, calculated and premeditated aggravating circumstance because it entered into the weighing process.

As an independent basis for reversal, Article X, Section 9 of the Florida Constitution provides:

> Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

It should be noted that the Florida constitutional provision does not require that the change in prosecution disadvantage the defendant, only that it "affect" him. As stated by this Court in Raines v. State, 42 Fla. 141, 28 So. 57 at 58 (Fla. 1900):

> The effect of this constitutional provision is to give all criminal legislation a prospective effectiveness.

As previously observed, the case at bar differs from Combs, supra and its progeny because Douglas had already been tried and sentenced before Section 921.141(5)(i) went into effect. In post-conviction proceedings, Douglas succeeded in getting his death sentence vacated. To allow the resentencing judge to retroactively apply this aggravating circumstance and admit it into the weighing process does not, in the words of the Combs opinion, "inure to [Douglas's] benefit".[2/]

[2/] At least two United States Supreme Court justices believe all retroactive application of the new aggravating circumstance violates ex post facto considerations and term the Florida Supreme Court's decision in Combs a "peculiar position." See, Justus v. Florida, __ U.S. __, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984), J. Marshall, dissenting.

ISSUE III.

THE COURT ERRED BY FINDING THE AGGRAVATING CIRCUMSTANCES OF SECTIONS 921.141(5)(h) AND 921.-141(5)(i) APPLICABLE TO THIS CAPITAL FELONY.

The resentencing judge found in his "Findings of Fact" (R176-182, see Appendix) that the aggravating circumstances "especially heinous, atrocious or cruel" and "committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification" were established by the evidence. The judge did not explain his finding "especially heinous, atrocious or cruel" and his explanation of the support for the other aggravating circumstance was limited to a rejection of the defense argument that the killing was motivated by passion (R178-179, see Appendix). Evidently, the resentencing judge intended the facts set forth in the section "Relevant Facts" (R177-178, see Appendix) to be scrutinized for possible substantiation for the aggravating circumstances found.

A.

The Killing Was Not Especially Heinous, Atrocious Or Cruel.

Although defense counsel at the resentencing conceded that there was "probably" legally sufficient evidence to support this aggravating circumstance (R81,155), previous decisions of this Court do not compel this concession. As this Court has noted, all killings are heinous but the death penalty is authorized only for the "especially heinous--'the conscienceless or pitiless crime which is unnecessarily torturous to the victim'". Lewis v. State, 377 So.2d 640 at 646 (Fla.1979).

Most often, the manner in which the victim was killed determines whether the killing qualifies as especially heinous, atrocious or cruel. At bar, Appellant was accused of striking the victim in the head with the stock of his rifle (T255). The force of the blow shattered the rifle stock, knocked the victim unconscious and could have caused death, in the opinion of the pathologist (T255-256,427). Two shots were then fired into the victim's head, each of which could have caused death (T259-260,426).

These facts do not rise to the level required for a heinous killing within the framework established by this Court's prior decisions. The primary consideration is whether the victim met a swift death or whether he was subjected to repeated bludgeoning while still conscious. Therefore, a finding of especially heinous, atrocious or cruel was reversed by this Court in Simmons v. State, 419 So.2d 316 (Fla.1982) because the victim was quickly dispatched with two blows to the head from a roofing hatchet. A bludgeoning death is especially heinous, atrocious or cruel in circumstances like those of Salvatore v. State, 366 So.2d 745 (Fla.1978), cert. den., 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979) where the victim was subjected to repeated blows with a lead pipe as he pleaded for help. Compare Halliwell v. State, 323 So.2d 557 (Fla.1975)(bludgeoning with breaker bar not heinous, atrocious or cruel) with Adams v. State, 341 So.2d 765 (Fla.1977), cert.denied, 439 U.S. 947, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978). (Brutal beating with a firepoker where the victim was left in-

coherent but did not die until the next day qualifies as heinous, atrocious or cruel.)

The case at bar can be meaningfully distinguished from that of King v. State, 436 So.2d 50 (Fla.1983). In King, the victim was hit with a steel bar. The defendant then went to the next room, returned with a pistol and shot the victim twice causing death. This killing was held within the aggravating circumstance. The significant distinction between King and the case at bar is that the victim in King was not rendered unconscious by the blow from the steel bar. At bar, the victim was instantly knocked unconscious and, in fact, may have died from the blow. There was no conscious awareness of pain or realization that death was to occur. Since the extent of the victim's suffering is the essence of this aggravating circumstance, the manner of killing was not especially heinous, atrocious or cruel. See Jackson v. State, 451 So.2d 458 (Fla. 1984).

Other occasions where this Court has found an especially heinous, atrocious or cruel murder include those where the victim suffered mental anguish prior to the killing itself because of protracted awareness that murder was imminent. In Knight v. State, 338 So.2d 201 (Fla.1976) this Court approved a finding that the murders were especially heinous, atrocious or cruel despite almost instantaneous deaths from shooting. The victims in Knight had been driven around for hours prior to the murders in a complex kidnapping/robbery scheme. This Court observed that it was probably apparent to the victims that they were going to be murdered.

At bar, Jay and Helen Atkins were driven around for an extended period but the evidence indicates only that they were apprehensive of Appellant's intentions--not that they were certain of an impending murder. When the vehicle became stuck and the group walked to the phosphate mine for assistance, the rifle remained in the rear seat of the stationwagon (T241). Twice Helen Atkins was sitting in the driver's seat with the rifle in back and Appellant outside. (T241,243,445). Yet no attempts to escape or to bring an outsider's attention to their situation were made by Jay or Helen Atkins. As the mine employee, Leroy Marshall, Jr., testified, everyone seemed to be getting along; nobody seemed frightened or tried to say anything to him (T455).

The jury may well have rejected Helen Atkins' contention that she and her husband did nothing because they believed Howard Douglas had a pistol in his pocket (T241,318). In view of her proximity to Douglas which should have enabled her to know whether Appellant had a pistol in his pocket and this same excuse for her behavior both the night of the killing and the days following it, a substantial question of credibility was presented to the jury. It would certainly not be unreasonable to conclude that the victim did not believe that he would be killed prior to the homicide itself.

While in some aspects the facts at bar parallel those of the Knight case, the distinction must be drawn regarding offenses already perpetrated on the victims. In Knight, the victims had been robbed of $50,000 and were kidnapped. These offenses were so serious that the victims had good reason to

suspect that they might be killed to eliminate them as witnesses. Even so, the court called it "a close question as to whether these murders were especially heinous, atrocious or cruel". 338 So.2d at 202.

At bar, the "close question" should be resolved by holding the killing did not rise to the level of the aggravating circumstance. Even after Douglas had forced Jay and Helen Atkins to perform sexual acts at gunpoint, the most serious offense he had committed was probably aggravated assault. Under the circumstances, it is questionable whether the victims would have even reported Appellant's conduct to the police. Therefore, it cannot be viewed that murder would have been the logical termination in the case at bar the way that it was in Knight. Both reason and the proven conduct of Jay and Helen Atkins in face of opportunity to escape support the conclusion that the victim, Jay Atkins, did not anticipate that his death was imminent.

It is evident from the "Findings of Fact" that the sentencing judge found the murder especially heinous, atrocious or cruel primarily because of the sexual acts which Appellant ordered the victim and Helen Atkins to perform immediately prior to the homicide. Indeed the "Relevant Facts" section of the order quotes with graphic detail from Helen Adkins' testimony as to what transpired (R177-178, see Appendix).

Probably no area of human behavior provokes more diversity of community opinion than sexual behavior. The sentencing judge was clearly incensed over the acts which Appellant forced Helen Atkins and the victim to perform. Other

members of the community might consider the spectacle degrading and humiliating to the victim, but not reaching the level of "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Since the jury did return a unanimous recommendation of life imprisonment, it is not unreasonable to suppose that the jury found that the conduct was not proved beyond a reasonable doubt to be especially heinous, atrocious or cruel. This Court should show deference to a jury's resolution of a question which positively calls for a moral judgment reflecting the conscience of the community.

Finally, the "Findings of Fact" entered by the sentencing court make reference to sexual acts which Douglas allegedly required Helen Atkins to perform with him following the homicide (R178,see Appendix). Such conduct occurring after the death of the victim is irrelevant to determining this aggravating circumstance. Jackson v. State, 451 So.2d 458 (Fla. 1984). Only the effect on the victim alone is material to the heinous, atrocious or cruel aggravating factor. Clark v. State, 443 So.2d 973 (Fla.1983), cert.den., __U.S.__, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984). See also, Trawick v. State, 473 So.2d 1235 (Fla.1985).

B.

The Killing Was Not Committed In A Cold, Calculated Premeditated Manner Without Any Pretense Of Moral Or Legal Justification.

This aggravating circumstance has never been deemed applicable to murders motivated by personal animosity arising from a romantic triangle. Indeed, this writer can find only

one instance where the cold, calculated and premeditated factor was approved in the context of a close personal relationship between the defendant and the victim. Analysis of this aggravating circumstance is not limited to whether there was "heightened premeditation" or an "execution-style" killing.

The facts of this case do show that Douglas directed the victim to drive a circuitous route which left them in an isolated area. Arguably, Douglas had calculated the murder from the outset, although the evidence does not establish this beyond a reasonable doubt. Certainly the killing itself was deliberate--the blow to the head was followed by two shots from a rifle held inches from the victim's head. In another context such as murder motivated by robbery of the victim, a finding of the cold, calculated and premeditated aggravating circumstance would be warranted. See e.g. Herring v. State, 446 So.2d 1049 (Fla.), cert.den., __U.S.__, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); Squires v. State, 450 So.2d 208 (Fla.), cert.den., __U.S.__, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984).

What distinguishes the situation at bar is the prior relationship among the parties. Helen Atkins had met Howard Douglas and Jay Atkins around the same time (T219). She lived with Douglas for about a year prior to her marriage to Jay Atkins (T217-221). When Helen and Jay Atkins returned to Florida, they lived separately for the most part (T222). When Helen Atkins came to Howard Douglas for assistance in May, 1973, she was eight months pregnant and had no place to sleep for herself and her 2 1/2 year old child except an automobile (T224, 305-306). Douglas found a trailer for her to live in and came

by regularly to check on her (T305-307). Douglas even gave her bus fare to visit her father in another part of the state (T326). He treated Helen Atkins' young child like a father would treat a son (R120,122).

After Helen Atkins gave birth in late June 1973, she displayed her gratitude to Douglas by moving out nine or ten days later to live with Jay Atkins once again (T226). When Howard Douglas encountered the two of them less than two weeks later, it was little wonder that Douglas "felt like blowing both of our mother fucking brains out", in Helen Atkins' words (T238). Following the killing itself, before Jay Atkins' body was abandoned, the wedding band was removed from his finger and dropped next to his body (T178,198). This telling gesture reveals both the motive for the slaying and the state of mind of the killer.

In comparable homicides, this Court has not found the cold, calculated and premeditated factor applicable. For instance, the facts in Simmons v. State, 419 So.2d 316 (Fla. 1982) showed that the accused was involved with the victim's wife. He told two witnesses that he was planning to kill the victim and solicited their help. After a deliberate murder, the victim's wife assisted the accused in disposing of the body and attempting to conceal the homicide. Yet neither the trial judge nor this Court found the cold, calculated and premeditated aggravating circumstance appropriate.

Similarly, in Kampff v. State, 371 So.2d 1007 (Fla. 1979) this Court found that no aggravating circumstance was

sufficiently established where a man shot his ex-wife to death believing that she was romantically involved with another man. This finding was despite evidence that the murder was planned and the defendant stalked his ex-wife to her place of employment.

There are two reasons why the cold, calculated and premeditated aggravating circumstance has not and should not be applied where the homicide occurs in the context of a romantic triangle. One is that such murders may be thoroughly premeditated and calculated but they are not cold. The other is that it is difficult to imagine a murder in the context of a romantic triangle which has no "pretense of moral or legal justification."

At bar, the behavior of the victim towards Helen Atkins coupled with her return to the victim after Appellant's efforts to gain her devotion reasonably provoked a jealous rage. Although the provocation here would not support a finding of excusable homicide, it certainly rises to the level of a "pretense" of justification. As this Court explained in Cannady v. State, 427 So.2d 723 (Fla.1983), the unlikelihood of the defendant's account of victim resistance and failure to explain why the victim was shot five times still did not erase "at least a pretense" of self-defense. The Cannady court concluded that the cold, calculated and premeditated aggravating factor was not proven beyond a reasonable doubt. Applying this standard of what constitutes a "pretense" to the facts at bar should clearly result in reversal of the trial court's finding. The trial court's refusal to accept Appellant's conduct as motivated

by "love" for Helen Atkins does not diminish the probability that Douglas committed the killing while enraged by jealousy against both the victim and Helen Atkins.

Comparison of the facts at bar with the facts of the lone decision of this Court approving the cold, calculated and premeditated factor where the homicide occurred within the context of a close personal relationship shows a total divergence. In Michael v. State, 437 So.2d 138 (Fla.1983), cert. den., __U.S.__, 104 S.Ct. 1017, 79 L.Ed.2d 246 (1984), the 37 year old defendant convinced an 83 year old religious woman that he was a prophet of God. They moved from Ohio and lived together in Florida. The elderly woman changed her will to leave her sizeable estate entirely to the defendant. Less than six months later, the woman was found murdered. Michael was subsequently convicted. Noting that the circumstances indicated pecuniary gain as sole beneficiary of the estate was at least one of the motives for the killing, the trial court found three aggravating factors present, including commission in a cold, calculated and premeditated manner. This Court approved the finding.

By contrast, there were no such ulterior motives in the homicide at bar. Personal animosity fueled by jealous rage fully accounts for this crime. The evidence simply doesn't support the trial court's application of the cold, calculated and premeditated aggravating circumstance.

ISSUE IV.

THE TRIAL JUDGE ERRED BY OVERRIDING THE UNANIMOUS RECOMMENDATION OF THE JURY THAT DOUGLAS BE SENTENCED TO LIFE IMPRISONMENT.

After the finding of guilt at trial, neither the State nor the defense presented evidence to the jury in penalty phase (T609-610). The jury returned an advisory sentence of life imprisonment (T630). An affidavit presented at the resentencing hearing disclosed that this was an unanimous jury recommendation (R135,191).

The original sentencing judge found no mitigating circumstances and the existence of the especially heinous, atrocious or cruel aggravating circumstance. Because the federal courts vacated the original death sentence, the findings of the prior judge are no longer binding. Neither are they relevant except to show the difference in posture that Douglas's appeal now presents.

A.

Comparison Of The Weight To Be Accorded Aggravating And Mitigating Circumstances In The Previous Sentence And In The Present Sentence.

At the resentencing hearing, Judge Norris heard additional penalty phase evidence only from the defense. Although he rejected defense evidence and argument pertaining to any statutory mitigating circumstance, Judge Norris did find two non-statutory mitigating factors applicable--no prior history of violence and excellent behavior while imprisoned on death row (R180, see Appendix). Consequently, there is now more weight on

the mitigating side of the balance than there was when Douglas was originally sentenced.

Even if the finding of the resentencing judge that two aggravating circumstances apply is approved by this Court, it does not follow that there is now more weight on the aggravating side of the balance as well. The State did not present any new evidence at the resentencing, but relied on the circumstances of the murder to prove aggravating factors. The murder itself did not become more egregious by the passage of time. Therefore, exactly the same weight should be given now to aggravating factors as was given at the original sentence. Certainly, the legislative addition of the cold, calculated and premeditated aggravating circumstance cannot be allowed to tip the scales. The ex post facto concerns raised in Issue II would surely demand that no additional weight be given to a later-enacted aggravating factor. Therefore the scale now balances the same weight of aggravating evidence against an increased weight of mitigating evidence.

Although Appellant recognizes that it is not this Court's function to reweigh the aggravating and mitigating evidence, some consideration of relative weight is unavoidable in order to determine whether the sentencing judge gave appropriate weight to the jury recommendation of life imprisonment or whether he merely substituted his own conclusion for that of the jury. The appropriate regard to be given a jury recommendation of life was first announced by this Court in Tedder v. State, 322 So.2d 908 (Fla.1975) as follows:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

322 So.2d at 910. The Tedder standard was restated in a format which leads perhaps to a more workable analysis in Richardson v. State, 437 So.2d 1091 (Fla.1983). The Richardson court explained:

> A jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion.

437 So.2d at 1095.

B.

There Was A Reasonable Basis For The Jury's Recommendation That Douglas Be Sentenced To Life Imprisonment.

There are basically two situations in which a jury recommendation of life imprisonment is mandated by the Florida capital sentencing scheme. The first is when none of the statutory aggravating circumstances is proved beyond a reasonable doubt. The second is when one aggravating circumstance or more is present, but there is mitigating evidence which outweighs the aggravating factor or factors. Although it is impossible to identify the exact reasons for any jury advisory verdict, the jury recommendation at bar is reasonable and sustainable on either a theory of insufficient proof of any aggravating circumstance or a theory of mitigating evidence outweighing any aggravating factor proved.

1) There was a reasonable basis for the jury to conclude that the aggravating factor especially heinous, atrocious or cruel was not proved beyond a reasonable doubt.

As argued under the previous issue in this brief, the State's evidence in support of a finding that the murder was especially heinous, atrocious or cruel depended in total upon the credibility of Helen Atkins as a witness. As previously pointed out, Helen Atkins was significantly impeached at trial. Therefore, the jury may reasonably have not given as much credence to her live testimony as the resentencing judge gave to the transcript of her testimony.

Moreover, the especially heinous, atrocious or cruel aggravating circumstance requires a moral judgment to be made. The interpretation given to this factor by this Court in State v. Dixon, 283 So.2d 1 (Fla.1973) illustrates the decisive role that morality plays:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

283 So.2d at 9.

Since the jury's role in Anglo-American jurisprudence is to reflect the conscience of the community, it is particularly appropriate that a jury decision on whether a crime is especially heinous, atrocious or cruel be given conclusive effect. The evidence, resting as it did primarily upon the sexual acts which Douglas allegedly forced the victim and Helen Atkins to perform prior to the homicide, would provoke a wide latitude of moral

viewpoints. That the jury reached a conclusion with which many would vehemently disagree does not make the conclusion unreasonable. After all, the jury is entrusted with balancing both conflicting evidence and conflicting views of morality. The jury's moral judgment that this crime did not reach the extreme level necessary to prove the aggravating factor of Section 921.141(5)(h), Florida Statutes was reasonable under the circumstances and should be inviolate.

As Justice England wrote in his concurring opinion to Chambers v. State, 339 So.2d 204 (Fla.1976):

> Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence,...the jury recommendation should be followed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice.

339 So.2d at 208-209. Accordingly, the resentencing judge should not have overrode the jury's life recommendation.

> 2) There was a reasonable basis for the jury to conclude that although an aggravating factor was proved, the romantic triangle relationship between the parties mitigated the enormity of the crime.

The resentencing judge heard testimony that Douglas loved Helen Atkins and also loved her small child (R120-122). There was the testimony of Helen Atkins at trial, also heard by the jury, indicating likewise that this homicide was a crime of passion.

Helen Atkins recounted that she had lived with Douglas for approximately one year before she left him to marry Jay Atkins (T217-221). When Helen Atkins returned to Florida, she

mostly lived apart from her husband (T222). She was eight months pregnant and homeless when she and her 2 1/2 year old child approached Douglas asking for assistance (T224,305-306). Douglas helped her by finding a trailer for her and the child (T305-306).

While Helen Atkins and her child were living in the trailer, Douglas would come by to visit (T305-307). He also paid the bus fare for Helen Atkins to visit her father in another part of the state (T326). Then, on June 25, 1973, Helen Atkins gave birth to the baby she was carrying (T226). Nine or ten days later, she encountered Jay Atkins and decided to move in with him (T226). The homicide occurred less than two weeks later.

Defense counsel at resentencing contended that these facts established either the statutory mitigating circumstance of Section 921.141(6)(b), Florida Statutes ("committed while the defendant was under the influence of extreme mental or emotional disturbance") or a non-statutory mitigating circumstance based on the emotional involvements within the romantic triangle. (R152-155) The resentencing judge rejected both contentions in his sentencing memorandum (R179-181, see Appendix).

In Gilvin v. State, 418 So.2d 996 (Fla.1982), this Court explained that a trial judge is not compelled to find mitigating circumstances. When there is evidence, however, upon which a jury could find mitigating factors and base a life recommendation, "the jury's view of the evidence and its conclusions" should be upheld. 418 So.2d at 999.

This Court has previously found that a domestic relationship existing prior to the homicide was an appropriate non-statutory mitigating circumstance for consideration by the jury. In Herzog v. State, 439 So.2d 1372 (Fla.1983), this factor was cited in finding the trial judge's override of a jury life recommendation improper.

Although the facts at bar differ from those of Herzog in that the victim in Herzog was the defendant's paramour, the emotional entanglements which provoked the jealous rage are clearly evident and support the jury's recommendation of life imprisonment. Other comparable cases where this Court has reversed a trial court override of the jury's life recommendation include Chambers v. State, 339 So.2d 204 (Fla.1976); Phippen v. State, 389 So.2d 991 (Fla.1980); Welty v. State, 402 So.2d 1159 (Fla.1981); McCampbell v. State, 421 So.2d 1072 (Fla.1982) and Jacobs v. State, 396 So.2d 713 (Fla.1981).

Furthermore, the facts at bar are consistent with a life sentence even in cases where the jury has recommended death. See Simmons v. State, 419 So.2d 316 (Fla.1982)(Justice Sundberg concurring); Kampff v. State, 371 So.2d 1007 (Fla.1979); Blair v. State, 406 So.2d 1103 (Fla.1981); Halliwell v. State, 323 So.2d 557 (Fla.1975).

C.

There Was No Evidence Available To The Trial Judge Which Was Not Before The Jury To Support A Jury Override.

In White v. State, 403 So.2d 331 (Fla.1981), cert.den., 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983), this Court approved the trial court's jury override on the basis that

additional aggravating factors were proved by information submitted to the trial court which was not before the jury. See also, Porter v. State, 429 So.2d 293 (Fla.), cert.den., 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983). These cases are not apposite to the case at bar. At the resentencing hearing, the State did not present any additional evidence beyond identification from crime scene photographs. As previously argued in this brief, the addition of the statutory aggravating circumstance, Section 921.141(5)(i), Florida Statutes, to the capital sentencing scheme between the jury recommendation and the death sentence now imposed cannot sanction the jury override either. Hence, nothing became available to the resentencing judge between the jury's life recommendation and the resentencing which would militate in favor of an override. Indeed, the mitigating evidence presented at resentencing was in part not available to the jury so any comparison would show more basis for the trial judge to uphold the jury's unanimous recommendation.

In summation, the record at bar points to a conclusion that the resentencing judge merely disagreed with the jury's life recommendation. There was no compelling reason for override. Consequently, a death sentence should not have been imposed and this Court should now vacate that sentence and order imposition of a sentence of life imprisonment. Rivers v. State, 458 So.2d 762 (Fla.1984); Smith v. State, 403 So.2d 933 (Fla. 1981).

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Howard Virgil Lee Douglas, Appellant, respectfully requests this Court to vacate the sentence of death imposed by the circuit court judge and to remand with directions to impose a sentence of life imprisonment.

Respectfully submitted,

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