IN THE SUPREME COURT OF FLORIDA

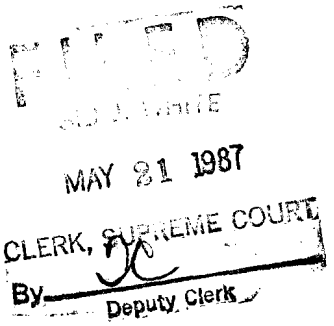
ANTHONY B. BRYAN,

Appellant,

v. Case No. 68,803

STATE OF FLORIDA,

Appellee.



ANSWER BRIEF OF APPELLEE

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellant Anthony B. Bryan was the defendant in the trial court below and will be referred to in this brief either as appellant or by his proper name. Appellee, the State of Florida was the prosecuting authority in the trial court and will be referred to in this brief either as "the state" or as appellee.

The record on appeal consist of five volumes and a "supplemental transcript of record" volume I consists, in part, of pleadings, motions, orders and other court papers, followed by the transcript of the trial in a portion of volume I and in volumes II-V. All of the main volumes are consecutively paginated. The supplemental transcript contains a reporting of a pretrial motion to suppress, sentencing proceedings, a copy of the deposition of Doctor Benjamin Ogburn the examining

psychiatrist and that of Mr. Joe Moore who did not testify at trial.

References to the pleadings and other court papers will be as "R" followed the appropriate page number in parenthesis, references to the trial transcript will be as "T" followed by the appropriate page number parenthesis and references to the supplemental transcript of record will be as "STR" followed by the appropriate page number in parenthesis.

STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case although some of the record page numbers appear to be incorrect.

Appellee generally accepts appellant's statement of the facts as far as they go but appellee feels compelled, in the interest of accuracy to provide the court with a few details which it feels are necessary for a more correct view of the events that led up to the murder of George Wilson.

At the time appellant met Sharon Cooper at a bar in Jacksonville he was "on the run" as a result of his having robbed a bank in Grand Bay, Alabama. (T 422) He was ultimately convicted of the bank robbery after his arrest in Madison, Florida in August of 1983. The pair began an odyssey together that had them criss-crossing the states of Florida, Alabama, Mississippi and at one point Louisana. (T 409-414) Appellant and Cooper traveled by water from Gulf Breeze, Florida where appellant had stolen a Sea-Ray cabin cruiser (T 413) to Pascagoula, Mississippi (T 414) where the boat was damaged by him beyond his ability to repair it. (T 415) The boat was docked near the Clark's Seafood plant where appellant and Cooper befriended George Wilson who was the night watchman at Clarks. (T 414) Wilson was not an armed security guard employed by an organization such as Pinkerton's but was apparently simply a night watchman, employed by Clark's who lived in a travel trailer

on the company premises. He was sixty-five years of age. Appellant neglected to mention that just prior to leaving Pascagoula for the fatal journey to Florida appellant took from Wilson at gunpoint the keys to the seafood plant offices but apparently recovered nothing of value. (T 416) Wilson's hands had been bound with a cord (T 416) and he was then driven into Florida in his own automobile and still bound at the wrists. (T 419) During his last moments alive Wilson asked Sharon Cooper if appellant was going to kill him and she told him she did not believe he was going to do that. (T 419) But during his last few fatal steps along the banks of Juniper Creek he pleaded with appellant not to cripple him. (T 419) A few moments later he was struck in the back of the head with the butt of the shotgun. (T 419) He fell or was thrown into Juniper Creek and then took the full force of a shotgun blast in the face. (T 447) Sharon Cooper heard him coughing and choking just before she heard the fatal shot. (T 437)

The pair acquired an automobile in Louisana (T 421) which had been reported stolen. (STR 13)* When Madison, Florida Police observed the vehicle resultant of a tip originating from a local auto repair establishment they ran the tag with NCIC which indicated the vehicle was still on the "hot sheet", as it were.

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* Pre-trial motion to suppress.

(T 341) Appellant was arrested and the shotgun was seized in connection with a routine departmental inventory search although the arresting officer had been able to see the sawed off shotgun in the vehicle from a lawful vantage point as he approached appellant and the car. (T 343)

Appellee disagrees with appellant's statement that the tapes of the telephone conversation of Sharon Cooper and appellant were not made available to him. In any event the tapes were used only on rebuttal.

SUMMARY OF ARGUMENT

Issue I - From the time that appellant committed a bank robbery in Grand Bay, Alabama in early 1983 until he was finally arrested at Madison, Florida the following summer, his life had been one continuing episode of flight and a need to acquire money and a means of transport in order to continue on the move and avoid arrest. The theft of the motorboat at Gulf Breeze, Florida, the armed robbery of Mr. Wilson, his ultimate murder victim, in Pascagoula, for the purpose of acquiring keys to Wilson's employer's business premises, the abduction of Wilson and theft at gunpoint of Wilson's car and his ultimate murder near Crestview, Florida were for puncuniary gain, witness elimination and avoidance of arrest for the bank robbery. All of the foregoing was one continuous episode and testimony pertaining thereto was necessary that the jury be properly informed as to all relevant circumstances. The probative value of the testimony complained of outweighed any prejudicial effect and the evidence against appellant as to the crimes actually charged was most compelling.

Issue II - There was no violation of discovery rules. The existence of the tapes in question was at all times material hereto known to trial defense counsel and he was invited on several occasions by the prosecutor to hear the tapes and inspect the prosecution's entire file. It is appellee's position that

trial defense counsel was lacking in diligence and that the tapes in question were at all times available to him for the asking. Further, the tapes were not played during the state's case-in-chief and the pertinent information was presented to the jury by the live testimony of one of the participants in the tape conversation. After appellant took the stand in his own defense and either denied or claimed a lapse of memory as to the contents of the tapes the tapes were properly admitted during rebuttal and played to the jury. Appellant has demonstrated no prejudice to the defense and even if there had been a degree of prejudice it is attributable to appellant's lack of deligence in accepting the tapes when they were offered to the defense before trial.

Issue III - The trial court did not err in imposing the death penalty nor was this a case of jury override. The jury's recommendation is entitled to great weight and the trial court could not have properly found that the jury's recommendation was either improperly supported or that no reasonable jury, based on the evidence, could have arrived at the recommended penalty.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION IN LIMINE. (Restated)

Appellee concedes that if the state, during trial, had proceeded to dredge up various and sundry transgressions of appellant from his near and distant past solely for the purpose of showing bad character or propensity same might have constituted a basis for a finding of reversible error. But that did not happen in this case. What appellant complains of, inter alia, was testimony by a co-participant, Sharon Cooper, who accompanied appellant on his odyssey from Jacksonville, Florida where they met at a bar out to Mississippi where they picked up appellant's truck, back to Gulf Breeze, Florida where their peregrinations continued by cabin cruiser to Pascagoula, Mississippi near which the boat was damaged and it became necessary for them to tie up the boat and ponder their next move. It was at Pascagoula that appellant and Cooper befriended George Wilson, the murder victim who was abducted, bound and transported to the vicinity of Crestview, Florida in his own car and shot to death and dumped in a creek. The story picks up again in Louisiana where the pair allegedly purchased a white Pinto automobile which turned out to be stolen. On their way back through Florida they were arrested at Madison after the local police agency ran the tag number through the NCIC computer prior

to making the arrest. Although appellant's sawed-off shotgun was visible from the outside of the car it was seized during routine inventory of its contents by the Madison Police. The shotgun had not been reported stolen and was ultimately traced to appellant through fingerprint and federal firearms purchase records maintained by the gun dealer. At the time appellant met Sharon Cooper in a Jacksonville tavern he was a fugitive from a bank robbery committed some weeks before in Grand Bay, Alabama, a crime of which he was later convicted in federal court. He was later transferred to the Santa Rosa county jail from which he escaped prior to being brought to trial for murder, kidnapping and robbery with a firearm in the instant case. He remained at large for over a year and was ultimately retaken in Colorado and brought to trial in Santa Rosa County, this trial ending in a mistrial. Appellant was ultimately tried and convicted in Walton County as a result of a stipulated change of venue.

As the evidence showed, the Sea Ray cabin cruiser was acquired at Gulf Breeze, Florida by virtue of appellant's hotwiring the boat and unlawfully taking it, accompanied by Sharon Cooper, to Pascagoula where it was damaged beyond his ability to repair it. The boat belonged to an Auburn, Alabama man who had not given anyone permission to take the boat.

The taking of the boat, i.e., the manner in which the pair made their way to Pascagoula, the circumstances under which they

met George Wilson, the victim, are all part and parcel of the factual background of this dastardly crime. The jury was entitled to know and, indeed, the state was obligated to show, the full circumstances surrounding the movements of appellant and his companion that lead up to the robbery, the kidnapping and murder. It is part of the res gestae of the matter and not some obscure event of appellant's past that was resurrected solely to show bad character. That is all that the cases cited by appellant stand for and while they are good law, they are inapposite to the issue as it presents itself to this court. It would have been impossible for the state to avoid some testimony concerning the movements of the pair and how they became initially involved with the victim George Wilson at Pascagoula without there being substantial gaps in the factual pattern and a resulting uninformed jury.

Appellant seems fond of presenting the sixty five-year-old deceased, George Wilson, as a "security guard" at Clark's Seafood Company in Pascagoula. The fact of the matter was that he was not a security guard on the model of the uniformed and armed Pinkerton guard but rather he was an aged, unarmed night watchman who lived in a little trailer inside the Clark's enclosure. The disabled stolen Sea Ray was docked nearby and appellant and Cooper became friendly with Wilson as with other persons employed in the vicinity and, at times, borrowed tools from them in an effort to repair the Sea Ray. Appellant's repair efforts were

unsuccessful and it became necessary for him to concern himself with finances and transportation.

It was not the meager treasure of the sixty five-year-old night watchman at the seafood plant that interested appellant but the possible contents of the seafood packing plant's offices that were the focus of his attention. The pair went to his trailer and appellant pointed his shotgun at Wilson and took from him the keys to the plant and offices as well as what money Wilson had. Apparently appellant's entry into the plant's offices yielded nothing of value. Wilson's hands had been bound and he was taken in his own automobile from Mississippi to Bayou La Batre, Alabama were the trio stopped at the Blue Bayou Bar where appellant was known. Whether the old man was in fear of his life or for what other reason he did not cry out was never developed during the trial but he apparently made no overt attempt to escape at that point. Then they proceeded to a motel at Crestview, Florida with the victim still being held with his hands bound. After a brief sojourne at the motel appellant, accompanied by Sharon Cooper, drove around near Crestview and in the vicinity of Munson on back roads until appellant came upon Juniper Creek where, in the presence of Sharon Cooper, marched the victim some yards from the car near the creek bank, struck him in the back of the head with a shotgun, possibly rendering him unconscious and then after the victim fell in the creek, shot him in the face with his twelve gauge shotgun. The body of Wilson and some of his personal

papers were found in the creek at different spots within the next few weeks. (T 401)

Although Cooper was arrested with appellant in possession of the stolen car at Madison, Florida, within a matter of days she was released within a relatively short period of time and appellant was being held to answer for the auto theft which was a crime not only in the state where the vehicle had been stolen but chargeable in federal court for interstate transportation of a stolen motor vehicle. It was during this point in time that Sharon Cooper went to the FBI in Jacksonville and told all. (T 423) She knew that appellant had robbed a bank in Alabama, (T 422) that he had stolen the boat at Gulf Breeze, Florida that he had robbed George Wilson and transported him to Florida where he had hit him in the head with the shotgun and shot him after he fell in the creek. (T 419) The precise nature of his wounds were not apparent to Sharon Cooper but all of this came to light during the medical examiner's testimony. From this point on, the Santa Rosa County sheriff, the FBI agents and criminalists and FDLE ballistic experts began to close the ring on Tony Bryan.

Bryan wore a mask of some sort when he robbed the bank at Green Bay but he carried with him a shotgun sawed off at both ends and briefly took prisoner an elderly man at the bank before making his escape. (T 457) The sawed off portions of the shotgun were found in clothes closet at a residence once shared by Bryan

and his then wife. (T 462) The shotgun recovered from the stolen Pinto at Madison, Florida was processed and latent fingerprints of appellant were identified under the forestock on the metal surface that would not normally be exposed but would be exposed if the weapon was disassembled for cleaning. (T 478-479) A spent shotgun shell was recovered at the place where Sharon Cooper lead the officer to where she witnessed the shooting of George Wilson by appellant. This particular shotgun casing had been fired from the shotgun recovered in the car at Madison. An FDLE ballistics expert told the jury how he could match up the shotgun's firing pin with the primer on spent shell and markings on the brass portion of the spent shell with characteristics of the shotgun's breach, extractor and or other parts of the magnesium which would make the own "signature" on the brass portions of the shell. (T 471-472) The gun dealer who sold the shotgun to appellant identified appellant as the purchaser through records kept pursuant to federal firearms sales regulations. (T 494) The evidence was overwhelming that appellant fired the fatal shot from the same gun that fired the shell that was found at the scene and which had been purchased by appellant at an earlier time.

Without some reference to the bank robbery and the boat theft the state's case would have been emasculated and it would have been utterly impossible for the trier of fact to perceive the "big picture" in order to arrive at a just result.

Although the state duly filed its notice of similar fact evidence, this was probably a perfunctory act done out of an abundance of caution. None of the evidence brought in was presented in any wise other than as the part of a running scenario of the defendant's activities preceding and close in point of time to the acts for which appellant had been arrested and tried. The bank robbery and the boat theft were not "collateral crimes" presented for the reasons that appellant suggests. They cannot be logically separated from the state's case-in-chief and certainly they had no special prejudicial effect as a bank robbery and a boat theft cannot prejudicially point to a propensity to commit murder, kidnapping etc. in and of themselves. If appellant had committed a bank robbery at some time in the dim past or had stolen a boat as a separate and destinct episode at some time remote it probably would have been error to present such evidence in the case at bar but that is not what happened. Neither a bank robbery nor a boat theft however inter-connected could constitute a feature of a trial that involved such strong evidence of a heartless calculated murder. Appellant is grasping for straws and once counsel had done his jack-in-the box act enough times he quietly settled down to taking full advantage of all of his opportunities to cross-examine every witness and attempt to develop even minute inconsistencies which he attempted to exploit, as was his proper function. Appellant himself needed for the whole picture to be

presented as all of the circumstances attendant were part and parcel of the defense because as the trial proceeded it was apparent that appellant wanted the jury to believe that he had done all of these things as a manifestation of a severely depressed mental state brought on by physical injury and financial distress. Appellant skillfully cross examined every single witness to good advantage in an attempt to convince the jury that it should forgive this poor defendant and not recommend the death penalty because of this terrible pattern of self-destruction brought on by his alleged misfortunes. Appellant needed all of this testimony of which he now complains to fashion a defense against imposition of the death penalty because he well knew that the physical evidence coupled with the eye-witness and participatory evidence given by Sharon Cooper gave him little chance of prevailing against the charges of murder, kidnapping and robbery. Appellant's were crocodile tears at trial and he has failed to demonstrate that testimony relating to the bank robbery and a boat theft had any prejudicial effect on the jury when it found him guilt of first degree murder, kidnapping and robbery and recommended, by majority vote, that the death penalty be imposed. What appellant feared was that testimony relating to the bank robbery and the boat theft would have given the jury the complete picture of appellant's relevant activities and not that the jury would receive some extraneous collateral matter that would indirectly prejudice the jury in deliberating as to whether

Anthony Bryan killed George Wilson and if he did so was it done in a manner that would lawfully justify imposition of the ultimate penalty.

Appellant took the stand in his own defense and although he did experience convenient lapses of memory whenever the prosecutor closed in-when his own testimony began to wear thin, his story differed from that of Sharon Cooper on at least one critical point. The way Bryan told it was that George Wilson had become indebted to Sharon Cooper as a result of her services to him as a prostitute and that he proposed to repay her through a dope deal that he was to set up in Florida. According to Bryan the trio traveled to Crestview, Florida and that while he was at the motel Sharon Cooper left with Wilson. Later she reported to him that something bad had happened to George, i.e., the dope deal had gone sour. Appellant denied any knowledge as to the circumstances of Wilson's death. He asked the jury to believe that a sixty five-year-old night watchman of Pascagoula, Mississippi would be engaging in dope deals in Florida. (T 621, 627) The jury also knew that Doctor Ogburn, the court-appointed psychiatrist had testified that appellant had told him during an interview that he knew nothing about any murder and did not know George Wilson. (T 736) Between the time of the interview with Dr. Ogburn and appellant's trial testimony his memory had shown a remarkable recovery except as to certain points that came up during his testimony where he denied any recall.

The general rule is that evidence of commission by defendant of another crime wholly independent of that for which he is on trial, even if it relates to a crime of the same sort, is not admissible. Padgett v. State, 53 So.2d 106 (Fla. 1951); West v. State, 140 Fla. 421, 191 So. 771 (Fla. 1939). However, evidence which tends to prove the defendant's guilt of the offense charged is admissible, although it may also have reference to a distinct offense. Wallace v. State, 41 Fla. 547, 26 So. 713 (Fla. 1899); Roberson v. State, 40 Fla. 509, 24 So. 474 (Fla. 1898). Thus, evidence of collateral crimes is permissible under certain circumstances. Matthews v. State, 366 So.2d 170 (Fla. 3rd DCA 1979). The test for determining whether a defendant's prior commission of crimes is admissible is relevancy. Ashley v. State, 265 So.2d 685 (Fla. 1972); Tafero v. State, 223 So.2d 564 (Fla. 3rd DCA 1969); Weinshenker v. State, 223 So.2d 561 (Fla. 3rd DCA 1969), cert.denied, 396 U.S. 973 (1969). The test for inadmissibility is the lack of relevancy. Hines v. State, 243 So.2d 434 (Fla. 2nd DCA 1971); Winkfeld v. State, 209 So.2d 468 (Fla. 1968). If evidence of a defendant's illegal or bad conduct in collateral matters is relevant to proof of an accused's guilt of a particular offense for which he standing trial it may be admitted. United States v. Stallings, 437 F.2d 1057 (5th Cir. 1971).

The test as to admissibility of evidence of crimes other than the one with which defendant is charged is whether the

evidence is clearly relevant and material to the issue being tried. Wingate v. State, 232 So.2d 44 (Fla. 3rd DCA 1970), cert.denied 400 U.S. 994 (1971). As long as evidence of other crimes is relevant for any purpose the fact that it is prejudicial does not make it inadmissible. Ashley v. State, 265 So.2d 685 (Fla. 1972).

Evidence of another crime is considered relevant and admissible if it shows motive, criminal intent guilty knowledge, absence of mistake, common scheme, identity, pattern of criminality or if it tends to foreclose a defense otherwise open to the accused. Coppolino v. State, 223 So.2d 68 (Fla. 2nd DCA 1969) cert.denied, 399 U.S. 927 (1970). In the instant case both during the guilt phase and the penalty phase of the trial appellant valiantly attempted to mitigate the gravity of the crimes or to explain his alleged lack of recall by putting on a variety of evidence to convince the jury that he was the victim of everything from prenatal injury to poor schooling to a bump on the head from a fall from the mast of the shrimpboat.

The balancing between the probative value of incidence prior or subsequence to the offense charged and any prejudice that may result from its admission is left within the sound discretion of the trial judge. United States v. Rodriguez, 474 F.2d 587 (5th Cir. 1973). Relevancy is a test but it is not the sole criterion for admissibility of a prior crime. Timeliness is part of the

test of relevancy. McGough v. State, 302 So.2d 751 (Fla. 1974). The collateral crimes in the instant case, bank robbery and boat theft were both part of a continuing eposode of criminality which lead up to the murder of George Wilson. From the time of the bank robbery in the spring of 1983 up until the time of the murder of George Wilson in August of that year, during all of that period appellant was a fugitive and all of the crimes, i.e., the bank robbery, the boat theft and ultimately the murder were committed either for financial gain or to facilitate further flight or to eliminate a witness or a combination thereof.

> Evidence of other offense is admissible if:
>
> (1) It is relevant and has probative value in proof of the instant case or some material fact or facts and issue; and (2) Its sole purpose is not to show the bad character of the accused; and (3) Its sole purpose is not to show the propensity of the accused to commit the instant crime charged; and (4) Its admission is not precluded by some other specific exception or rule of exclusion.

Green v. State, 190 So.2d 42, 46 (Fla. 2nd DCA 1966).

The other crimes may be both prior and subsequent to the crime at issue. Talley v. State, 36 So.2d 201 (Fla. 1948); Andrews v. State, 172 So.2d 505 (Fla. 1st DCA 1965). Certainly the fact that appellant was ultimately arrested because the automobile he was driving or license tag that the NCIC computer said belonged on a stolen automobile is also material and probative and not, unbalanced and prejudicial to appellant. As a result of this arrest, the murder weapon was recovered through an inventory search and Sharon Cooper, after her release had an attack of conscience and subsequently related the entire history of her experiences with appellant to law enforcement authorities.

Appellant has failed to demonstrate any prejudicial effect under this issue that would have in any way affected the ultimate outcome of the trial. The scientific and testimonial evidence against appellant, in the instant case, was overwhelming. It was only in the penalty phase of the trial that appellant had even a prayer of a chance to influence the jury with the evidence presented by the defense. Even then, a majority of the jurors were not impressed.

ISSUE II

THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY RELATING TO A TAPE RECORDING OR THE SUBSTANCE THEREOF. THERE WAS NO VIOLATION OF EITHER THE RICHARDSON RULE NOR ANY PROVISION OF THE SECURITY OF COMMUNICATIONS ACT. (Restated)

Appellant's positions under this issue are ridiculous. As appellant states, Sharon Cooper did enter into an agreement with the state to attempt to place a telephone call to appellant and to have a conversation with him relevant to certain issues that would probably surface during appellant's trial. To suggest here that Sharon Cooper was not a consenting party to the interception and recording of her telephone conversation with appellant is sheer nonsense and unsupported by the record. As a matter of fact, on cross-examination, counsel for the defendant documented very nicely Ms. Cooper's willness to make the call, viz:

> BY MR. STOKES: Q Well, did you tell him that you were calling from the sheriff's office and you were calling because (Captain) Rick Cotton wanted you to?
>
> A No. I wasn't calling because Rick Cotton wanted me to, I was calling because I wanted to.
>
> Q Oh, thats why you had it tape recorded? Is that right?

A Yes.

(T 723)

Appellant's statement in his brief on page twenty-five that neither party consented to the call is simply untrue and based upon the foregoing excerpt from the trial record appellee sees no reason to dwell further on that point.

The purpose of a Richardson inquiry is to determine whether the state's alleged violation of the criminal discovery rules was inadvertent or willful, whether the alleged violation was trivial or substantial, and what effect, if any, did it have upon the ability of the defendant to properly prepare for trial. Richardson v. State, 246 So.2d 771, 775 (Fla. 1971). If the court is apprised as to these essentials it may then exercise its discretion as to whether the allegedly omitted material may be presented. Id. at 775. There are no formal parameters for a Richardson inquiry and whether or not the courts inquiry is actually formally designated a Richardson hearing is not essential. Actually, in the instance case, the court did conduct an inquiry concerning the tapes and became fully apprised as to all relevant circumstances. (T 664-669)

Counsel acknowledged that he received a copy of the immunity agreement and then wrote a letter asking for a copy of the transcript of the telephone conversation. During appellant's

first trial before Judge Lowrey declared a mistrial the prosecutor advised counsel that he had the tape with him and invited him to listen to it. This conversation occurred in Judge Lowrey's office. (T 664) Counsel for appellant has not denied that this conversation took place. (T 664) In addition, the prosecutor sent a letter to defense counsel and told him that his file was completely open to him at all times and that he was welcome to come and inspect and copy anything contained in the files. (T 664) What actually happened was that on January 7, 1986 defense counsel wrote to the prosecutor asking for a transcript of the taped conversation. (T 666) Because the matter was set to go to trial on January 10th the prosecutor knew that he would not have time to respond by mail and verbally advised defense counsel again that he did have a taped conversation and asked him if he would like to listen to it, that he had it on his person. (T 667) The tape concerned a concocted story by appellant for Sharon Cooper to tell at trial. (T 668)

It was the trial court's ruling that the witness Sharon Cooper would be permitted to testify concerning the conversation and that she could refresh her memory by listening to the tape. Ultimately, the only use the tape was put to was in rebuttal. Appellant took the witness stand and gave his own account of the wanderings of Anthony Bryan and Sharon Cooper about various places and at various times to the extent that he cared to remember. There was a Richardson inquiry albeit informal and the

trial court properly found that there was no Richardson violation. Certainly there was nothing proper about Sharon Cooper's testifying for the state about the telephone conversation. If appellant chose to make certain denials that was his right but in doing so he necessarily invited rebuttal evidence by the state and that is what the tapes were. Appellant now cries foul but his counsel knew that the tapes existed and had he not invited rebuttal by what he said on the stand it is doubtful that the tapes would have been played at all or even had that much relevancy as Sharon Cooper recalled the conversation and was subject to cross-examination in that connection. Further, Sharon Cooper was deposed by defense counsel on December 27, 1985 at Wilmington, North Carolina. See appellant's brief, exhibit C, page 35(c).

With a minimum of diligence defense counsel could have listened to the tape any time he wanted to or had access to transcripts of same if, in fact, they existed. Such as it is, appellant has demonstrated no error.

ISSUE III

THE TRIAL COURT DID NOT ERR IN IMPOSING THE DEATH PENALTY WHICH WAS CONSISTENT WITH THE JURY'S MAJORITY RECOMMENDATION. (Restated)

Under this issue, appellant takes to many liberties with the record. Appellant's argument that the only evidence to support a conviction and subsequent sentence was the testimony of Sharon Cooper is nonsense. Her testimony was strongly corroborated by the physical evidence. It was established and uncontroverted that the murder weapon had been purchased by Anthony Bryan and that the spent shotgun shell found at the scene of the killing was not only of the same gauge but bore the firing pin marks of the murder weapon on its primer and tool marks from the breech and receiver of Bryan's shotgun which was seized from him at the time of his arrest in Madison, Florida for possession of a stolen automobile. All of this was established by expert testimony. The medical examiner found that the sixty five-year-old victim had been fatally shot in the face at relatively close range with a twelve guage shotgun. Pellets were recovered from the body. Appellant's fingerprints were found on surfaces of the shotgun that would not normally be exposed except after disassembly for cleaning or repair. It was also established that appellant gave details of the killing that would be known only to law enforcement and the killer himself, to a fellow prisoner (Mark Allen Hart) whom he met at the federal psychiatric facility at Springfield, Missouri. Appellant's subsequent escape from the

Santa Rosa County Jail while awaiting trial was ample evidence of an attempt to avoid prosecution. Further, appellant's fanciful account of the reasons for the journey with the victim and Sharon Cooper from Pascagoula, Mississippi to Crestview, Florida were, for very good reason, totally rejected by the jury in the guilt phase of the trial. Appellee submits that it would hardly have been necessary to hold a shotgun on the sixty five-year-old victim twenty-four hours a day when his wrists were bound and when he knew that the shotgun was nearby. What is appellant suggesting-that he accompanied them to Florida willingly? If so, what would have been the purpose of leveling a shotgun at him in first place or binding his wrists.

Appellee takes exception to appellant's reference to the testimony of the proprietor of the Blue Bayou Bar, a friend of appellant. No record page number was cited. The record is devoid of any indication that Mr. Gulfers was acquainted with the victim George Wilson nor was there any reference to Mr. Wilson as such. Further Mr. Gulfers gave no testimony that indicated he would have been in any way familar with what psychological pressures, threats or duress that may have been present in the mind of George Wilson if, in fact, Gulfers saw him at all. Appellant's argument in mitigation of the death penalty neglects to mention George Wilson's pleading with appellant, to wit, "please don't cripple me" as related by Sharon Cooper. Cooper also testified that after Mr. Wilson was struck with the butt of

the shotgun and fell in the water that she heard choking and coughing just before the gunshot. The helpless victim, with his wrists bound was literally drowning at the point in time when he was shot in the face by appellant.

Appellant makes a great deal over the fact that after appellant hit the victim in the back of the head with the gun Cooper turned around to run and that she did not actually see appellant hit the victim with the gun but heard it, heard a splash and then a gunshot but that she did not actually see the victim shot. Only three people were there. Sharon Cooper walked away, Anthony Bryan walked away and the body of George Wilson was found in the creek a short distance away with his wrists bound and his face blown away by a twelve-gauge shotgun. This calls to mind the old lawyer's courtroom anecdote about a defense attorney pressing a witness on cross-examination. The attorney asked the witness if he actually saw the defendant bite off the victim's ear. The witness replied "no, but I saw him spit it out." What is the impression appellant is attempting to convey-that George Wilson hit himself in the back of the head with the shotgun, shot himself in the face and then gave the shotgun back to Anthony Bryan?

Appellant may be correct in that the court, in being scrupulously fair in combining circumstances (d)(f) to constitute one aggravating circumstance and combining circumstances (h)(i)

to constitute a second circumstance there remained in addition only circumstance (e) as set out in the applicable statute. Therefore, there may have been only three aggravating circumstances in the final analysis. However, this miscount by the trial court does not form any basis for its not imposing the death penalty as the jury majority recommended.

The logic of appellant's argument that he was not in flight (from capture for the bank robbery) during the trip from Pascagoula, Mississippi to Crestview, Florida escapes appellee. No one, during the trial, accused appellant of being very intelligent or even very cautious either about how he ran a shrimpboat or how he conducted his life in general. But in any case, a casual glance at a road map shows clearly that when one proceeds eastwardly from Pascagoula, Mississippi, to the Florida panhandle a trip to the Grand Bay-Bayou La Batre area is unavoidable. When appellant passed through he didn't turn himself into the FBI but he knew that he was wanted for bank robbery. It appears that he was confident that his friends at the Blue Bayou Bar would not turn him in and his reasoning in this regard appears to have been correct. Appellant's statement that he was simply engaged in an ordinarly course of travel is absurd, otherwise he would not have been using so many assumed names including the false name he gave to the arresting officer at Madison, Florida.

Appellee finds appellant's argument that he did not murder George Wilson for witness elimination because George Wilson might not have known about the bank robbery is pure balderdash because there has been no suggestion that the bank robbery per se motivated appellant to kill George Wilson. The true motivation was pure and simple. At Pascagoula, Mississippi appellant approached George Wilson in his trailer armed with a shotgun and took from him the keys to the Clark's Seafood plant which he apparently entered or attempted to enter in order to steal anything of value that could sustain him while he was a fugitive from justice. Further, at Pascagoula appellant took Wilson's automobile at gunpoint and then tied the old man's hands while they kidnapped and falsely imprisoned him for the trip to Crestview, Florida in which vicinity the murder actually took place. It wasn't the bank robbery that was on appellant's mind, it was the robbery and possible burglary at Pascagoula which George Wilson did know about. Wilson's personal moneys were also taken by appellant by force. There were ample reason for appellant to eliminate George Wilson as a witness solely because of what happened at Pascagoula. It is a ridiculous argument on the part of appellant that the taking of the victim's car did not constitute personal gain because the car was every old and probably worth little money. The fact is the car ran and it was a thing of value. The car was taken when appellant drove out of Pascagoula with the victim sitting in the back seat with his

hands bound. Although the initial robbery took place in Mississippi, appellant retained possession of the car by force up until and including the point in time when he murdered George Wilson at Juniper Creek. Appellant argues that there is no evidence that appellant derived any monetary or pecuniary gain from that vehicle which was soon ditched in a river.

This argument is to shallow to merit comment. Appellee submits that once appellant parked the automobile at Juniper Creek and took the bound-up old man out of the car and marched him fifty or so yards down the creek the old fellow knew that he was doomed and he pleaded with appellant "please don't cripple me". It will never been known whether George Wilson was conscious as he was gasping and choking in Juniper Creek after having been struck in the head with the shotgun but since he was shot in the face and he was not blindfolded there is a reasonable chance that he looked down the muzzle of a Browning automatic shotgun an instant before the blast destroyed his face and a portion of his brain. Appellant knew what he was going to do. He did not march George Wilson those last few yards with his hands bound with any intent to show mercy or spare his life. He coldly and calculatedly intended to do what he did do.

This is not a case where the trial judge overruled the jury's majority recommendation. Therefore, cases cited by appellant in such circumstances where the trial court went beyond

the jury's recommendation and found sufficient aggravating circumstances to impose the death penalty are of questionable persuasive authority here. What would appellant have had the trial judge do in the case at bar?

This court said in LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978) a case involving a trial court's sentence consistent with the jury's recommendation of the death penalty:

> The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation.

". . .[t]he jury recommendation is entitled to great weight" Stone v. State, 78 So.2d 765, 772 (Fla. 1980), cert.denied 449 U.S. 986 (1980), citing Tedder v. State, 322 So.2d 908 (Fla. 1975).

The trial court followed the law and made its own independent determination that the aggravating circumstances presented by the evidence in this case outweighed appellant's meager presentation of supposedly mitigating circumstances. Although appellant, concededly is not terribly bright by "white-collar" standards, the evidence showed that he was still very much capable of formulating a plan. Many men have suffered physical injury that has effected their abilities to earn a living or provide for their families but they have not turned to

a life of crime as a solution as did appellant when he took that first fatal step in holding up the First National Bank of Grand Bay, Alabama. From that point he was a hunted man for a federal crime and one thing led to another until he was finally arrested at Madison, Florida for possession of a stolen automobile. Physical disability and economic impairment do not mitigate kidnapping, armed robbery and deliberate murder. If this were true, we would all live in a world of anarchy and civilized society as we know it could not exist.

The fact that appellant, throughout the trial, denied any cupability whatsoever counted not for mitigation. It remained for other persons, family members and acquaintances to plead for mercy on his behalf. He simply would not come clean with the jury and he came across to them exactly what the evidence showed that he was - a heartless person who would kill for the sake of temporary pecuniary advantage and to eliminate person or persons whom he perceived to be a potential threat to him on the witness stand as was the unfortunate George Wilson.

CONCLUSION

The trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief had been forwarded by U.S. Mail to Ted A. Stokes, Post Office Box 84, Milton, Florida 32572 this 21 day of May, 1987.

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