IN THE FLORIDA SUPREME COURT

JUAN BANDA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 69,102

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY

BRIEF OF APPELLEE

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I

Pursuant to this court's decision in Stewart, infra, appellant has procedurally defaulted this issue. Appellant did not defend on the ground that the killing of the victim was either justifiable or excusable either in his presentation to the jury or his motions for judgment of acquittal to the court.

To the extent there is merit to appellatn's Harris v. State based argument the error was harmless because manslaughte is at least two steps removed from murder in the

II

The trial court did not palpably abuse its discretion in declining to impose sanctions for the state's late disclosure of the witness Blanton. It had conducted a Richardson hearing. And, it could properly conclude, as it did, that appellant suffered no prejudice. It could also properly conclude that no sanctions were necessary in light of what the state had already done in helping to locate possible impeaching witnesses.

Nor, did the trial court palpably abuse its discretion in denying appellant's motions for continuance. Appellant presented impeaching evidence. The witness he was unable to subpoena could offer nothing but cumulative evidence. And, there was no proffer as to what the missing witness would have been able to add. It seems at best that his testimony too would have been cumulative.

Appellant has procedurally defaulted the constitutional calim because he did not present it to the trial court.

III

Appellant had no right to impeach the witness Jones with the use of an alibi as that is not a proper basis for impeachment. Nothing in Smith v. Illinois, infra changes this. The policy considertions advanced by Smith are not advanced by allowing the elicitation of the use of an alias.

Appellant's point is not properly before the court. He did not make the objection or join in it. And the court's ruling on the codefendant's attempt did him no prejudice because his trial strategy called for impeaching only a few specifics of Jones testimony. He relied on Jones' other testimony to support his attack on Townsend's credibility.

IV

Sequestration of the jury between guilt and penalty phases lies within the sound discretion of the trial court. And, there were no circumstances before the trial court or suggested to this court that would have required the trial court to enter such a sequestration order. The circumstances that set the deliberative portion of the jury's work aside from its other work are such that only that portion is vulnerable to the possibility of prejudice according to the reasoning this court found persuasive in Livingston v. State, infra. Following appellant's logic would be counter to this court's prior reasoning in this area and would require that all juries be sequestered from the beginning of trial until the return of the verdict, an absurd result.

V

Appellant did mention and argue that there were nine possible aggravating circumstances and that the state was only arguing one. Appellant did make a proportionality argument, although not the one suggested as precluded by appellant's argument. Appellant's counsel is only second guessing trial counsel on this matter. Trial counsel had all the tools he needed to make the proportionality argument suggested in his brief in the penalty phase instructions. The court's ruling did nothing to preclude this line of argument. The trial court correctly sustained the state's objection. Appellant was not pursuing the evidence and was asking the jurors to simply count and not weigh.

VI-A

The trial court did err in rejecting appellant's requested instruction number six for the penalty phase instructions because it was not an accurate statement of the law. This court has never held that the Tedder standard applies to overrides of a death recommendation. The jury instructions on the penalty phase in this case addressed the concerns expressed in Caldwell v. Mississippi by reminding the jurors of the gravity of their undertaking and asking them to remember that a human life is at stake. Affirmance is mandated because appellant procedurally defaulted his Caldwell claim by his failure to object on this ground to the court below. And, even if this court could reach the merits it would have to affirm on the basis of prior precedent.

B

There was no necessity for the trial court to redefine reasonable doubt. The jury in this case had had printed copies of the reasoable doubt instruction during the guilt phase and had applied the concept in acquitting the codefendant. Counsel argues extensively and repeatedly that there was a reasonable doubt regarding the heightened premeditation needed to prove this element on account of the jury's acquittal of the codefendant.

Barwicks v. State infra, is not instruction for the resolution of this case. It was concerned with a single phase trial. And, there is nothing in this record to suggest that appellant was prejudiced in the slightest.

C

Appellant did not object to the jruy instructions on numbers to recommend a sentence. Analysis of the reocrd shows that his argument during the motion for new trial that he had argued this issue and the error was the state's fault was erroneous. He had not done so. There is no suggestion of prejudice and in keeping with past precedent this court should find that appellant waived and procedurally defauted this issue.

D

There was no cumulative error in the sentencing phase.

VII

Appellant made no suggestion to the court below that there was any pretense of a moral or legal basis for his actions. The statements to which his arguments point show only his utter disregard for the norms of civilized society. And, because appellant did not make this claim below this court should rule that it is procedurally defaulted.

VIII

Appellant's contention on the basis of Blair v. State , infra, that his sentence is not proportional to his offense and his record and character is without merit. The legislature had not made this an aggravating factor at the time of Blair's offense. It was not found as an aggravating factor in Blair's case. And, other factors, not present here, led to the reduction of Blair's death sentence. Properly understood, as this court shows in Fead v. State, infra, Blair is a lover's quarrel or domestic dispute case.

While it is true that the court has reduced death sentences when there is only one aggravating factor and a death recommendation, that is not the basis for decision in the cases advanced by appellant to support it. The bases for the reductions of the sentences in the cases cited by appellant are not present in this case.

ARGUMENTS AND CITATION TO AUTHORITIES

I

Appellant contends that the trial court committed fundamental error in not instructing the jury on justifiable and excusable homicide. And, he contends that whether the killing was justifiable was an issue for the jury. Appellee cannot agree. There was no question for the jury's resolution as to whether this killing might have been justifiable. There was not only no objection in the court below but counsel for appellant affirmatively went along with the idea of excluding the instructions on justifiable and excusable homicide. Accordingly, under this court's decision in Stewart v. State, 420 So.2d 862 (Fla. 1982), the omission of these instructions cannot be deemed fundamental error.

Reference to this court's decision in State v. Dominguez, 509 So.2d 917 (Fla. 1987), illustrates why there was no fundamental error caused by the absence of instructions on excusable and justifiable homicide. The Dominguez case presented this court with a certified question asking whether the then current jury instruction on trafficking in cocaine sufficiently instructed the jury that one of the issues for their resolution was whether the state had met its burden of proving that the defendant knew the substance in which he trafficked was cocaine. This court ruled that it was not and found that Dominguez had been prejudiced because he had defended on the ground that he did not know that the substance was cocaine and had requested a jury instruction on knowledge of the nature of the substance as cocaine.

This appellant did not defend on the basis that he had killed but that the killing was either justifiable or excusable. Nor, obviously, did he request such an instruction Reference to the closing argument shows as much. Appellant attacked Townsend's credibility and attempted to shift blame to him. His closing argument covers 26 pages of the record. Attacks on Townsend's credibility appear on 19 of those pages. A fair reading of the closing argument clearly demonstrates that appellant asked the jury to base its decision on Townsend's lack of credibility and exonerate him all together.

Likewise, reference to the content of the appellant's motion for judgment of acquittal shows that he was neither claiming nor relying on any claim that the killing was either justifiable or excusable on his part. There was no fundamental error in counsel's decision to go along with the state's suggestion to exclude justifiable and excusable homicide instructions.

To the extent therre is merit to appellant's Harris v. State, 438 So.2d 787 (Fla. 1983) based claim, the error is harmless. This is so because manslaughter is at least two steps removed from murder in the first degree. And, the omission of instructions on justifiable and excusable homicide only render the manslaughter instruction incomplete. Accordingly, under this court's decision in State v. Abreau, 363 So.2d 1063 (Fla. 1978) such error is harmless.

II

Appellant's argument under this point urges that the trial court erred in not finding that the late disclosure of a witness had prejudiced him and that the court further erred in not granting him a continuance. Reference to the relevant facts surrounding this issue shows that the trial court's ruling were well within its discretion. And, they show that appellant suffered no prejudice on account of the late disclosure or the denial of his motions for a continuance.

Appellant sought relief on account of this circumstance by filing a motion for sanctions asking that the court preclude the state from offering the testimony of the witness Blanton. R. 373-374 Blanton had been a cellmate of appellant's for a short while. R. 2010 In accordance with the teachings of Richardson v. State, 246 So.2d 771 (Fla. 1971), the trial court held a hearing on appellant's motion. R. 1346-1356

The court learned of the state's short purposeful delay in the service of the already prepared disclosure on account of the witness' fears and an impending continuance from the prosecutor. R. 1352 And, it learned of the paper's subsequent loss by burial in the file. R. 1353 The prosecutor also explained his efforts to produce the witness for an earlier deposition and the witness' failure to answer subpoenas. R. 1353

And, contrary to appellant's counsel's representation to the court (R. 1349), which he repeats in his brief (Brief for Appellant at -25-) that the deposition revealed that three other individuals had overheard the statement, there was only a

possibility that others had overheard the statement attributed to appellant. R. 1353

Reference to the text of the deposition (R. 1200-1233) shows that what the prosecutor's recollection of the deposition revealed was more accurate than appellant's counsel's recollection. The witness had testified that one day while talking and playing cards that he had asked appellant "what he was in here for" and that appellant had responded, "The guy threatened to kill be[sic] and I figured I better do something about it first." (R. 1214) Exploration of how many people were present and where they were revealed the following. There were about six people present at the time.(R. 1216) The statement had come in the wake of their smoking marijuana. (R. 1215-1216) The witness recalled Paul Discher; Cecil McCall, his cell mate, and an old man named Ed as being present. (R. 1214,1216,1217) Appellant was not whispering on the one occation when he made the statement.(R. 1217) Appellant and the witness had been sitting on the top bunk and Ed and Cecil had been on the bottom bunks when appellant made his statement.(R. 1225) The statement occurred while "[e]very body was just talking, shooting the breeze".(R. 1226) There were no responses to appellant's statement.(R. 1226)

The prosecutor also told the court that he had run Mr. Discher's and Mr. McCall's name through the computer and that one was still in jail and that he had an address for the other one on Arizona Avenue in St. Petersburg. R. 1354 The prosecutor also told the court he thought that appellant's proper request for

relief should be by way of a motion to continue. R. 1354

In ruling on appellant's motion, the court said, "While I am sympathetic with the timing, I really do not feel that sufficient prejudice has been shown or can be shown under the circumstances." R. 1355 After addition argument from appelant's counsel, the court observed that appellant had had the name for at least a week and had take depositions and had time to work on it. R. 1356 The state had disclosed the witness in a paper served on May 19 and filed on May 20. R. 350 That additional list of witnesses also included three experts from the Federal Bureau of Investigation. Sometime before May 29, appellant's counsel also came into possession of a transcript of the witness' statement to Assistant State Attorney Scalera. R. 371-372

Appellant moved for a continuance after the court's adverse ruling on his motion for sanctions. R. 1356 The court denied the motion. Appellant renewed his motion for a continuance at the start of the trial. R. 1514-1516 And, he moved for yet another continuance after the witness Blanton testified. R. 2033 He represented that he had located the witness Paul Discher by telephone but that his investigatior had not been able to find him. R. 2033 The court established that Discher's testimony would "basically be the same as McCall's." R. 2033 Appellant called McCall as his witness when his turn came to present his defense. R. 2029-2107

The trial court correctly found that appellant's defense suffered no prejudice, procedural or otherwise, from the late disclosure of Blanton's name to him. The late disclosure did

not prevent him from properly preparing for trial. At the hearing on his motion for sanctions, the prosecutor supplied him with locations for two of the witnesses, one of whom was in county jail, who might have overheard his statement. The trial judge was certainly in a position to make an accurate judgment regarding both appelant's request to exclude evidence and for a continuance. Thus, as this court explained in Smith v. State, 500 So.2d 125,126 (Fla. 1986) he had the relief to which he was entitled. There is no basis for this court to find that the trial court palpably abused its discretion in ruling on appellant's his motion for sanctions. See Zeigler v. State 402 So.2d 365, 372 (Fla. 1981) The trial court's conclusion that no additional remedy was appropriate in light of the state's efforts to help locate possibly impeaching witnesses was correct. And, it is in keeping with the remedy afforded in Zeigler for late disclosure of a witness, a thirty minute recess for a witness interview.

Nor, can it be said that the trial court palpably abused its discretion in denying appellant's motions for continuance. This court does not overturn the sound exercise of a trial court's discretion in the granting or denying of a continuance in the absence of a palpable abuse of discretion. Echols v. State, 484 So.2d 568,572 (Fla. 1985); Lusk v. State, 446 So.2d 1038,1040 (Fla. 1984); Jent v. State, 408 So.2d 1024, 1028 (Fla. 1982); Zeigler v. State, 402 So.2d at 372; Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980).

Appellant presented the impeaching evidence through the

testimony of the witness McCall. The evidence of the witness Discher would have been cumulative. And, there is no showing that even if the witness Ed had been located that his evidence would have differed from or been any more beneficial to him than the testimony that McCall had given. Under such circumstances, the state submits that appellant has failed to show a palpable abuse of discretion in the trial court's rulings on his various motions for continuance. This appellant is certainly in no worse position than was Lusk. He had sought a continuance on account of trouble getting prison witnesses interviewed and having depositions transcribed. The trial court in that case ordered immediate transcription of the depositions and did not address the problem Lusk was having in interviewing prison witnesses.

Appellant mentions that the circumstances of the case impaired him from exercising his right to compulsory process. he did not, however, present this issue to the trial court. This court should, accordingly, find that this constitutional claim is procedurally barred. Tillman v. State, 471 So.2d 32 34-35 (1985)(appellant may not change specific ground advanced in trial court on appeal).

III

Appellant contends, under this point that, the trial court committed error of constitutional magnitude in prohibiting counsel for the codefendant from eliciting from the witness Allen Jones the fact that he had used an alias. Appellant argues by analogy from the decision in Smith v. Illinois, 390 U.S. 129, 88

S.Ct. 748, 19 L.Ed.2d 956 (1968). Although recognizing that Smith was involved with the resolution of the converse of the situation presented by these facts, refusal to have a witness testifying under an alias disclose his real name, appellant contends, nevertheless, that it controls and mandates a reversal here.

Appellant's point is without merit for two reasons. First, appellant did not preserve this point. He did not ask the question. Nor, did he object when the trial court prohibited counsel for the codefendant from asking the question. Second, even if appellant had preserved this claim for review in this court, he could not prevail. The policies supporting the reversal in Smith have no application to the converse of the situation. And, finally even if there was error, the error did not prejudice this appellant. During closing argument, appellant's counsel did not attack Jones' credibility.

During the cross examination of the witness Allen Jones, Mr. De Vlaming, counsel for Davis, the acquitted codefendant, engaged in the following exchange with the witness:

> Q. Mr. Jones, do you know who Robert David Taylor is?
>
> A. Excuse me?
>
> Q. Do you know who Robert David Taylor is?
>
> A. [No response]
>
> Q. Do you want me to repeat the question?
>
> A. Yes.
>
> Q. You know who Robert David Taylor is?
>
> A. I don't recall.
>
> Q. Did you ever use that as an alias?

A. [No response]

Q. Did you ever use that as an alias?

A. Oh, on my past?

Q. Yes, sir?

A. I knew Robert Taylor when I was like fifteen, yes.

Did you ever use his name as an alias for yourself?

A. No.

(R. 1910)

At that point, one of the assistant state attorneys trying the case interposed an objection. Mr. DeVlaming requested and received a bench conference. (R. 1910-12) Counsel for appellant, apparently correctly recognizing that this was an improper attempt at establishing the basis for any type of impeachment, did not contribute his perspective on the situation during the bench conference. Accordingly, appellant preserved nothing for this court's consideration. Cf. State v. Lipak, 277 So.2d 19, 22 (Fla. 1973) (one of two codefendants who had not relied on defense of entrapment at trial which had been asserted by other codefendant at trial was not entitled to assert it on appeal). The state urges the court to rely exclusively on this ground in disposing of this issue in the interest of finality of criminal judgments.

Assuming, arguendo, that Banda's counsel, Mr. Henninger, had been asking the questions and had then attempted impeachment of the witness by contradiction on this point and been precluded from showing that the witness had used an alias, there would

still be no error. Use of an alias is not a ground for impeachment under the Florida Evidence Code. Section 90.608 Florida Statutes sets out the ways in which a witness may be impeached. Use of an alias is not among those methods. The trial judge did not abuse his discretion in regard to this ruling any more that did the trial judge in Rose v. State, 472 So.2d 1155 (Fla. 1985) when he precluded an attack on a detective's professionalism as an improper method of attacking credibility.

Nothing in Smith compeled the trial court to allow evidence to contradict the witness Jones' denial of the use of Robert David Taylor as an alias. It would have done nothing to place the witness in his proper setting. And, it did not for close any avenues of inquiry. The Court reached the result it did in Smith because the trial court's ruling had precluded the defendant from eliciting the witness' real name. Thus, it precluded "countless avenues of in-court examination 'normally available by asking a witness' who he is and where he lives" Smith, 390 U.S. at 313" United States v. Navarro, 737 F.2d 625, 634 (7th Cir. 1984).

Even assuming that it were proper to impeach by use of an alias and that this claim was available to appellant for review here, there is no showing of any prejudice to him by the court's ruling. Appellant's cross examination of Jones contains no generalized attack on his credibility just impeachment by prior arguably inconsistent statements on specific points.

Reference to the closing argument shows why. Appellant relied on the witness Jones' testimony about being awakened by yelling to contradict Townsend's denial of such yelling on the

morning following the murder. R. 2254-55 And, he called the jury's attention to the fact that the physical evidence of the victim's intoxication corroborated Jones testimony about how much he and the victim had had to drink the night of the victim's death. R. 2255 The only part of Jones testimony appellant attacked was his in court testimony that the victim and he did not shake hands after the fight. R. 1924, 25 (cross examination reference) 2257 (argument reference)

Since he needed some of Jones testimony to bolster his attack on Townsend's credibility, it did not make sense for him to launch a more generalized attack on Jones' testimony. Both his handling of the cross examination of the witness and the content of his closing argument shows that it would have would against his trial strategy to pursue the type of impeachment counsel for Davis attempted.

IV

Under this point, appellant contends that it was error not to sequester the jury between the guilt phase and the penalty phase of the proceedings. Appellant contends that the logic of Linvingston v. State, 458 So.2d 235 (Fla. 1984) mandates this result. There are a multitude of reasons for rejecting appellant's argument under this point. Sequestration of a jury during the trial of a capital case is subject to the discretion of the trial court. There is no basis for any contention that the trial court erred in declining to exercise its discretion in

accordance with appellant's request. There is a meaningful basis for distinguishing between that portion of a trial involving the reception of evidence and the jury's deliberation. Following appellants logic would lead to an abused result. And, it would mean rejecting the logic Livingston has already adopted.

As Livingston clearly recognized, Ford v. State, 374 So.2d 496 (Fla. 1979) is still good law and the sequestration of a jury during the trial, aside from deliberations, of a capital case is subject to the discretion of the trial court. And, that discretion is to be governed by the necessities of each proceeding. Id. at 237 Appellant offered the trial court no basis for exercising its discretion to sequester the jury between the guilt and penalty phases of this trial. There was just the bare request for sequestration. R. 2327 And, the argument advanced in favor of reversal certainly does not. There is simply nothing here like the claim of excessive publicity found to be an inadequate basis for the exercise of the trial court's discretion to sequester in Ford.

The passage from State v. Smalls, 99 Wash. 2d 755, 665 P.2d 384 (1983) which this court found persuasive and quoted in Livingston explains why the deliberative phase of the jury's work is more susceptible to taint that other portions of the trial and thus warrants sequestion:

> In our opinion, jurors are especially sensitive to prejudicial influence during deliberations. While still hearing evidence, it is probably easier for jurors to keep an open mind. Moreover, the impact of potentially prejudicial influences will be dissipated by subsequent evidence, the arguments, and instructions. But when the

> juror have heard all the evidence, and have been focused onto the issues before them by the arguments of the parties and instructions, substantially. 458 So.2d at 238

The jurors in this case knew that there was still a penalty phase to come. They had been readmonished about their duties as jurors. R. 2329 The preliminary instructions given in his case admonished the jurors to keep an open mind and "not form any definite or fixed opinion on the merits of the case" until after all the evidence is in and they have heard the arguments of the lawyers and the instructions of the court. R.1498 And, the trial court specifically admonished the jurors not to discuss the case and not to read or listen to any reports about the trial prior to the recess after the guilty verdict. R. 2329

In addition to this, the jurors were still to hear additional evidence, arguments and instructions. These features are the very ones found to be important in dissipating any potentially prejudicial influences that might have acted on the them in the interim.

Accepting the logic of appellant's argument would mean sequestering all juries in all cases from the time they start hearing evidence until such time as they finish deliberations. Cf. Taylor v. State, 498 So.2d 943 (Fla. 1986) (extending Livingston into non capital context). And, it means rejecting the distinction between the deliberative aspect of the jury's work and the remainer of its function in a trial that the court has already recognized by its inclusion in the passage in Livingston quoted from Smalls. The appellant's argument offers

no reason for the court to make such a radical departure from the policies it found to be advanced by the provision of Rule 3.370(b). And, the arguement, likewise, offers no basis for the trial court to have exercised its discretion to sequester in accordance with Ford. Appellant's argument under this point simply offers no reason to upset the result below.

V

Under this point appellant's argument contends that the trial court erred in not permitting him to argue the absence of statutory aggravating circumstances as a mitigating circumstance. Appellant contends that by prohibiting such argument the trial court violated the principles embodied in Skipper v. South Carolina, --- U.S.---, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) Appellant also contends that even if the error were not of constitutional magnitude that it was error as this type of argument has a foundation in the decisions in Rembert v. State, 445 So.2d 337 (Fla. 1984); Caruthers v. State 465 So.2d 496 (Fla. 1985) and Ross v. State, 474 So.2d 1170 (Fla. 1985). Reference to the argument actually presented and the law on which appellant bases his conclusions shows that his argument is totally without merit.

Lockett, Eddings and Skipper do indeed stand for the proposition that the Eighth Amendment forbids exclusion from the sentencer's consideration evidence that might "serve as a basis

for a sentence of less than death. Skipper, 90 l.Ed.2d at 7 But, the court's decision not exclude any such evidence. Although appellant was not allowed to go into the exact nature of the irrelevant statutory aggravating circumstances, he was allowed to argue that only one of nine possibles was present in this case.

Appellant did argue, without objection from the state, that it had urged only one of the "nine aggravating factors that the State of Florida could use in arguing to a jury that this particular case necessitated the death penalty, nine factors." R.2397 Appellant elaborated on this in an additional paragraph without objection. R.2397 It was only when counsel renewed this line of argument saying, "[o]ne of the aggravating factors that is present, not in this particular case, but of the nine aggravating factors that I --" that the state objected and sought a bench conference. R.2403 The jury did not hear either the state's objection or any ruling on it. The next thing the jury heard was appellant's counsel telling them that the state's argument was, in essence, an appeal for a to return to the lex taliones, i.e., an eye for an eye and tooth for a tooth. R.2406 Along these lines the only other thing the jury heard was an objection sustained to argument that the state had only offered one of nine possible aggravating factors while he had presented four mitigating factors. The trial court correctly sustained this objection because the comment to which it was addressed invited a simple counting and thus invited the jury to stray from their duty of not just counting but weighing those factors that had been presented to them on the question of punishment. See

Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978)(counting improper).

In a similar vein, appellant argues that because of the ruling he was precluded from showing "the jury that even if they found that the State proved one aggravating factor, death was not necessarily the proper sentence". It is simply unfair to portray the record as showing that appellant had no opportunity to argue that death was not proportional to the offense in this case because appellant's counsel did so argue at R.2408 telling the jury the state's proof had not established beyond a reasonable doubt the heightened premeditation necessary to establish this aggravating factor and that the facts did "not justify a returning of an advisory verdict of death." R.2408

The court specifically instructed the jury that even if they found the aggravating factor present it was still incumbent on them to decide whether it was of sufficient weight to warrant death prior to beginning the analysis of the mitigating factors and the weight they should receive. R.482, 2410 Had appellant wished to make the argument appellant counsel now urges that the court's ruling on the irrelevant statutory aggravating circumstances precluded him from making he certainly could have. He had all the tools at his disposal. He had the jury instruction. And, he did make a variation on the argument that preserved and agreed with his major premise that their acquittal of Townsend showed that the heightened premeditation necessary to establish the cold, calculated and premeditated factor of Section 921.141(5)(i) Florida Statutes had not been proved beyond a reasonable doubt.

Appellee is at a loss to understand appellant's argument that starts by observing that a convicted murderer has the right to rely on nonstatutory mitigating factors and the state has no corresponding right to rely on nonstatutory aggravating factors. Appellant's reasoning that since the state cannot introduce evidence to negate an unurged mitigating factor he should be allowed to argue the nonexistence of unurged aggravating factors does not follow.

The policies supporting the legal premises on which appellant rests his argument do not support the result appellant seeks here. The state is precluded from, as appellant's argument correctly observes, pursuing anticipatory rebuttal of a waived statutory mitigating factor so that the jury will not be exposed to nonstatutory aggravating evidence. And, the state is precluded from offering nonstatutory aggravating evidence because the statute specifically limits it to those enumerated. Songer v. State, 365 So.2d 696, 700 (1978). These policies do nothing to help appellant's argument. The court's ruling was correct and even if it had not been it certainly did not prejudice appellant.

VI

A. THE CALDWELL CLAIM

Under this subpoint, appellant urges the court to conclude that the trial court's denial of his requested jury instruction number six created error under Caldwell v. Mississippi, U.S. ___ , 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Appellant's argument is without merit for two reasons. First, the trial court did not error in rejecting the requested instruction

because it was not an accurate instruction. Second, the claimed Caldwell violation is not properly before this court. The instruction given is an accurate statement of Florida law. And, there was no objection to the instruction in the court below.

This jury had an instruction before it that addressed the concern that a jury might be inclined to recommend death it they were not fully cognizant of their responsibility in making such a recommendation. The court reminded the jurors of the gravity of their undertaking saying:

> The facts that the determination of whether a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due ragard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence. R. 484, R. 2412, 2413

Appellant's requested jury instruction asked the court to tell the jury that whatever penalty they recommended, that recommendation was entitled to great weight and serious consideration by the court in its ultimate decision. But, that is not the law of the state. Only a recommendation of life is entitled to such weight. Tedder v. State, 322 So.2d 908 (Fla. 1975). Florida law does not provide that a jury recommendation of death is entitled to great weight and serious consideration by the sentencer.

The conclusion of the United States Court of Appeals for the Eleventh Circuit to the contrary in Mann v. Dugger, 817 F. d

1471, 1482 (11th Cir. 1987) rehearing en banc granted September 10, 1987 is based on a misreading of McCampbell v. State, 421 So.2d 1072 (Fla. 1982). McCampbell was an override case. And, there is no indication from the context that this court intended that a death recommendation should enjoy such weight. The context is clearly to the contrary. This court should take this opportunity to clear up the Eleventh Circuit's misconception of Florida law in the regard. It can be forced to defer to this court's supremacy as the final arbiter of Florida law. Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) It is particularly appropriate to do so in this case because that misconception along others has led the 11th Cir. Mann panel to force Florida into a new sentencing hearing that was not waranted under the law. And, that does significant damage to the body politic.

It has long been settled that it is simply not error for a trial court to refuse a requested instruction that is not an accurate statement of the law. Barwicks v. State, 82 So.2d 356 (1955). And, as previously demonstrated, the requested instruction was erroneous.

The instruction about which appellant complains in this argument is an accurate statement of the law of this state. The final decision about punishment is the responsibility of the trial judge. And, it is the duty of the jury to follow the law and make a recommendation to the court. That is precisely what the instruction at issue here told the jurors. See R 482, 2409-10 and Brief for Appellant at -39- It does not differ in

substance from the charge on the respective responsibilities of the court and jury in capital sentencing approved over a Caldwell objection in Aldridge v State, 503 So.2d 11257 (Fla. 1987). The instruction at issue there said:

> Ladies and gentleman of the jury, you have found the defendant guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment. Final decision as to what punishment shall be imposed rests solely and only with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant. Id. at 1259

It is also clear that the Caldwell claim is not properly before this court. Appellant procedurally defaulted the right to raise this claim when he did not object to the instruction about which he now complains. Fla. R. Crim. P. 3.390 "The lack of objection at trial followed by argument on 428 appeal constitutes a waiver of the objection." Copeland v. Wainwright, 505 So.2d 425, (1987) (Caldwell claim). See also Maxwell v. Wainwright,490 So.2d 927 (Fla. 1986) Maxwell is also highly instructive in this regard. Both the appeal from the denial of the Rule 3.850 motion and the habeas corpus speak to why the absence of an objection below is fatal to the presentation of this issue on direct appeal. In the appeal, this court ruled that an arguably erroneous instruction that a sentencing recommendation had to be by a majority was not cognizable on collateral relief because there had been no objection to the erroneous instruction. Id. at 931 And, on review of the habeas action attacking appellate

counsel's effectiveness, this court ruled counsel had not been ineffective in not attacking a jury instruction to which no objection had been made. The court reasoned that counsel could have reasonably concluded that the issue did not hold much promise for relief on appeal. Id. at 934

The appellee urges the court to base its ruling on appellant's Caldwell claim on procedural default and make it unmistakably clear that this court consistently applies the procedural bar of the rule to such claims. The United States Court of Appeals has already questioned whether this court does so. Adam v. Dugger, 816 F.2d 1493, 1497 (11th Cir. 1987). Failure to so rule poses a substantial risk of undermining the value of finality of the criminal judgments of the state in general and death sentences in particular.

B. REINSTRUCTION ON REASONABLE DOUBT

Appellant's argument asserts that because the court did not redifined reasonable doubt in its penalty phase instructions this "inhibited counsel's ability to argue effectively that the State failed to prove an aggravating circumstance beyond a reasonable doubt." Brief of Appellant at -42- Accordingly, it urgest that it was prejudicial error for the court to refuse to reinstruct on reasonable doubt. This argument is without merit because appellant's argument offers no basis in fact for its conclusion that the absence of an additional instruction defining reasonable doubt "inhibited counsel's ability to argue effectively." The penalty phase instructions were more than adequate to instruct

the jury in its function at this phase of the trial.

The court did instruct the jury that it was incumbent on the state to prove aggravating circumstances beyond a reasonable doubt. (R. 2411) During the course of appellant's penalty phase argument, he repeatedly reminded them that the state had the burden of proving the existence of the aggravating factor beyond a reasonable doubt (R. 2391, 2392, 2402, 2408) He reminded then that they had listened to the reasonable doubt instruction and applied it in acquitting Davis. (R. 2394, 2395) He specifically asked the jury to remember the reasonable doubt instruction that the court had given prior to the guilt phase of the trial. (R. 2402) Counsel argued extensively and repeatedly that their treatment of Davis indicated that Townsend's testimony was not worthy belief beyond a reasonable doubt to establish the heightened premeditation need to prove the aggravating factor. (R. 2395, 2396) And finally the close of his argument appellant's counsel once again urged that the state had not preoved that aggravating factor beyond a reasonable doubt. (R. 2408)

Appellant's reference to Barwicks v. State, 82 So.2d 356 (Fla. 1955) as some how uspporting reversal of the sentence is without merit. Barwicks is simply not instructive for the resolution of this case. As appellant acknowledged that case held that failure to define reasonable doubt in a trial with only a guilt phase was not error where there had been no proper request for such a definition. This was a two phase trial. The jury had already heard reasonable doubt defined in the guilt

phase instructions. They had applied reasonable doubt in acquitting Davis. There were no requests for reinstruction after the jury retired to consider its sentencing recommendation. There is nothing in this record to indicate that appellant was prejudiced in the slightest by the court's decision not to redefine reasonable doubt in its penalty phase instructions. The court should therefore affirm the sentence of appellant's objection under this point.

C RETURNING A VERDICT RECOMMENDING LIFE OR DEATH

Appellant contends that despite the absence of a proper objection below he is entitled to reversal of the penalty and a new sentencing hearing in front of a new jury because the voting instruction was erroneous and the fact that it was erroneous is the state's fault. Appellant's point is without merit. There was no appropriate objection below. Thus, the matter is waived and procedurally barred. The factual basis for appellant's attempt to get around the procedural default is contradicted by the transcript of the penalty phase charge conference.

Contrary to trial counsel's representations at the motion for new trial hearing, the transcript of the penalty phase charge conference shows no discussion of the difference between the Harich v. State, 437 So.2d 1082 (Fla. 1983) and post Harich, October 1985 update to pages 81 and 82 of Florida Standard Jury Instructions In Criminal Cases (1981 ed.), instructions on returning verdict recommending life of death upon the jury's retirement to start deliberations. The trial court covered this matter at R. 2360 After going through, the various statutory

mitigating circumstances, the court informed counsel:

> All right, we will then read the rest of Page 81 and 82, and followed by 83 in terms of the dialogue, polling the jury, together with the defendant's requested number Twelve, Seventeen, Nineteen and Twenty-two. (R. 2360)

It is not clear from the context whether the judge was working from the October 1985 update that contains the amendment to address the Harich problem or an earlier edition. What is clear, and of paramont significance for the proper analysis of appellant's claim that he should be relieved of his procedural default is that this refinement in the instructions was not discussed. And, appellant's counsel certainly made no specific request that the revised instruction be given.

Appellant also claims prejudice because there was a close vote, seven to five for death. But, again the facts revealed by the record point away from any prejudice. Appellant's counsel made a point of arguing that a tie vote was a vote for life during his penalty phase argument. R. 2392 This drew no objection. The jury deliverated only twenty-five minutes. The jury requested no additional instructions from the court. And, they had the written instruction to consult. R. 2409

There was a procedural default of this issue. And, in the interest of consistency this court should decline to entertain the merits of this issue just as it has always done when the matter has not been properly raised. See e.g., Maxwell v. Wainwright, 490 So.2d at 931; Jackson v. State, 438 So.2d 4 (Fla. 1983); Rembert v. State, 445 So.2d 337 (Fla. 1984).

D. THE CLAIM OF CUMULATIVE ERROR

Because there has either been no error as the state's argument has demonstrated under subpoints A and B and because there was a procedural default of a matter that caused appellant no prejudice under subpoint C, there was no cumulative error.

VII

Under this point, appellant contends that the evidence establishes that he acted with the pretense of a moral or legal justification for his action in murdering his victim He reasons that both appellant's statements and evidence of the victim's belligerent behavior and boast of prior acts of violence serve to establish show that he acted with the pretense of legal or moral justification. Appellant's argument points to one case Cannady v. State, 427 So.2d 723 (Fla. 1983) to support his argument. Analysis of that case shows that it offers him no support for the argument he advances here.

Appellant gave no indication that he felt that there was any basis in law or morality for his actions. Appellant's argument suggests no moral or legal theory that might condone one person in planning and carrying out the murder of another while that other slept just because he could be belligerent and had bragged of shooting another in the past. And, why has appellant been unable to do so? Because such justification does not exist in any legal or moral system known to your undersigned. It certainly is not like a case where a battered woman retaliates against the tormenter to whom she is bound by a pathological

dependency in a premeditated act of despiration.

It most assuredly is not a case like Cannady where this court found that the state's proof of the heightened premeditation feature of this aggravating circumstance had not been proved beyond a reasonable doubt. And, the case is unlike Cannady in that the state did not have to rely on appellant's account of the homicide for direct evidence of how the homicide occurred. Here there is no doubt that appellant started the homicide by striking the victim as he lay asleep or passed out.

There is simply nothing in this case even remotely comparable to Cannady's s intial statements repeatedly denying intent to kill and saying that he only shot because the victim jumped at him. See Cannady v. State, 427 So.2d at 730 There was nothing to show that appellant felt helpless to defend himself against appellant. It is the state's position that the statements to which appellant's argument make reference show only appellant's utter disregard for the norms of civilized conduct. It is no wonder that appellant did not urge this theory on either the judge of jury. And, it is for this reason that this court should not even entertain the argument on this appeal. Tillman v. State, 471 So.2d at 34,35.

VIII

Appellant contends under this point in his brief that death is not proportional to his offense in light of this court's disposition of Blair v. State, 406 So.2d 1103 (Fla. 1981). Appellant's appeal to the result in Blair is without merit

because there are very substantial bases for distinguishing this case from Blair. Blair was sentenced prior to the enactment of subsection (i) of section 921.141(5). There were improperly found aggravating factors. There was a mitigating factor present. And, this court treats the proportionality finding in that case as based on the fact that this killing fell into the class of killings coming to be known as domestic disputes or lovers' quarrels cases.

The Blair trial court had found, in listing the aggravating factors, that the killing had been accomplished from a premeditated design. 406 So.2d at 1108 In addressing this finding, this court noted the trial court had not used the statutory language of subsection 921.141(5)(i). The prosecutor nad not argued the existence of this aggravating factor and the jury was not instructed on it. This court therefore found that the finding "was not intended to to represent the aggravating factor found in the amended version of the statute." Id. It had also erroneously found the existence of the aggravatng factor of creating a "great risk of death to many persons." And, it had erroneously characterized the burial under concrete of the victim as rendering the killing heinous, atrocious and cruel. This court rejected this finding on analogy to its decision in Halliwell v. State, 323 So.2d 557 (Fla. 1975) And, there was the mitigating factor of no signifcant history of prior criminal activity.

Reference to the facts reported in Blair shows that they differ dramatically from the operative facts establishing the

existence of the cold, calculated and premeditated aggravating factor in this case. Unlike this case where there was direct evidence that appellant went out and dug the victim's grave substantially prior to the killing and relished the picture of the victim's soon to be decaying body while doing so, Blair, according to the state's theory of the case, used a conveniently stopped up sink to justify the digging of the hole that became the burial site of his victim. Id. at 1105 The evidence there was not nearly so clear as that here that the hole was dug in anticipation of the murder or just used. And, this court has just recently classified Blair as a lovers' quarrel or domestic dispute case in Fead v. State, No. 68,341 (Fla. Sept. 3, 1987) [12 F.L.W. 451,452] grouping it with other cases of that ilk. The facts of this case show that Blair is just not sufficiently analogous to this case to be a basis for reducing the sentence on the basis of proportionality.

Appellant appeals to Rembert v. State, 445 So.2d 337 (Fla. 1984); Ross v. State, 474 So.2d 1170 (Fla. 1985) and Proffitt v. State, Nos. 65,507 and 65,637 (Fla. July 9, 1987) [12 F.L.W. 373] as example of a proposition his argument urges on the court. The proposition is that this court may reduce a death sentence when there is only one aggravating factor present and a death recommendation. What appellant asserts is true. But, it does not do justice to the facts and circumstances that promped this court to find death an inapropriate punishment in those cases.

This court reduced the sentences in Rembert and Proffitt because it found death a disproportionate punishment for a murder

committed during a residential burglary where there were no other features of the case arguably pointing to death as the appropriate punishment. Proffitt, 12 F.L.W. at 373 There was also considerable mitigating evidence in Rembert. 445 So.2d at 340 The Ross court pointed to the fact that the case involved a domestic dispute and that the trial court had overlooked significant evidence in that the states case showed Ros to be an alcoholic who was intoxicated at the time of the homicide. Ross v. State, 474 So.2d at 1174 In short, appellant has presented this court with no basis for concluding that death is not proportionate to this offense and appropriate for this offender.

This appellant had plenty of time to cool between the perceived offense and the digging of the grave. And, he had even more time to cool and think better of his plans between the digging of the grave and the carrying out of his plan to murder his victim. The heightened premeditation present in this case is of the type found in the contract killing cases. And, this court has not, in any cases known to your undersigned, reduced a death saentence based on a jury recommendation of death in such a case. It should affirm the death sentence over appellant's proportionality attack.

CONCLUSION

WHEREFORE, Appellee asks the Court to affirm appellant's judgments and sentences finding all the waivers and procedural defaults requested in the text on the basis of the reasons arguments and authorities advanced in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Douglas S. Connor, Assistant Public Defender, P. O. Box 9000-Drawer PD, Bartow, Florida 33830, this 14th day of September, 1987.

OF COUNSEL FOR APPELLEE