IN THE FLORIDA SUPREME COURT

JUAN BANDA, :

Appellant, :

vs. : Case No. 69,102

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS (Cont'd)

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

STATEMENT OF THE CASE

On July 23, 1985, the Grand Jurors of Pinellas County returned an Indictment charging Juan Banda, Appellant, and a co-defendant, David Davis, with murder in the first degree in the bludgeoning death of Melber Tyrone Denmark (R7-8).

Prior to trial, Banda filed a motion to suppress statements (R173-174) and a motion to suppress evidence (R175-176). These motions were heard before the Honorable James R. Case on January 27, 1986 and denied (R1252-1305,183-184).

On May 22, 1986, another pretrial hearing was held before Judge Case on a motion filed on behalf of a St. Petersburg Times newspaper reporter who was subpoenaed as a defense witness (R1327-1343). The court granted the reporter's motion to quash subpoena (R1343).

Alleging a discovery violation, defense counsel filed a motion to impose sanctions against the State (R373-374). After a hearing held May 29, 1986, the motion was denied (R1345-1356). Banda then moved for a continuance, which was also denied (R1356).

The case proceeded to trial before Circuit Judge Case and a jury on June 3 through 6, 1986 (R1360-2324). At the jury charge conference, defense counsel waived Banda's presence (R2177). The State requested that the court delete the instructions on excusable and justifiable homicide from the standard "Introduction to Homicide" instruction (R2182). Defense counsel acquiesced to the court's assertion that there was no allegation of excusable or justifiable homicide (R2183). Accordingly, both the written jury instructions and those read by the judge had all mention of the lawful homicides removed (R435,2295).

The jury returned verdicts finding Banda guilty of first degree murder and acquitting the co-defendant Davis (R457,2324).

Banda's motion to sequester the jury between the ending of the guilt or innocence trial (June 6) and the penalty trial (June 10) was denied (R2330). At the penalty trial, the State relied on the evidence presented at guilt phase and defense presented three witnesses (R2365-2379). The jury, by a vote of 7-5, recommended that Banda be sentenced to death (R485,2415).

Banda's motion for new trial was heard and denied on July 21, 1986 (R492-497,2424-2435).

On July 22, 1986, the sentencing hearing was held before Judge Case (R2437-2452). A presentence investigation which recommended that Banda be sentenced to life imprisonment was considered (R542-551, 2438-9,2448-9). The court imposed a sentence of death (R519-520,2452). The sentencing order of the court found that the aggravating circumstance "committed in a cold, calculated and premeditated manner" was the sole aggravating factor applicable (R508, see Appendix). The court also found "insufficient mitigating circumstances which would require a lesser penalty" (R506, see Appendix).

Banda filed a notice of appeal on July 24, 1986 (R552). The same day, the Public Defender of the Tenth Judicial Circuit was appointed as appellate counsel (R553).

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

STATEMENT OF THE FACTS

A. Pre-trial Motions

Banda filed a motion to suppress all post-arrest statements made by him to detectives from the Pinellas County Sheriff's Department on the ground that he was illegally arrested (R173-174). After hearing, the court denied this motion (R184,1293). Although Banda's statements were not suppressed, the State never introduced them at trial.

Banda also moved to suppress all tangible evidence seized in the search of a 1965 Chevrolet belonging to Lynn Purviance, co-defendant Davis' girlfriend (R175-176). This vehicle was impounded at the time of Banda's arrest on July 9, 1985 and searched pursuant to a search warrant issued July 11, 1985 (R175,2499-2503).

At the hearing, defense counsel argued that the affidavit upon which the search warrant was issued did not supply probable cause for the search (R1293-1296). Banda also argued that although he was only a passenger in the vehicle, he could challenge an illegal stop (R1299-1304). If the stop was unreasonable, the evidence seized should be suppressed (R1299-1304).

The court ruled that since the arrest was ruled lawful, it followed that the stop was reasonable (R1304). The court further relied upon Davis' statement at the time of the vehicle's seizure (R1304). Davis told the officers that if the owner consented to a search of the vehicle, he wouldn't object (R1297). Lynn Purviance later consented to a search of her car before the warrant was issued (R1297,2502). The motion to suppress evidence was denied (R1304).

Alleging that the State committed a discovery violation by failure to promptly disclose a material witness, Banda filed a Motion to Impose Sanctions (R373-374). At the hearing on this motion, the State admitted that Charles Blanton's name was not disclosed at an earlier date because the witness was afraid for his safety (R1352). Blanton gave a statement to the State Attorney's Office prior to January 1986, concerning a confession allegedly made by Banda while the two were incarcerated in the Pinellas County Jail (R373,1347). The State's "Additional List of Witnesses" disclosing Blanton was served May 19, 1986 (R350).

Blanton did not appear for the scheduled deposition (R1348). Defense counsel was not able to take Blanton's deposition until 4:00 p.m. on May 28, 1986 (R1348-1349). At that time, he learned that there were three other witnesses to Banda's alleged confession (R1349). Defense Counsel had only been able to contact one of these witnesses (R1349). Defense argued an inability to investigate adequately Blanton's statement and moved that the State be barred from calling Blanton as a witness (R1351).

Co-defendant Davis' counsel noted that Blanton's statement was exculpatory towards Davis (R1351). He added Blanton on a reciprocal witness list, requesting that he be made available at trial (R1357).

The prosecutor noted that he had located two of the three alleged by Blanton to have been present when Banda confessed (R1354). However, the prosecutor doubted that defense counsel would call these witnesses to impeach Blanton in any case (R1354). He urged the Court to find that the defense was not prejudiced (R1354).

The court denied the Motion to Impose Sanctions (R1356). Subsequently, Banda moved for a continuance, which was also denied (R1356).

The jury trial commenced June 3, 1986 (R1364). After the jury was selected and sworn (R1496), Banda's counsel renewed his motion for a continuance (R1514). He noted that he had located one of the alleged witnesses to Banda's statement, but was unable to contact the other two (R1514-1515). The renewed motion to continue was denied (R1516).

An objection to portions of a videotape showing the victim's body being exhumed by the Medical Examiner's office was overruled (R1519).

B. Evidence at Guilt or Innocence Trial

In July, 1985, Juan Banda, Appellant, and Melber Tyrone "Terry" Denmark, the victim, were roommates who resided with Allen Jones in the Veterans Village subdivision, New Port Richey (R1891-1892). Jones owned the house and took in roommates after his wife and two children moved out (R1892).

On Friday, July 5, 1985 there was an argument between Banda and Denmark (R1893). As recounted by Jones, Terry Denmark accused Banda of coming into his room earlier that week and taking about $10 from a bag where he kept his money (R1894-1895). Denmark did not say anything about it at the time, but expected Banda to pay him back on Friday, Banda's payday (R1894-1895). Banda told Denmark that he had not taken any money from him (R1895).

At this point, Denmark became enraged and threatened to

take Banda outside so he wouldn't "ruin Allen's house" (R1896). Denmark told Banda to step outside, saying "I'm going to beat your fucking ass in Allen's front yard right now" (R1896). Banda did not go outside, continued to deny taking Denmark's money, and stared at him (R1896-1897). According to Jones, the argument concluded with Denmark calling Banda a thief and saying, "I just have to watch my stuff" (R1897). Jones and Denmark then left the house together (1897).

On Sunday, July 7, 1985, Frank Townsend returned from a weekend boating trip with his family between 3:00 and 5:00 p.m. (R1735-1737). His co-worker at a construction company, Juan Banda, showed up at his residence along with co-defendant David Davis later that afternoon (R1737-1738). Banda said that he wanted to go walking back in a wooded area adjacent to Townsend's residence (R1740).

As the three were walking in the woods, Banda said that he was going to kill someone named Terry because Terry had threatened to kill him the next time he saw him (R1740-1741). Banda said he wasn't going to hide from Terry; he was going to kill Terry first (R1741). Banda was carrying a shovel (R1741).

At a certain point, Banda and Davis agreed they had gone far enough into the woods (R1741-1742). They took turns digging a large hole (R1742). Townsend had thought that the talk about killing someone was a joke, but Banda said that Terry was "tied up to the syndicate" and he was serious (R1743).

The three left the woods and went back outside Townsend's residence. Davis and Banda saw some pieces of pipe lying around and made comments to the effect that the pipes would make good weapons (R1744). Davis hit a tree with two of the pipes (R1744). Banda

told Townsend not to worry if he heard anything that night because it would just be Davis and him (R1745).

Townsend heard nothing that night. In keeping with his usual schedule, he drove to Banda's residence the next morning around 5:30 a.m. to give Banda a ride to work (R1746). Banda, however, was not at home (R1746). When Townsend arrived at work, Banda was already there, wearing nothing except a soaking wet pair of cut-off shorts (R1747).

Townsend asked Banda why he was wet (R1747). Townsend said Banda replied "the mother fucker pissed on him three times" (R1747).

Townsend and Banda worked a normal day (R1748). After work, Banda volunteered to help Townsend work on his car, so they returned to Townsend's house (R1748). Banda said something about having to choke someone as they pulled in Townsend's driveway (R1748-1749). Later, Townsend opened the trunk of his car and smelled a urine-type smell from the shorts Banda had been wearing that morning (R1750).

When Banda left around 8:00 p.m., Townsend went directly back into the woods where the hole had been dug (R1751). He reached down and found a body buried there (R1751).

Frank Townsend's wife, Sara, testified that shortly after Banda left, Frank went into the woods for a short time (R1993). When Frank returned, "he was real upset" (R1993). He told his wife to get inside the house with the kids and not to let anybody in (R1993). Frank left on his bicycle, saying he was going to their friends, the Elliotts. (R1994).

William Elliott testified both as a State witness and, after

the court sustained the State's objection to the scope of cross-examination, as a defense witness (R1610-1656). Elliott and his family had accompanied Townsend's family on the weekend boating trip. (R1612-1613). The next day, Monday, Frank Townsend arrived at Elliott's house in the evening when it was almost dark (R1614-1615). Townsend acted like he was "scared to death" (R1614).

Townsend told Elliott about finding a body (R1646). He also revealed that there was an outstanding fugitive warrant for him from the State of Kentucky (R1622). Elliott advised Townsend to go to the police anyway (R1614).

Tarpon Springs police officer Paul Mayer was on duty around 9:30 p.m., July 8, 1985 (R1685-1686). While he was stopped at a traffic light, a man on a bicycle got off and started to run through traffic towards him (R1686). After hearing this individual, Townsend's, story, Officer Mayer contacted the Pinellas County Sheriff's Department because Townsend's address was in their jurisdiction (R1686-1687).

Two deputies responded and after further questioning Townsend, the four proceeded to Townsend's residence (R1688). When they arrived, Banda and Davis were standing beside Townsend's car (R1689).

Corporal Steven Cressman of the Pinellas County Sheriff's Department arrived with Officer Mayer (R1584). He saw Banda and Davis arrested at the scene (R1589). Then, he, Deputy Yuna and Detective Halliday accompanied Townsend out to the hole in the woods (R1586). He dug into the hole and confirmed that a body was there (R1586).

Larry Bedore, chief investigator for the Medical Examiner's Office arrived at the site around 1:00 a.m., July 9 (R1538). He

excavated the body with his hands (R1539). The excavation was videotaped (R1540). This videotape was shown to the jury with description by Detective Coachman (R1564-1570).

Dr. Edward Corcoran conducted the autopsy on the body identified as Melber "Terry" Denmark (R1867-1868). He found six lacerations on the victim's head and an area of bruising on the neck (R1870). He said there were extensive fractures of the skull which would cause unconsciousness and eventual failure of the respiratory centers (R1873). Dr. Corcoran said the wounds were consistent with a weapon such as a tire iron (R1875). Although strangulation could have been a factor in Denmark's death, the bruising on the neck could also have been caused by blunt trauma (R1882).

Allen Jones last saw Terry Denmark alive about 2:30 or 3:00 a.m. Monday (R1901). On Sunday, Denmark, his friend Rocky and Jones bought a case of beer and a bottle of Mescal Tequilla (R1899). They sat around drinking and later bought another bottle of Mescal Tequilla (R1899). Banda was around for only a few minutes to change his clothes (R1900). Denmark fell asleep on the living room floor (R1901). Jones saw him there about 2:30 or 3:00 a.m. and gave him a pillow and a quilt (R1901).

Police investigators later cut out a portion of stained carpet from Jones' living room and seized the quilt (R1818-1820). These items were shipped to the F.B.I. lab (R1819-1820). At trial, F.B.I. Special Agent Robert Hall said there was human blood on the carpet which could be that of Denmark (R2045-2047).

Pursuant to a search warrant, the vehicle driven by Davis and Banda to Townsend's house was processed (R1814). Two garbage

bags in the trunk of the vehicle contained fabric which was stained and appeared to be the headliner and carpet of the vehicle (R1814).

At trial, F.B.I. Special Agent Wayne Oakes testified that he found two head hairs on the headliner material which were consistent with the head hairs of Denmark (R1973-1974). Special Agent Hall also testified that human blood was on the headliner fabric (R2045,2054). The blood could have come from Denmark (R2047). In addition, Davis' fingerprints were found on one of the garbage bags containing the headliner (R1858).

Charles Blanton was incarcerated in the same cell of the Pinellas County Jail as Juan Banda in December 1985 (R2009-2010). Blanton testified that during this period he asked Banda about the charges against him (R2012). According to Blanton, Banda neither admitted nor denied the murder, but explained "the guy threatened to kill me so I figured I better get him first." (R2012)

Blanton admitted that the State Attorney's Office dropped the three felony charges which were pending against him (R2011,2016-2017). He denied however that he got preferred treatment because he offered to testify against Banda (R2011,2017-2018,2022). Blanton conceded that he offered to testify against some other jail inmates as well, but denied that he was a "professional snitch" (R2022-2023).

After the defense motion for judgment of acquittal was denied (R2080), Banda called Cecil McCall as a defense witness (R2092). McCall, an inmate in the same cell as Blanton and Banda, had been mentioned by Blanton as another witness to Banda's jailhouse statement (R2020).

McCall testified that Banda had never discussed his charges

while they were cellmates (R2094). He denied overhearing any conversation between Blanton and Banda about Banda's case (R2094-2095). McCall suggested that because of the lack of privacy in the cell, Blanton might well have gone through Banda's paperwork to find out information (R2095-2098).

Defense counsel noted in a bench conference that he had contacted another inmate in the same cell, Paul Disher, but was unable to serve him with a subpoena (R2033). Counsel represented that Disher would also testify that Banda had never made any admission concerning the murder (R2033). Counsel's renewed motion for a continuance in order to bring Disher in as a witness was denied (R2034).

Co-defendant David Davis testified in his own defense (R2108). He explained that his hobby was collecting snakes (R2111). He had a Florida state license permitting him to possess poisonous snakes (R2111). Davis had been to Townsend's property on three occasions, including July 7, 1985, to hunt snakes (R2113).

On Sunday, July 7, he went with Banda to Townsend's property for the express purpose of hunting snakes (R2114). He, Townsend and Banda walked back on the property (R2117). Townsend was carrying a shovel and after they had walked out into the field, Townsend said he wanted to check on his marijuana plants (R2117). While Davis continued to hunt for snakes in the field, Townsend and Banda headed into the wooded area (R2118). About an hour later Davis met up with them again as Townsend and Banda came out of the woods (R2119). There was no talk about killing anyone (R2119).

Davis left the Townsend residence with Banda and they

returned to Davis' apartment in Palm Harbor (R2120). Before he left, Townsend mentioned that he was having car trouble and asked to borrow Davis' vehicle (R2121). Davis said no because the car belonged to his fiancée (R2121-2122).

Banda told Davis that he had had an argument with his roommate Terry and didn't feel comfortable about returning to his own residence (R2122). Davis allowed him to stay over (R2123). Davis fell asleep that night while watching TV (R2133).

Davis woke up after 5 a.m. and started to get ready to go to work (R2124). Banda asked him if he would give him a ride to Townsend's (R2127). Davis agreed and, as the two were walking out, Banda said "I gotta tell you something" (R2128). As Davis approached the car, he saw there was blood on the seats (R2128). Banda then admitted that he had borrowed the car during the night to go over to Townsend's (R2128-2129). While he was there, Townsend borrowed the car (R2129). Townsend came back saying that he saw a motorcycle accident involving someone he knew (R2129). Rather than waiting for an ambulance, Townsend picked up the injured motorcyclist and drove him to the hospital (R2129).

Davis was furious, but he drove Banda to the meeting place for his job (R2130). Then Davis proceeded to a U-Haul warehouse he was renting (R2132). He took out the interior items of the car (R2132-2133). Davis said there were many people coming and going as he cleaned the car in the open (R2133).

Davis said that he told Detectives Rhodes and Halliday about these events shortly after his arrest (R2134). He was aware that the police report indicated a different version, but attributed

this to a mistake on the detectives' part (2135).

The State was permitted to call rebuttal witnesses (R2156-2157). Detective Terrell Rhodes testified that after his arrest, Davis told him that he had loaned his car to Townsend on the evening of Sunday, July 7 (R2160). Townsend returned the vehicle the next morning and explained that he had picked up a motorcyclist who had been in an accident (R2160-2161). Davis said nothing about Banda being involved (R2161).

Detective Rhodes said that Davis' statement was not tape recorded because there was none available at the time (R2163).

Detective John Halliday's testimony was consistent with that of Detective Rhodes (R2167-2176).

After the jury retired, they returned three times with questions (R2311-2315,2316-2318,2319-2322). On the final occasion, the court gave an "Allen charge" as contained in the standard jury instructions (R2321-2322). The jury found Banda guilty as charged and Davis not guilty (R2324).

C. Evidence at Penalty Trial

The State relied upon the evidence presented in the guilt or innocence phase (R2365).

Banda's father, Juan Banda, Sr., described Appellant's upbringing (R2366-2371). He testified that he had been an alcoholic and blamed his drinking problem for many of Appellant's difficulties while growing up (R2370-2371).

Edward Anthony Snidar, Jr., Banda's foreman at F & S Frame and Trim, testified that Banda worked under his supervision for

about nine months (R2372-2373). Snidar said that Banda was a "pretty good" carpenter who was very reliable (R2373-2374). Banda was almost always on time (R2373). If he missed his ride, he would walk to work (R2373).

Corrections officer George McKusick of the Pinellas County Jail testified that Banda used the time he spent in jail constructively (R2375-2378). Banda was very cooperative in the law library and assisted McKusick in maintaining quiet (R2377-2378). Banda was a "very good student" in the G.E.D. program (R2378-2379).

During defense counsel's closing argument in penalty phase, the prosecutor objected because defense counsel tried to argue to the jury that there were eight statutory aggravating circumstances established by the legislature which were not applicable in this case (R2403). The prosecutor contended that because the State had not argued that these other aggravators were present and the jury was to be instructed only on the cold, calculated and premeditated factor, defense counsel's argument was improper (R2403-2404). The Court ruled that the other statutory aggravating factors were not relevant and "should not be brought to the attention of the jury" (R2405).

By a vote of 7-5, the jury recommended that Banda be sentenced to death (R2415,485).

D. Motion for New Trial

At the hearing on Appellant's Motion for New Trial heard July 21, 1986, defense counsel noted that an incorrect instruction was given to the jury during penalty phase (R2428). Rather than

informing the jury that a six-to-six vote could be returned as a life recommendation, the jury was actually instructed that "seven or more" should be in agreement (R2429-2430). Defense counsel admitted his failure to object contemporaneously; but he also pointed out that he had requested the new instruction and the State Attorney's Office had transcribed the jury instructions (R2429).

Defense counsel also argued that the cold, calculated, and premeditated aggravating circumstance was overbroad, both on its face and as applied, in violation of the United States Constitution, Eighth and Fourteenth Amendments (R497,2430-2432).

The Court denied Banda's motion for new trial (R2432,2435).

E. Sentencing

Juan Banda, Sr., accompanied by three other members of the family, appeared at the sentencing hearing and spoke briefly to the Court (R2440). After hearing arguments of counsel, the court adjudicated Appellant guilty of first-degree murder and imposed a sentence of death (R2452-2453).

SUMMARY OF ARGUMENT

The trial judge declined to give any instruction whatsoever on justifiable or excusable homicide while instructing the jury on first-degree premeditated murder and the lesser-included homicide offenses. This was error because the murder statute places the burden on the State to prove an unlawful killing as an essential element of first-degree murder. Although trial counsel appears to have acquiesced to the trial court's omission of these instructions, the defendant did not personally waive these instructions. In any case , total failure to instruct the jury on lawful homicides is fundamental error. Moreover, there was evidence which the jury would have to consider in order to decide whether the homicide at bar was justifiable or unlawful.

The State failed to disclose on their witness list a jailhouse informant who allegedly heard Banda make an admission concerning the homicide until less than two weeks prior to trial. At a hearing, the trial court ruled that the defense was not prejudiced. Later, the trial court denied motions for a continuance to allow defense counsel to subpoena a known witness. The trial court erred by failing to recognize the prejudice to the defense caused by the State's discovery violation and fashioning an appropriate sanction.

Banda's constitutional rights to cross-examine state witnesses were impermissibly restricted when he was prevented from exploring the use of an alias by a state witness, Allen Jones. Use of an alias relates to the credibility of a witness.

Following rendition of their verdict in the guilt or innocence phase on Friday, the jury was permitted to separate until commencement of the penalty phase on Tuesday over Banda's objection. The rationale supporting jury sequestration once deliberations have begun also supports jury sequestration between the guilt determination and penalty proceedings when the defendant makes an affirmative request for sequestration.

During closing argument in penalty proceedings, defense counsel was impermissibly restricted from arguing to the jury a legitimate basis for recommending a sentence less than death. The attempted line of argument was to show the comparative lack of aggravation in the case at bar when measured against the nine aggravating circumstances provided by Florida law.

In giving jury instructions during penalty phase, the trial court erroneously denied Banda's request for a special instruction clarifying the importance of the jury's penalty recommendation. The court also denied Banda's request that the standard jury instruction defining "reasonable doubt" be given. The trial court also instructed the jury that they should return their verdict when seven or more jurors were in agreement, contrary to previous decisions of this Court holding this instruction erroneous.

The trial court's finding that this homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification was error. The aggression of the victim and the testimony of state witnesses established that there was at least a pretense of moral or legal justification for the homicide.

Finally, the circumstances of this homicide and the mitigating evidence produced on behalf of Banda demonstrate that a sentence of death is not proportional when compared to other capital cases.

ARGUMENT

ISSUE I.

THE TRIAL COURT'S FAILURE TO GIVE ANY JURY INSTRUCTION ON JUSTIFIABLE OR EXCUSABLE HOMICIDE DENIED BANDA DUE PROCESS OF LAW AND DEPRIVED HIM OF HIS RIGHT TO HAVE A JURY DETERMINE HIS GUILT OR INNOCENCE REGARDING EVERY ELEMENT OF THE CRIME HE WAS ACCUSED OF COMMITTING.

Two basic constitutional guarantees are central to the argument in this issue. First, the United States Constitution, Fourteenth Amendment requires the State to prove every element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Secondly, the Florida Constitution, Article I, Section 16 and the United States Constitution, Sixth Amendment guarantees an accused the right to have a jury determine whether the State has met that burden in serious criminal cases. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). As demonstrated below, the interrelation of these constitutional guarantees reveals that Banda's trial was unfair.

A. Charge Conference

At the charge conference, the trial judge commenced reading from the Standard Jury Instructions, "Introduction to Homicide."[1/] The proceedings continued as follows:

1/ Florida Standard Jury Instructions in Criminal Cases, 2d edition, 1985, p.61.

THE COURT: All right, in this case it will be each defendant, then I think they ought to be named, is accused of the crime of murder in the first degree. Murder in the first degree includes the lesser crimes of murder in the second degree and murder in the third degree and manslaughter, all of which are unlawful.

Killing that is excusable or is committed by use of justifiable deadly force is lawful..." how much of this instruction is the State requesting be read? All of it?

MS. ANDREWS (prosecutor): The State? Not excusable or justifiable.

MR. HENNINGER (Banda's counsel): Wait a minute.

THE COURT: Well then I think on the introduction to homicide, the appropriate portion, the appropriate introduction would end with the second paragraph, murder in the first degree includes the lesser included crimes of murder in the second, murder in the third and manslaughter, all of which are unlawful.

MS. ANDREWS: I'm lost.

THE COURT: Go back to Page Sixty-one.

MS. ANDREWS: I am.

MR. HENNINGER: Different degrees as applicable.

MS. ANDREWS: And stop?

THE COURT: And stop.

MS. ANDREWS: I have no objection to that.

THE COURT: We have no allegations of excusable or justifiable, agreed?

MR. DE VLAMING: I agree. Davis agrees.

THE COURT: Mr. Henninger?

MR. HENNINGER: Yes, I do.

THE COURT: Stop there. Then proceed to Page Sixty-three, murder in the first degree.

(R2181-2183)

The result is that the following portion of the "Introduction to Homicide" instruction (which is to be given in "all murder and manslaughter cases"[2/]) was deleted:

> A killing that is excusable or was committed by the use of justifiable deadly force is lawful.
>
> If you find (victim) was killed by (defendant), you will then consider the circumstances surrounding the killing in deciding if the killing was (crime charged) or was [Murder in the Second Degree] [Murder in the Third Degree] [Manslaughter], or resulted from justifiable use of deadly force.
>
> JUSTIFIABLE HOMICIDE
>
> The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in which the defendant was at the time of the killing.
>
> EXCUSABLE HOMICIDE
>
> The killing of a human being is excusable, and therefore lawful, when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.
>
> I now instruct you on the circumstances that must be proved before (defendant) may be found guilty of (crime charged) or any lesser included crime.

Florida Standard Jury Instructions in Criminal Cases, 2d edition, 1985, p.61.

2/ See "Note to Judge", Fla.Std.Jury Instr. (Crim.), p.61.

The jury instructions submitted to the jury, both oral and written, reflect this deletion of all reference to lawful homicides. (R2295,435)

B. The Court's Instruction on First Degree Murder as Given Unconstitutionally Relieved the State of its Burden to Prove Every Element of the Offense.

Florida's murder statute, Section 782.04, Florida Statutes (1985) reads:

> 782.04 Murder.-
>
> (1)(a) The unlawful killing of a human being:
>
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
>
> * * *
>
> is murder in the first degree ...

Clearly one essential element of premeditated murder is an "unlawful killing". The legislature has specifically designated within Chapter 782 which homicides are lawful. These are justifiable homicide, Section 782.02, Florida Statutes (1985) and excusable homicide, Section 782.03, Florida Statutes (1985).

The "Introduction to Homicide" portion of the Standard Jury Instructions reflects the statutory design. The jury is supposed to be instructed that if they find the accused killed the victim, they must then find whether the killing was an unlawful homicide or one of the lawful homicides. Brief definitions of justifiable homicide and excusable homicide are given to enable the jury to determine whether the "unlawful killing" element of murder was proved by the

State beyond a reasonable doubt.

In the case at bar, the judge's instruction to the jury was equivalent to directing a verdict in favor of the State as to whether the killing of Terry Denmark was unlawful. Since the jury never heard that there was such a thing as a lawful homicide, they could only conclude that Banda was guilty of a crime if they found that Banda killed Denmark. The State never had to satisfy its burden of proving "unlawful killing" to the exclusion of a reasonable doubt.

As this Court wrote in Henderson v. State, 155 Fla.487, 20 So.2d 649 at 651 (1945):

> It is elementary that every element of a criminal offense must be proved sufficiently to satisfy the jury (not the court) of its existence.

Failure to correctly instruct the jury on the essential and material elements of the crime charged results in a denial of due process of law. Id.; Gerds v. State, 64 So.2d 915 (Fla.1953).

It should also be recognized that a defendant's constitutional right to a jury trial is abridged where the jury does not determine whether the State met its burden to prove each element of the offense beyond a reasonable doubt. No matter how overwhelming the evidence, a trial judge cannot enter a judgment of conviction or direct the jury to return a verdict of guilt. United States v. Martin Linen Supply Co., 430 U.S.564, 97 S.Ct.1349, 51 L.Ed.2d 642 (1977). When the trial judge at bar decided that there was no reason to instruct the jury on lawful homicides, he was in effect directing a verdict of guilt as to the "unlawful killing" element of murder.

The Sixth Amendment, United States Constitution and Article I, Section 16 of the Florida Constitution indicate that only the jury can make the determination of whether a killing is unlawful.

C. Effect of Trial Counsel's Failure to Object to the Court's Erroneous Instruction

The transcript of the charge conference indicates that Banda's counsel did not object to the court's decision to delete all mention of justifiable and excusable homicide from the jury instructions. Ordinarily, under the contemporaneous objection rule established by this Court in Castor v. State, 365 So.2d 701 (Fla. 1978), an error in jury instruction will not be considered on appellate review unless objected to in the trial court. However, under the circumstances at bar, there are two reasons why the contemporaneous objection rule should not bar review.

The first of these is that the failure to define the "unlawful killing" element of premeditated murder amounts to fundamental error.[3/] In Anderson v. State, 276 So.2d 17 (Fla.1973), this Court reversed a first-degree murder conviction where the trial court failed to define"premeditation" in its charge to the jury despite the defendant's failure to object. The error at bar is of the same magnitude as the error in Anderson.

The second reason not to bar review for lack of objection

3/ Compare Alejo v. State, 483 So.2d 117 (Fla.2d DCA 1986) (fundamental error where judge failed to define justifiable and excusable homicide as part of manslaughter instruction).

is that this is a capital case. In Harris v. State, 438 So.2d 787 (Fla.1983), this Court held that in a capital case, the jury must be instructed on necessarily lesser-included offenses unless the defendant personally waives the right to these instructions. This holding has not been extended to non-capital cases. Jones v. State, 484 So.2d 577 (Fla.1986).

While justifiable homicide and excusable homicide are by no means lesser-included offenses, the reasoning of Harris is still relevant to Banda's situation. Banda was not present himself at the charge conference; his defense counsel told the court that he didn't want him present. (R2177). Even assuming that it would be possible to waive jury instruction which defines an essential element of the criminal charge, any waiver should be made by the defendant personally in a capital case.

As the United States Supreme Court has declared, the Eighth and Fourteenth Amendments of the Federal Constitution cannot tolerate uncertainty and unreliability in the fact finding process of a capital case. Beck v. Alabama, 447 U.S. 625,100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

D. Evidence Which Made Justifiable Homicide a Question of Fact.

At the outset, Appellant asserts that jury instruction on lawful homicides is required in a capital case regardless of the evidence produced at trial. In addition, however, there was evidence in the case at bar which made the element of "unlawful killing" a contested issue.

Banda did not testify in his own defense. Basically, his defense was to require the State to prove every element of premeditated murder to the exclusion of a reasonable doubt. Banda in no way conceded that the killing of Denmark was unlawful.

The State's evidence contained testimony which made justifiable homicide a question for the jury's resolution. According to Allen Jones, the victim, Denmark, had at least threatened to beat up Banda. (R1896) Frank Townsend's testimony reported Banda telling him, "Terry had threatened the next time he seen [sic] him that he was going to kill him." (R1740-1741) Finally, Charles Blanton, the jailhouse informant, testified that Banda explained the circumstances as "the guy threatened to kill me so I figured I better get him first. (R2012)

This evidence in the State's case was sufficient to create a factual question as to whether the homicide of Denmark fell within the definition of justifiable homicide or whether it was unlawful. Without instruction, this question could not be determined by the jury.

Accordingly, Banda was denied due process of law and his right to a jury trial. His conviction should now be reversed and a new trial ordered.

ISSUE II.

THE TRIAL COURT ERRED BY FINDING THAT THE STATE'S VIOLATION OF FLA.R.CRIM.P. 3.220(f) DID NOT PREJUDICE BANDA'S DEFENSE AND IN FAILING TO GRANT ANY MOTION FOR CONTINUANCE.

On May 19, 1986, the State served an "Additional List of Witnesses", disclosing for the first time Charles Blanton. (R350) Banda's counsel received this witness list around May 21, 1986, less than two weeks prior to trial. (R373) Banda filed a "Motion to Impose Sanctions", requesting that the State be prohibited from calling Blanton at trial. (R373-374)

At a hearing held May 29, 1986, it developed that Blanton had been a cell mate of Banda's in the Pinellas County Jail during November and December 1985. (R1346-1347) Blanton alleged that Banda had made an admission in November concerning the homicide of Denmark. (R1346) Blanton conveyed this alleged admission to the State Attorney during December 1985. (R1347)

Although the State's "Additional List of Witnesses" promised to make Blanton available for deposition on May 23 (R350), he was not produced until May 28. (R1348-1349) When defense counsel deposed Blanton, he learned that Blanton alleged that three other individuals overheard Banda's admission. (R1349) Banda's counsel charged that the State's failure to disclose Blanton until the last minute was intentional and designed to prevent an adequate defense at trial. (R1351)

The prosecutor admitted that the witness list was intentionally delayed from the time it was originally prepared. (R1352)

The reason for delay was fear for Blanton's safety. (R1352) However, the witness list got buried in the file; the prosecutor said he did not purposefully violate the discovery rules. (R1353) The prosecutor further stated that he had obtained addresses for two of the three alleged additional witnesses and made them available to Banda. (R1354)

In urging that Banda's motion be denied, the prosecutor claimed that the defense couldn't show prejudice because, "I don't believe he would be calling witnesses against this witness anyway." (R1354)

The court ruled that defense had not shown sufficient prejudice and denied the Motion to Impose Sanctions. (R1355-1356) A motion for continuance was also denied. (R1356)

After the jury had been selected and sworn, Banda renewed his motion for continuance. (R1514) Although defense counsel had located Cecil McCall, one of the witnesses to Banda's alleged admission, he was unable to contact the other two. (R1514-1515) This motion for continuance was also denied. (R1516) After Blanton's testimony at trial, Banda's counsel informed the trial judge that he had located one of the other alleged witnesses, Paul Disher, but was unable to serve him with a subpoena. (R2033) Disher's expected testimony would also impeach Blanton's assertion that Banda had made an admission. (R2033) The court again denied a renewed motion for continuance to produce Disher. (R2034)

Contrary to the prosecutor's prediction, Banda did call one of the witnesses, Cecil McCall, to testify. (R2092-2100) Banda was not able to have the benefit of Paul Disher's testimony, however.

In the case at bar, there is no question but that the State violated Fla.R.Crim.P. 3.220(f), which provides:

> Continuing Duty to Disclose. If, subsequent to compliance with the rules, a party discovers additional witnesses or material which he would have been under a duty to disclose or produce at the time of such previous compliance, he shall promptly disclose or produce such witnesses or material in the same manner as required under these rules for initial discovery.

Indeed, the State admitted an intention to delay discovery in the alleged interest of Blanton's fears for his safety. Fla.R.Crim.P. 3.220(j) gives the trial court broad authority to impose appropriate sanctions for discovery violations. As this Court said in Cooper v. State, 336 So.2d 1133 (Fla.1976), "failure to obey the Rule should be remedied in a manner consistent with the seriousness of the breach." 336 So.2d at 1138.

The most important aspect of a trial court's inquiry into a violation of discovery rules by the State is whether the violation affected the ability of the defendant to prepare for trial. Richardson v. State, 246 So.2d 771 (Fla.1971); Wilcox v. State, 367 So.2d 1020 (Fla.1979). The State has the burden to show that no prejudice resulted to the defendant from the discovery violation. Cumbie v. State, 345 So.2d 1061 (Fla.1977).

If the trial court "determines that the State's noncompliance with the rule has not prejudiced the ability of the defendant to properly prepare for trial ... the circumstances establishing non-prejudice to the defendant [must] affirmatively appear in the record." Richardson, supra. 246 So.2d at 775.

At bar, the reason given for non-prejudice to Banda was

that he wouldn't call these witnesses anyway. This reason proved to be an unwarranted speculation because Banda did in fact call one witness to impeach Blanton's testimony and he requested a continuance to subpoena another favorable witness. A third witness might have been located had the State made timely disclosure of their witness, Blanton. Hence, there was significant prejudice to Banda's ability to prepare for trial.

Most importantly, this prejudice impacted upon Banda's rights under the Florida Constitution, Article I, Section 16 and the United States Constitution, Sixth Amendment to have complusory process for witnesses in his favor. Until the State's disclosure of Blanton, the defense was unaware that it would have to defend against any admission. In the short time available, the defense was able to produce one favorable witness who testified at trial. Another favorable witness could have been produced if the defense was given an opportunity to serve a subpoena. Had the judge granted a short trial recess or any of the motions for continuance, it is likely that Paul Disher could have been subpoenaed on Banda's behalf.

This Court has observed:

> It should not be forgotten that the discovery sanctions are designed in part to deter willful discovery violations. Wilcox, supra. 367 So.2d at 1023, n.3.

At bar, the State was able to benefit by its violation of discovery rules because Banda didn't have sufficient opportunity to subpoena a favorable witness. Rather than detering discovery violations, the trial court's failure to impose any sanction could only encourage such violations.

Accordingly, the trial court abused its discretion by failing to at least grant Banda a continuance to produce Paul Disher at trial.

ISSUE III.

THE TRIAL COURT UNDULY RESTRICTED BANDA'S CROSS-EXAMINATION OF STATE WITNESS, ALLEN JONES.

On cross-examination of Allen Jones, the roommate of Juan Banda and Terry Denmark, defense counsel attempted to delve into whether Jones had used the name Robert David Taylor as an alias. (R1910) The purpose was not to show felony convictions under this alias (Jones admitted to two felony convictions); but rather to attack the credibility of Jones. The Court sustained the prosecutor's objection to this line of cross-examination. (R1912)

The right to cross-examination of adverse witnesses is included within an accused's Sixth Amendment right to confront witnesses against him at trial. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). This federal constitutional right has been made obligatory on the States. Id.

In Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968), the principal prosecution witness admitted that the name he was testifying under was not his real name. The trial court sustained the prosecutor's objection to defense counsel's attempt to make the witness reveal his true name.

In reversing, the United States Supreme Court held that when the credibility of a witness is at issue, the accused must be allowed to ask the witness his real name. Otherwise, the witness cannot be placed in his proper setting and the jury cannot fairly appraise his credibility.

The factual situation at bar is the converse of the

situation in Smith; but the nature of the prejudice is identical. Banda was unable to explore Jones' use of an alias to give the jury a proper perspective on the issue of credibility.

Accordingly, Banda was denied his right under the United States Constitution, Sixth Amendment and Article I, Section 16 of the Florida Constitution to confront at trial adverse witnesses. A new trial should be ordered.

ISSUE IV.

THE TRIAL COURT ERRED BY FAILING TO GRANT BANDA'S MOTION TO SEQUESTER THE JURY BETWEEN THE RENDITION OF VERDICT IN THE GUILT OR INNOCENCE PHASE AND THE COMMENCEMENT OF THE PENALTY PHASE.

On June 6, 1986, the jury returned verdicts acquitting co-defendant Davis and convicting Banda of first-degree murder. (R2324) Immediately following rendition of the verdict, Banda's counsel moved to sequester the jury until commencement of the penalty phase. (R2327) The prosecutor objected. (R2327)

The trial judge then dispersed the jury until June 10, 1986 with admonitions not to discuss the trial with anyone nor view media reports of the trial.(R2329-2330) Accordingly, the jury was permitted to separate from Friday, June 6 until it reconvened on Tuesday, June 10. (R2332)

In Livingston v. State, 458 So.2d 235 (Fla.1984), this Court held that once a jury starts deliberations, it must be sequestered until a verdict is reached. While neither the Livingston decision (nor any other decision that counsel is aware of) discusses whether a jury must be sequestered upon a defendant's request between the two phases of a capital trial, the Livingston court's reasoning pertains with equal force to jury separation between the two phases of a capital trial.

In establishing a rule of per se reversible error where the jury is permitted to separate over the defendant's objection once deliberations in a capital case have begun, the Livingston court wrote:

> The reason for such a rule is of course, quite simply, to safeguard the defendant's right to a trial by an impartial jury. This right is fundamental and is guaranteed by the sixth amendment to the United States Constitution and article 1, section 16 of the Florida Constitution. There is no way to insulate jurors who are allowed to go to their homes and other places freely for an entire weekend from the myriad of subtle influences to which they will be subject. Jurors in such a situation are subject to being improperly influenced by conversations, by reading material, and by entertainment even if they obey the court's admonitions against exposure to any news reports and conversations about the case they have been sworn to try.

458 So.2d at 238.

The same "myriad of subtle influences" could operate to affect a juror's perception of whether a sentence of death or life should be recommended.

In the case at bar, the penalty phase proceedings were brief. The State presented no further evidence. (R2365) Banda presented three witnesses to testify regarding his character and the difficult circumstances of his upbringing. (R2366-2379) Consequently, a juror's preconception of the proper penalty formed during the jury separation might not have been challenged.

The most critical fact, however, is that the jury's death recommendation was by the minimal vote of 7-5. (R485,2415) One vote difference would have meant a life recommendation. And, given the facts at bar, the Tedder[4/] standard of appellate review applicable

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4/ Tedder v. State, 322 So.2d 908 (Fla.1975).

when the trial court imposes a death sentence over a jury's life recommendation would have precluded affirmance of a sentence of death here had the jury recommended life. See Valle v. State, Case No. 61,176 (Fla.January 5, 1987)[12 F.L.W. 51].

Under these circumstances, the constitutional mandate of the Eighth Amendment that the sentencing determination in capital cases meet a heightened standard of reliability does not permit a sentence of death to stand where the jury may have been subjected to improper influences during their separation. Banda should now be awarded a new penalty phase proceeding before a new jury.

ISSUE V.

THE TRIAL COURT ERRED BY NOT PERMITTING BANDA'S COUNSEL TO ARGUE DURING PENALTY PHASE ARGUMENTS A RELEVANT BASIS FOR THE JURY TO RECOMMEND A SENTENCE OF LIFE.

During defense counsel's closing argument to the jury during penalty phase, he started to mention that there were nine statutory aggravating factors, when the prosecutor objected. (R2403) The prosecutor contended at the bench conference that it was "totally improper" for defense counsel to mention statutory aggravating factors which the State had agreed were not applicable.[5/] (R2403-2404) According to the prosecutor, such a defense argument was as equally improper as a prosecution argument rebutting statutory mitigating circumstances (such as lack of significant criminal history) which the defendant had agreed to waive. (R2404)

Defense counsel replied that he should not be precluded from informing the jury about the factors which the legislature had deemed essential to whether a death sentence should be imposed. The trial court ruled that the aggravating factors not argued by the State were not relevant to the case and "should not be brought to the attention of the jury." (R2405) Accordingly, defense counsel had to abandon this line of argument.

5/ The State agreed with the trial judge that the only applicable aggravating circumstance was §921.141(5)(i) (R2357-2358). The jury was instructed on this aggravating factor only (R2410).

In Maggard v. State, 399 So.2d 973 (Fla.1981), cert.den., 454 U.S.1059, 102 S.Ct.610, 70 L.Ed.2d 598 (1982), this Court held that the State could not present damaging evidence against a defendant to rebut a mitigating circumstance which the defendant had expressly conceded was nonexistent. If a defendant waives consideration of a mitigating circumstance, neither the State nor the defendant may argue to the jury the existence or nonexistence of such mitigating circumstance. The question presented at bar is whether Maggard sauce for the goose is also sauce for the gander.

Analysis of the factual basis behind Maggard reveals that if the State were permitted to engage in anticipatory rebuttal of the mitigating factor "no significant history of prior criminal activity", a defendant's prior record, otherwise inadmissible, would come in. For instance, in Barclay v. State, 470 So.2d 691 (Fla. 1985), this Court found that the trial court had improperly used the defendant's prior record as a nonstatutory aggravating factor. Prior conviction of a violent felony is relevant to the statutory aggravating circumstance §921.141(5)(b) but non-violent felonies and misdemeanors are irrelevant to any statutory aggravating circumstance.

This Court recognized this rationale of the Maggard decision in Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla.1986) when it declared:

> The erroneous permitting of anticipatory rebuttal by the state directed at a statutory mitigating factor reliance upon which had been waived by the defense in effect allowed the state to present improper nonstatutory circumstances in aggravation.

490 So.2d at 940.

While it is clearly improper to place evidence of non-statutory aggravating factors before the jury, it is just as clearly proper to present nonstatutory mitigating evidence. In Skipper v. South Carolina, __U.S.__, 106 S.Ct.1669, 90 L.Ed.2d 1 (1986), the the United States Supreme Court relied upon its prior decisions in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct.869, 71 L.Ed.2d 1 (1982) to hold that the Eighth Amendment, United States Constitution requires that evidence which might serve "as a basis for a sentence less than death" not be excluded from the sentencer's consideration. 90 L.Ed.2d at 7.

At bar, defense counsel intended to inform that jury that the legislature had established nine aggravating circumstances applicable to capital cases. By mentioning these and why they were not applicable to the case at bar, defense counsel intended to show the jury that even if they found that the State proved one aggravating factor, death was not necessarily the proper sentence.

This is a proper line of argument with foundation in the case law of this Court. For example, 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) are among the cases where this Court found the existence of an aggravating factor but also found the death penalty unwarranted. Banda's counsel should have been permitted to argue along similar lines that a sentence of death was not proportional to the facts of the homicide and the good points of Banda's character.

As in Skipper, supra, the trial court's limitation on Banda's presentation of evidence or argument directed at potentially mitigating considerations was prejudicial and violative of the United States Constitution, Eighth and Fourteenth Amendments. Accordingly, Banda's sentence of death should be vacated and he should be given a new penalty phase proceeding before a new jury.

ISSUE VI.

THE JURY INSTRUCTIONS GIVEN DURING PENALTY PHASE WERE ERRONEOUS BECAUSE: 1) DEFENSE REQUESTED INSTRUCTIONS ON THE SIGNIFICANCE OF THE JURY'S RECOMMENDATION AND REASONABLE DOUBT WERE DENIED, AND 2) THE JURY INSTRUCTIONS GIVEN INCORRECTLY REQUIRED THE JURY NOT TO RETURN A VERDICT UNTIL SEVEN WERE IN AGREEMENT.

A. The Trial Court Erred By Denying Defense Requested Instruction No. 6.

In the penalty phase charge conference, one of Banda's requested special jury instructions was:

> The fact that your recommendation is advisory does not relieve you of your solemn responsibility, for the Court is required to and will give great weight and serious consideration to your verdict in imposing sentence.

(R468)

The trial judge denied this instruction, on redundancy grounds saying that it was covered by the standard jury instructions.

The standard jury instruction given, however, reads quite differently:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence.

(R482,2409-2410)

The standard jury instruction given is deficient because it fails to inform the jury that the recommendation cannot be ignored by the judge; the law requires him to give great weight to the jury's recommendation.

In Caldwell v. Mississippi, __U.S.__, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Court held that the Eighth Amendment requirement of heightened reliability in capital sentencing was violated where the sentencing jury was led to believe that the responsibility for determing the propriety of a death sentence rested elsewhere. Noting that its capital punishment decisions were premised on the assumption that a capital sentencing jury was aware of its "truly awesome responsibility," the Court found this sense of responsibility was indispensible to the constitutionality of capital sentencing. The Caldwell court wrote:

> ...the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. 7/

105 S.Ct. at 2641-2642.

Subsequently in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), the Eleventh Circuit determined that the Caldwell holding was applicable to the Florida capital sentencing scheme although the Florida jury's penalty verdict is advisory in nature. Because a Florida defendant receives enhanced protection when the Tedder standard of appellate review attaches following a jury recommendation of life,8/ the jury's role is critical in all cases except those where a life recommendation would be irrational. The jury's

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7/ Cf. Pait v. State, 112 So.2d 380 (Fla.1959).

8/ Valle v. State, Case No. 61,176 (Fla.January 5,1987)[12 F.L.W.51].

role in Florida capital sentencing is "so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell." 804 F.2d at 1530.

This Court has recognized that a capital defendant has the right to a jury advisory opinion unimpared by inadequate or misleading instructions from the court. Floyd v. State, 497 So.2d 1211 (Fla.1986). At bar, Banda was further denied his right under the Eighth and Fourteenth Amendments to the United States Constitution to a reliable sentencing determination. As the Caldwell court stated:

> Because we cannot say that this effort [to minimize the jury's sence of responsibility] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eight Amendment requires.

105 S.Ct. at 2646.

The facts at bar must be distinguished from those present in Pope v. Wainwright, 496 So.2d 798 (Fla.1986), where this Court rejected an argument based on similar comments about the advisory role of the jury. The difference at bar is that Banda's jury was never correctly informed of the significance attached to their recommendation. By contrast in Pope, "the trial judge stressed the significance of the jury's recommendation and the seriousness of the decision they were being asked to make." 496 So.2d at 805.

B. The Trial Judge Erroneously Refused To Define "Reasonable Doubt" in the Penalty Phase Jury Instructions.

The standard of proof applicable to aggravating circumstances in a capital case is proof beyond a reasonable doubt.

Williams v. State, 386 So.2d 538 (Fla.1980). Banda's counsel requested the trial judge to give the definition of "reasonable doubt" in the penalty phase jury instructions. (R2353) The court denied this request. (R2354)

Later, the following colloquy occurred between Banda's counsel and the Court:

> MR. HENNINGER: But these instructions don't have the -- the instructions in penalty phase do not specifically advise the jury again what a reasonable doubt is, and I would like to be able to comment on that reasonable doubt in my argument even though the Court is not going to instruct the jury.
>
> THE COURT: Let's not rehash the old instructions.

(R2355-2356)

The trial judge should have granted Banda's request. When the penalty phase immediately follows the guilt phase of a capital trial, jury reinstruction on the definition of reasonable doubt may be unnecessary. At bar, however, the jury found Banda guilty on Friday, June 6, 1986. The penalty proceedings were not held until Tuesday June 10, 1986.

Moreover, not only did the trial judge deny counsel's request for a jury instruction, he also inhibited counsel's ability to argue effectively that the State failed to prove an aggravating circumstance beyond a reasonable doubt. In Barwicks v. State, 82 So.2d 356 (Fla.1955), this Court held that a failure to define "reasonable doubt" was not reversible error where counsel did not request a proper instruction. Since Banda's counsel did request a proper instruction defining "reasonable doubt", it follows that reversible error was committed here.

C. The Jury Instructions Given Were Defective Because the Jury Was Instructed That Its Verdict Should Not Be Returned Until Seven or More Jurors Were in Agreement.

The trial judge's final instruction to the jury was:

> You will now retire to consider your recommendation. When seven or more are in agreement as to what sentence should be recommended to the court, that form of recommendation should be signed by your foreman and returned to the court.

(R484)

This is the same instruction which this Court held was error in Harich v. State, 437 So.2d 1082 (Fla.1983). It is defective because it does not inform the jury that a vote of six in favor of life imprisonment should be returned as a life recommendation. Notably, the Harich court found no prejudice because the jury's vote was nine-to-three. At bar, the jury vote was seven-to-five so it is evident that the erroneous instruction may have affected the result.

The more difficult question is whether lack of a contemporaneous objection to the instruction given should bar appellate relief. This Court has previously held that the same jury instruction error was not preserved for appeal when there was no objection at trial. Jackson v. State, 438 So.2d 4 (Fla.1983); Rembert v. State, 445 So.2d 337 (Fla.1984).

At bar, the jury instruction error was not raised until the hearing on Banda's motion for new trial. There, Banda's counsel noted that during the charge conference, the difference between the old jury instruction and the amended version was discussed. (R2429) Banda's counsel stated that he had specifically requested that the

new jury instruction be given. (R2429)

The prosecutor admitted that his office had typed the jury instructions. (R2361,2432). However, he asserted that counsel had looked over the written instructions before they were submitted to the jury and no objection was lodged. (R2432). The prosecutor further gave his opinion that the instructions given might be the correct ones. (R2433)

The trial court ruled that there was no material difference between the revised instruction and the former one. Banda's motion for new trial was denied. (R2435) This ruling was error. Harich, supra.

Given the circumstances at bar, the contemporaneous objection rule should not bar relief for Banda. He did request that the proper instruction be given. The error was caused by incorrect preparation of the instructions by the State Attorney's Office. Although defense counsel should have been more vigilant before accepting the jury instructions as prepared, Banda still had a right to rely upon the State's accurate preparation of instructions that were previously requested.

D. Cumulative Error

Even if the prejudice to Banda from each of the errors in the penalty phase instructions considered individually was insufficient to warrant reversal, the cumulative effect must also be considered. Taken cumulatively, it is clear that Banda was denied due process of law under the Fourteenth Amendment and his right to a reliable sentencing determination under the Eighth Amendment by the penalty instruction errors. Accordingly, his sentence of death should be vacated and a new penalty trial ordered.

ISSUE VII.

THE CAPITAL HOMICIDE FOR WHICH BANDA WAS CONVICTED WAS NOT COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In Cannady v. State, 427 So.2d 723 (Fla.1983), this Court reversed a trial court finding that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The Cannady court wrote:

> When he first began incriminating himself, he repeatedly denied that he meant to kill Carrier. During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life.
>
> The trial judge expressed disbelief in appellant's statements because the victim was a quiet, unassuming minister and because appellant shot him not once but five times. Though these factors may cause one to disbelieve appellant's version of what happened, they are not sufficient by themselves to prove beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

427 So.2d at 730.

Later, in Scott v. State, 494 So.2d 1134 (Fla.1986), this Court distinguished the facts in Cannady. In affirming the trial court's finding that the CCP aggravating circumstance applied to Scott, it was noted that:

> Scott made no statement tending to prove that he acted under a pretense of moral or legal justification.

494 So.2d at 1138.

At bar, the State's evidence showed that the chain of events started with an argument between the victim and Banda. The victim, Terry Denmark, was the aggressor in this argument. According to Allen Jones, who witnessed the argument, Denmark told Banda he was going to take him outside and "beat your fucking ass in Allen's front yard right now."[6/] (R1896)

Denmark's nickname was "Rambo". (R1070) He had boasted to Jones that he shot his ex-wife in the head. (R842-843) According to "Rambo's" story, the bullet went in her mouth and out the side of her face. (R842) He was never charged with the shooting. (R842)

From Denmark's belligerent behavior and his boasts of violence, Banda may well have had reason to think he was in danger. The State's case relied heavily on Townsend's testimony that Banda said Terry Denmark threatened to kill him and "he wasn't going to hide from him, he was going to get him first." (R1741) Charles Blanton, Banda's cell mate at the Pinellas County Jail, testified that Banda said "all I'm going to say is that the guy threatened to kill me so I figured I better get him first." (R2012)

As in Cannady, supra, these statements together with the victim's violent aggressive behavior establish at least a pretense of moral or legal justification. Indeed, the State was not even

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6/ At some point, Jones may have made a statement that Denmark threatened to kill Banda rather than "kick his ass". See the deposition of Jones. (R854-856,860-861). It should also be remembered that Jones described Terry Denmark as his "best friend". (R882)

able to suggest a motive for the homicide other than a preemptive strike to protect Banda's own life. Accordingly, the State failed to prove beyond a reasonable doubt that the homicide of Denmark was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

ISSUE VIII.

A SENTENCE OF DEATH IS NOT PROPORTIONAL UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

Only one aggravating factor was found by the trial court in the case at bar, Section 921.141(5)(i), Florida Statutes. (R508, See Appendix) Although Banda presented mitigating evidence of a difficult upbringing with an alcoholic father, good employment record, and being a cooperative prisoner who utilized his time in the county jail constructively, the sentencing judge found these mitigating circumstances "insufficient". (R506, See Appendix) Not considered, but evident from the record, was Banda's lack of any prior violent criminal history. (R2359)

In Blair v. State, 406 So.2d 1103 (Fla.1981), the defendant's wife had threatened to report the defendant to the police because he allegedly made his stepdaughter pregnant. The defendant instructed his son to dig a large hole in the backyard and place a piece of plywood over it. After the hole was dug, the defendant sent the children on errands while he shot and killed his wife. Her dead body was placed in the hole and a concrete slab was later poured over the grave.

On appeal, the Blair court compared the facts with other capital cases and determined that death was not the appropriate sentence. A life sentence was ordered.

The facts at bar are comparable but less reprehensible because Banda was not trying to cover up criminal activity and the victim was the belligerent party. Banda's introduction of consider-

able nonstatutory mitigating evidence further indicates that a death sentence is not proportional to the circumstances of the offense and the character of the accused.

Other cases where this Court has reduced a death sentence to life imprisonment under the situation of a jury death recommendation and one valid aggravating circumstance include Rembert v. State, 445 So.2d 337 (Fla.1984), Ross v. State, 474 So.2d 1170 (Fla.1985), and Proffitt v. State, Case Nos. 65,507 and 65,637 (Fla.July 9,1987) [12 F.L.W. 373]. These decisions also support the conclusion that a sentence of death is disproportionate in the case at bar.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Juan Banda, Appellant, respectfully requests this Court to grant him the following relief:

Issues I - III - Reversal of conviction and remand for a new trial.

Issues IV - VI - Vacation of death sentence and remand for a new penalty trial.

Issues VII - VIII - Vacation of death sentence with remand for imposition of a life sentence.

Respectfully submitted,

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