IN THE SUPREME COURT OF FLORIDA

LEONARD SPENCER,
Appellant,
vs.
STATE OF FLORIDA,
Appellee,

CASE NO: 69,883

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant Spencer and co-defendant Amos were tried jointly in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Appellee was the prosecution below.

In this brief, the parties will be referred to as they appear before this Honorable Court of Appeal.

The following symbol will be used:

"R" Record on Appeal

"AB" Appellant's Initial Brief

All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the case and facts as found on pages one (1) through twenty (20) of Appellant's Initial Brief, to their limited extent, with the following additions and/or clarifications:

The first witness called by the State at trial was Terry Gene Howard. Howard was at Mr. Grocer at 11:20 p.m. having a beer after he got off work. (R 1846). Howard knew the clerk at Mr. Grocer. (R 1847). Howard noticed two black males walk in. The short male had a dollar bill in his hand and walked up to the counter and asked for a pack of cigarettes. The tall male went to the cooler where sodas were kept. From Howard's vantage point, he did not see a car drop these two males off. (R 1849). The males came from the direction of a parking lot located beside the store parking lot. (R 1849).

The short male asked the clerk for a pack of cigarettes as the tall male walked towards the back of the store. The tall male was looking at Howard. (R 1851-52). The tall male returned to the check-out counter and set his Mountain Dew soda down next to the cigarettes. (R 1852). The tall man turned around and acted as if he was going to leave although Howard was positive he never exited the door. (R 1852-54). The tall male was only out of Howard's sight for a second. (R 1854). Howard testi-

fied that the tall male grabbed him around the neck and put a gun to his side. (R 1854). There was no doubt in Howard's mind that the tall male grabbed him (R 1855) - a third person did not come in and grab him. Howard knew it was the tall male who grabbed him because if it was anyone else, he would have heard the store doors open up behind him again (R 1855) as Howard was standing by the doors. (R 1876). Howard never heard these doors open. (R 1895). The tall man told Howard to get his face to the ground and had a big gun. (R 1855). Howard never saw the short male with a gun. (R 1874). As Howard hit the ground he heard a gunshot. (R 1856). Howard was not sure where the gunshot came from. (R 1856). Howard heard someone behind the counter saying to open up the cash register and someone positioned on the outside of the counter saying to open up the cash register. (R 1858, 1877). Both males were asking that the cash register be opened up. (R 1874). Howard didn't realize they were talking to him until the one on the outside of the counter nudged him. (R 1858). Howard told them he couldn't open up the cash register and didn't work there. (R 1858). The male located on the outside of the counter told him to keep his face on the ground and to move to the back of the counter. (R 1859). Howard was able to hear fumbling over the cash register after he had moved behind the counter. (R 1859). One of the males asked him several times for the

keys to his car so Howard told him they were hanging on his belt loop. (R 1862-1863). The questions regarding his keys and wallet came from further away. (R 1902) One of the males then took his keys and his wallet. (R 1863). Howard was then shot, receiving injuries to his wrist and elbow, and a bullet in his hand. (R 1864-65). Howard waited a few seconds, looked over the counter to make sure they were gone, then called the police. (R 1865-66). The clerk, McAnich, was laying on his stomach with blood coming out of his mouth, and showed no signs of consciousness. (R 1866). Howard testified that McAnich never refused or argued with the men, indeed, McAnich never said anything to them at all. (R 1867). When the police arrived, he told them one of perpetrators had set the Mountain Dew can on the counter. (R 1870).

On June 12, 1986, Bobby Lee Helvey, Jr. went to Mr. Grocer at approximately 11:30 p.m. to buy a pack of cigarettes. (R 1912). As he pulled into the store, he noticed two black males leaving the store quickly and running to a car. (R 1913-14). The tall male got into the car on the driver's side and the short male entered the passenger side. (R 1914-15). The short male looked at Helvey's car in the direction of Helvey's headlights which enabled Helvey to get a good look at his face. (R 1920). Helvey didn't see a gun in either man's hands nor did he see the tall male point any weapons at the short male. (R 1916). Later that morning, Helvey was able to make an

identification of the short male from a photographic lineup. (R 1916). At the time of the crime, both black males were wearing blue jeans. The short male had on a black, vest-like shirt and the front of his jeans were a different color than the back. (R 1917). Clothing matching Helvey's description, a pair of two tone jeans and a vest-like shirt, were seized from Appellant Amos after he was apprehended. (R 3053-3453-3455). The car left the parking lot quickly (R 1916), heading morth on Military Trail in the direction of the English Pub. (R 1918).

Shahwan Afzal, the manager for the Mr. Grocer which was located at the corner of Gun Club Road and Military Trail, arrived at approximately 1:05 a.m. (R 1924, 1926). The cash register had been unplugged because it was beeping. Afzal plugged the cash register back in and it started beeping again. (R 1928-29). The figure on the register was $1.38. (R 1929). Afzal testified that the sale hadn't been completed at that time and that the register couldn't be opened without pushing the total button. (R 1929). When Afzal pushed the total button the completed sale came out to $1.45. Afzal testified that a pack of cigarettes cost $1.38 plus .07¢ tax on June 12, 1986, and that no other items in the store cost $1.38. (R 1927). Afzal testified that the case register would beep if someone pushed the wrong buttons. (R 1932). After the $1.38 was

entered in the register, someone pushed the wrong buttons causing the register to beep. (R 1932) No money was missing from the register. (R 1935).

On June 12-13, 1986, Curtis Bowlen was living at 4545 Southern Boulevard, just off the intersection of Southern Boulevard and Military Trail. (R 1962). Bowlen testified that he had the occasion to look out of his window and see a lot of police who appeared interested in a light colored car left in his driveway. (R 1962-63). This car had pulled into Bowlen's driveway around midnight. (R 1963). The car's lights had caused him to look out his open window. (R 1964). He noticed two men get out of the car and head north. (R 1964-65). The man on the passenger's side appeared to have an afro. (R 1965). The men had no weapons trained on one another and there was no indication that one male was in physical control of the other. (R 1966).

John D. Foster arrived at the English Pub at 12:10 a.m. on June 13, 1986. (R 1973). He pulled into the parking lot with his friend Craig Betehelor and parked in a space directly behind a truck by which a black male and white male were fighting. (R 1974). They appeared to be fussing with their hands and fighting over some keys. (R 1974, 1975). The black male was bigger than the white male. (R 1975). Foster could see that there was nothing in the black male's hands who was struggling

with the white male. (R 1988). The fight started at the rear of the truck and worked its way forward near the door, and consisted of the black male trying to take the keys away from the white male. (R 1976-77). Foster didn't get a good enough look at this black male to identify him again. (R 1977). More scuffling occurred near the truck door at which point Foster heard a bang and realized someone had been shot.(R 1978) After the shot, Foster observed a second black male standing on the other side of the door. (R 1978-79). The two men who were fighting were only within a foot or two of the second black male. (R 1979). Foster testified that it was impossible for the black male fighting with the white male to have shot him because both of his hands were busy trying to get the keys. (R 1985, 1991). Foster testified that the second black male was the shorter of the two men. (R 1985-86). After the gunshot, the white male fell forward on the black make he had been wrestling with, clutched his stomach, walked between Foster's car and the truck, and then fell over. (R 1987). The short black male ran around and got into the passenger side of the truck (R 1984, 1986), while the taller male got in on the driver's side. (R 1984). The lights of the truck came on and it looked like the men were talking to each other. (R 1984-85).

Deputy Robert Anderson observed a vehicle he intended to stop for a traffic violation at approximately 11:30 - 12:00 a.m. on June 12, 1986. (R 2019). Anderson observed a black

over yellow Ford Torino coming out of the north driveway of Mr. Grocer and heading north without any lights on. (R 2019-2023). The vehicle didn't turn on its lights until it turned onto Gun Club Road and proceeded toward Military Trail. Anderson had intended to stop the occupants but never did because as he turned his car around to make the stop he got a call of a shooting and armed robbery and was put on standby. (R 2024). Anderson responded to the Mr. Grocer on the corner of Gun Club and Military Trail and observed an injured person exit the store. (R 2025-26).

Later that evening, in the early morning hours of 2:00 a.m. on June 13, he responded to the northern end of Palm Beach County, in the area of Dyer Dump, specifically at A & M Auto Parts. (R 2029-2030). Anderson observed a Honda with a set of footprints exiting the driver's door and proceeding north into A & M Auto Parts. (R 2031). Those footprints led to the wall of A & M Auto Parts. (R 2032). Another set of footprints from the passenger side indicated the subject was running. (R 2032). The passenger ran along Dyer and then made a left turn onto 49th Terrace and proceeded north. (R 2032). Anderson returned to his vehicle to get his K-9, Falco, and attempted to track the footprints. (R 2063). Anderson, Falco, and Deputy Columbrito were able to use the dog to track to 49th Terrace. (R 2064). They continued tracking eastward toward the intersection of Military Trail and Blue Heron Boulevard. (R 2066).

They continued to trail until they reached railroad tracks where the track terminated. Anderson testified he had heard an eastbound train during the time they were attempting to set up a perimeter. (R 2067). Anderson believed it was possible that the subject Falco tracked jumped this train. (R 2088). Anderson returned to A & M Auto Parts where he was directed to a particular junked automobile. (R 2069). Anderson identified Appellant Amos in the court as the person he observed inside the vehicle. (R 2071). Amos did not come out immediately after being ordered to do so. (R 2071). Amos was found using a different police dog to track. (R 2072, 2076).

Mark Nordman was waiting for a friend at the English Pub at 11:30 p.m. on June 12. (R 2086). At approximately 12:10 a.m., Nordman saw two black males running by a dumpster. (R 2086). When they ran by Nordman's car, one of them glanced at his car. (R 2087). Nordman looked to his left and saw a white male laying on the ground between a row of cars. (R 2087). A truck had been slightly moved from its parking place and the driver's door was open. (R 2087).

Nordman testified that when he had first arrived at English Pub waiting for his friend, he saw these black males in a Camaro and they yelled something at Nordman. Nordman turned down his radio and they asked Nordman if he wanted to race. (R 2088). They left the English Pub, headed south on

Military Trail, made the first U-turn, and proceeded north on Military Trail. As Nordman made the U-turn first the black males came speeding around the other side of him almost forcing him to stop. (R 2088). Their cars stopped and the driver stared at Nordman for a second before they continued the race back to the English Pub. Nordman noticed a white male in the back seat. (R 2138). Nordman overshot the entrance to the pub and had to make another U-turn to get back. While he was on his way back to the pub, he heard gunshot fire. (R 2089). As he returned to the parking lot, he observed the Camaro speeding out of the parking lot and two black males running by the dumpster. A white male was driving the Camaro as it left. The males leaving the dumpster area were the same two he had just raced. (R 2090). Nordman had his headlights on and the black males ran into his headlights. He recognized the driver of the Camaro because he looked over at him. (R 2140).

At approximately 4:30 a.m., Nordman was asked to go with Detective Creston to a junkyard to make an identification. (R 2092). Nordman identified the black male in the back seat as one of the persons he saw earlier. (R 2093). The person he identified was the same person who glanced over at him earlier that evening. (R 2141). Nordman also made an identification from a photo lineup four days later. (R 2143).

Nordman identified the same person he had seen earlier in the police car. (R 2098). When he made the photo identification, Nordman did not rely on what he observed in the back seat of the police car but rather, on what he observed from the English Pub parking lot. (R 2143).

On June 13, 1986, Allen Sedenka was in the area of Military Trail and Belvedere Road. As part of his occupation as a private investigator, he had three firearms and a police scanner in his 1986 Honda Accord. (R 2178-79). Shortly after midnight, he turned on his police scanner and heard a report of a shooting which had just occurred at the English Pub. (R 2180) Sedenka heard a broadcast description of the two suspects. While north of the English Pub on Military Trail, Sedenka spotted two black males coming out of a wooded area, walking and running north on Military Trail. Sedenka went to the Kentucky Fried Chicken at Belvedere Road and Military Trail, called 911, and informed them that he spotted the suspects. (R 2181). While he was put on hold, Sedenka observed the suspects cross the street. (R 2181). Sedenka got in his car and as he was trying to leave thetall male put a gun to his head. (R 2181-2182). Sedenka was told he was going to drive them. Sedenka refused and told the black males to take the car. (R 2181). The short male told him to do what he was told or he would be shot. (R 2182). Sedenka abandoned the car and went south. (R 2182). The tall male with the gun got

into the driver's seat while the short man got in on the passenger side. (R 2183). Sedenka testified that the passenger's door was locked and he didn't open it. (R 2183). When Sedenka neared American Mirror and Glass, he saw the brake lights go on. The driver then switched seats with the passenger. The vehicle proceeded north on Military Trail, and turned west onto Belvedere Road. (R 2184). Sedenka went back to the phone which was still off the hook and told the 911 operator that the males stole his vehicle and gave her a description of the suspects. (R 2184). Sedenka testified that neither black male pointed a weapon at the other nor did he hear any threats between them. (R 2196). Sedenka didn't observe any indication of physical domination of one by the other. (R 2197).

Sedenka was able to make a photo identification of both subjects and was positive of his identification. (R 2240). His memory regarding detail was better right after the incident. (R 2241). Nordman was shown photographs of the short male 2-3 hours later. (R 2247). Later, at approximately 11:30 a.m. to 12:00 p.m. he was shown photographs and picked out the tall male. (R 2247).

Sergeant Arthur Newcomb heard a second BOLO for a Honda heading west on Belvedere Road from Military Trail. While on Haverhill Road, he saw a small vehicle one-half

mile away heading north. (R 2279). Newcomb pulled off to the side of the road to observe the vehicle. (R 2229). The vehicle was travelling so fast that he couldn't observe its make but he did notice it was a compact car. (R 2229). Newcomb pursued the vehicle in his marked sheriff's vehicle. (R 2280) and had almost caught up to it when it turned east onto Dyer Boulevard. (R 2282). As Newcomb came around the corner, the suspect's car was pulling off the road into a wooded area. (R 2282-83). The driver, the short male, headed into the wooded area; while the passenger, the tall male, went into a wooded area around the corner. (R 2284). Newcomb identified the car as a Honda. (R 2284). The suspects had their attention focused on getting away from Newcomb. (R 22850. No weapons were visible in the hands of either suspect and there was no indication that either suspect was in fear of the other. (R 2284-85). Newcomb testified that the driver went north into the A & M Auto Parts fenced area. (R 2288).

Sergeant Gregory Richter examined States Exhibit 26, the Mountain Dew can, for fingerprints. (R 2389, 2446). The latent prints found on the Mountain Dew can were identified as belonging to Appellant Spencer. (R 2538-39).

Sergeant Michael Free participated in the crime scene investigations at Mr. Grocer. (R 2552). He located a white male laying face down behind the counter. (R 2554). The

cash register was squealing and had the amount of $1.38 in the window. (R 2554). Free located a projectile on the countertop behind the cash register. (R 2555). The white male had a bullet wound in the center of his back. (R 2560). Free believed the bullet on the counter was the same one that killed the clerk. (R 2702). Free believed the clerk was standing slightly to the left of the cash register at the time of injury. (R 2705) Based upon his observations, Free believed the bullet was fired from the counter. (R 2708). The bullet entered the clerk's body in a slightly downward angle. Therefore, the gun had to be pointed in a downward angle. (R 2712-13).

Agent Gary Rathman examined State's Exhibit 34, a bullet removed from decedent Robert Bragman (R 2737-41) with Exhibit 37, a derringer gun. (R 2736, 2750-2753, 2754). It was his opinion that this bullet was fired from the barrel of the derringer pistol. State's Exhibit 33, which contained the bullet located behind the cash register (R 2580), was remarked as Exhibit 36. (R 2598, 2745). Rathman compared Exhibit 36, the bullet removed from Mr. Grocer, with Exhibit 37, the derringer pistol, and testified that the bullet seized from Mr. Grocer could not have been fired from the derringer. (R 2754). Similarly, Exhibit 1, bullet fragments taken from Terry Howard (R 2613), was compared with the derringer. (R 2754).

The larger fragments in State's Exhibit 1 were not fired from the derringer. (R 2755). Rathman compared Exhibit 36, the Mr. Grocer bullet, with Exhibit 1, the fragments, and concluded that both the bullet and the fragments came from the same gun, but not from the derringer. (R 2756). Rathman testified this indicated to him that there were two guns involved. (R 2756).

Detective Robert Lynn testified in a video-taped deposition that he seized the derringer weapon from the Ford truck located at the English Pub. (R 2772, 2795).

Dr. Benz, the medical examiner, performed autopsies on Allen McAnich and Robert Bragman. (R 3086). It was stipulated that the identity of the person depicted in photograph State's Exhibit 10 was Robert Bragman and that Allen McAnich was depicted in State's Exhibit 20. (R 3086). Robert Bragman, whom he observed at the scene of the English Pub, died as a result of a gunshot wound that entered the left side of his face. (R 3092-93). Dr. Benz located gunpowder particles around the wound which indicated it as an entry wound. (R 3094). Benz observed the presence of soot and stippling marks as well. (R 3094). As Benz testified, the fact that stippling was spread out only 2-2½ inches indicates that the weapon was held at close range. (R 3089).

Dr. Benz testified that Allen McAnich also died from

gunshot wounds which entered the front of his chest and travelled downward. (R 3106). The slug went all the way through McAnich's body. (R 3107-08). Benz determined that the entry would was to the chest due to the stipple marks in the area of the neck. (R 3108). The gun was fired at McAnich at less than five to six feet away. (R 3109). Benz believed that McAnich was leaning forward when shot, and that the person who shot McAnich was positioned in front of him. (R 3127)

Deputy Columbrito, working as a roving K-9 unit in the early morning hours of June 13, responded to A & M Auto Parts and removed Appellant Amos from an abandoned car. (R 3177-78). A new package of Newport cigarettes was removed from Amos' right rear pocket. (R 3179-3180).

Rodney King was Appellant Spencer's roommate in June of 1986 . (R 3183). At approximately 3:00 a.m. on June 13, 1986, Ed Cain knocked on his door. (R 3185). Appellant Spencer was not with Cain. (R 3186-87, 3251). Appellant Spencer returned home at approximately 7:00 a.m. to 8:00 a.m. (R 3198-99). Appellant Spencer asked King to get some gas for him and gave him $20.00. (R 3257-58). Because of the way Appellant Spencer was behaving, he went to Spencer's mother's house to tell her he was not acting right. (R 3259). After King filled up Spencer's car, he never saw him again until the

week of trial. (R 3259).

Detective Fitzgerald investigated the homicide scenes at the Mr. Grocer and English Pub. (R 3362). He observed Appellant Amos' clothing between 4:00 a.m. and 5:00 a.m. on June 13, and observed them to be very wet. (R 3362). On July 9, 1986, Fitzgerald observed Appellant Spencer in custody of the Ocala Sheriff's department. (R 3367).

Detective Richard Oetinger showed photo lineups to Mark Nordman, Allen Sedenka and Terry Howard. (R 3381). Oetinger was requested by Detective Creston to show Exhibit 45, containing Appellant Spencer's photo, to these three people for an identification. (R 3388-3391). On June 13, between 6:00 p.m. and 6:35 p.m. he showed Exhibit 45 to Terry Howard. (R 3391). Howard selected two photographs that he thought looked similar to the individuals involved in the crimes at Mr. Grocer. (R 3394). One of the photos that he selected was that of Appellant Spencer. (R 3394). Oetinger also displayed the photo lineup to Mark Nordman at 7:18 p.m. on June 13. (R 3394-95). Nordman made a careful study of the six photos and chose the photo of Appellant Spencer as one of the individuals involved in the incident at the English Pub. (R 3395-97). Nordman signed and dated the back of the photo. (R 3397). This photo lineup was also displayed to Allen Sedenka at 4:30 p.m. on June 13. (R 3398). Within a

few seconds, Sedenka immediately picked out Appellant Spencer. (R 3399). Sedenka signed and dated the back of the photo. (R 3399). Oetinger identified Appellant Spencer in court as the individual whom Nordman and Sedenka selected. (R 3400).

Detective Diane Creston showed a photo lineup, State's Exhibit 46, containing a photo of Appellant Amos, to Bobby Lee Helvey, Terry Howard, and Allen Sedenka. (R 3462-63). Bobby Lee Helvey was shown Exhibit 46 on June 13 at 5:36 a.m. and selected Appellant Amos' photo. (R 3465-66, 3470). Helvey was positive of his identification and signed the back of the photo. (R 3471-72). Terry Howard was shown Exhibit 46 on June 13 at 6:30 a.m. (R 3472-73). After viewing the lineup, Howard pointed to Appellant Amos' photo and indicated he was positive of his identification. (R 3473-74). Howard initialed the back of this photograph. (R 3473). Creston showed Exhibit 46 to Allen Sedenka on June 13 at 12:44 p.m. (R 3474). Sedenka selected Appellant Amos' photo. (R 3475).

Creston testified that she met with Mr. Nordman and brought him to the Dyer Dump area to make an identification. (R 3475, 3477). Appellant Amos was seated in the rear of a patrol car. (R 3477). Nordman was not told beforehand that Appellant Amos was involved in the shooting, and there was no suggestion made to Nordman that he needed to select anybody. (R 3478). Nordman identified Amos as being at the English Pub

shooting, and was positive of his identification. (R 3479).

Other facts will be cited where appropriate throughout the body of the brief.

SUMMARY OF THE ARGUMENT

POINT I

The trial court correctly denied Appellant's motion relating to a jury venire to be drawn from the county at large. Palm Beach County as a whole has a 7.487 percentage of registered black voters who are eligible for jury duty whereas the Eastern Jury District in which Appellant's trial was held, contained a 6.393 percentage of black registered voters. Thus, an absolute disparity of 1.1% does not constitute a gross disparity or significant underrepresentation of a distinctive group in the community. Appellant has not demonstrated intentional discrimination as to satisfy his equal protection challenge. Finally, the Palm Beach County Jury District System passes constitutional muster under the Florida Constitution.

POINT II

The trial judge did not abuse his discretion in the excusal for cause of a black juror whose responses indicated she had health problems and wore a pacemaker. Nor did the trial judge abuse his discretion by excusing several jurors, including two black jurors, who could not follow the court's instruction.

POINT III

Appellant's right to confrontation was not denied where the trial court admitted the testimony of Detective Oetinger that two witnesses identified Appellant from a photo lineup where the witnesses testified that they made an identification. Any testimony as to an identification made by Terry Howard where Howard did not testify at trial as to an identification was harmless where Howard's identificiation was not positive and where there was other evidence of identification, fingerprints, linking Appellant to the Mr. Grocer crimes.

POINT IV

There is substantial, competent evidence of identity to support Appellant's convictions.

POINT V

Florida's capital punishment laws are constitutional both facially and as applied to the Appellant. All of Appellant's arguments have been rejected by this Court.

POINT VI

Both the United States Supreme Court and this Court

have held that the Constitution does not prohibit the States from death qualifying juries in capital cases.

POINT VII

The trial court correctly imposed sentences of death based on five (5) aggravating factors and zero (0) mitigating factors in Count I, and four (4) aggravating factors and zero (0) mitigating factors in Count V. Although the trial court considered mitigating evidence, it did not find it sufficient to rise to the level of a mitigating circumstance. Any error in admission of victim impact testimony before the trial judge only is procedurally barred where Appellant did not object to such testimony. Moreover, any error is harmless where the advisory jury did not consider such testimony yet recommended a sentence of death.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS RELATING TO A JURY VENIRE TO BE DRAWN FROM THE COUNTY AT LARGE WHERE THE PALM BEACH JURY DISTRICT SYSTEM IS CONSTITUTIONAL.

Appellant contends that Administrative Order No. 1.006 - 1/80, "In Re: Glades Jury District/Eastern Jury District" violates the Sixth Amendment in that it is a system which does not allow for a fair cross-section of the community to be in the jury pool from which jurors are drawn. Appellee submits that Appellant has failed to establish a prima facie violation of the Sixth Amendment's "fair cross-section" requirement.

A.

THE PALM BEACH COUNTY JURY DISTRICT SYSTEM DOES NOT EVISCERATE THE REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY.

It is well established that the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial. Taylor v. Louisiana, 419 U.S. 522, 528 (1975). However:

> To establish a prima facie violation of the Sixth Amendment's fair cross-section requirement, a defendant

> must show (1) that the excluded group is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; (3) that this under-representation is due to the systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). If a defendant fails to establish any of these elements he has failed to establish a prima facie violation of the Sixth Amendment.

United States v. Pepe, 747 F.2d 632, 649 (11th Cir. 1984). See also, United States v. Rodriquez, 776 F.2d 1509 (11th Cir. 1985) (in accord).

At first blush, the statistics provided by Appellant appear impressive. However, upon closer inspection, these statistics do not demonstrate that the venires from which juries are selected in the Eastern District of Palm Beach County are not fair and reasonable in relation to the number of black registered voters in the entire county. Petitioner provided the trial court with the following statistics, taken from data maintained by the Palm Beach County Supervisor of Elections (R 5250-5251):

TOTALS FOR PALM BEACH COUNTY AS A WHOLE
VOTER REGISTRATION

TOTAL REGISTERED VOTERS	BLACKS	PERCENTAGE BLACK
398,797	29,859	7.487%

TOTALS FOR GLADES JURY DISTRICT

TOTAL REGISTERED VOTERS	BLACKS	PERCENTAGE BLACK
9,549	4,974	52.08%

Although Petitioner did not provide the trial court with voter registration statistics for the Eastern District, these figures can be derived from those furnished. If the total registered voters for the entire county is 398,797, of which 9.549 registered voters reside in the Glades District, then the remaining 389,248 registered voters reside in the Eastern District. Similarly, if the entire county contains 29,859 black registered voters, of which 4,974 reside in the Glades District, then the Eastern District is comprised of 24,885 black registered voters. Thus, the percentage of black registered voters in the Eastern District is 6.393%. These figures would look as follows:

TOTALS FOR EASTERN JURY DISTRICT
VOTER REGISTRATION

TOTAL REGISTERED VOTERS	BLACK	PERCENTAGE BLACK
389,248	24,885	6.393%

Appellee submits that if the county as a whole has a percentage of 7.487% black registered voters, the Eastern

District's 6.393% of eligible black jurors does not constitute a gross disparity or significant under-representation of a distinctive group in the community. Moreover, Appellee would point out that in the venire assembled for Appellant's trial, according to defense counsel, five out of sixty potential jurors were black, or 8.3%, although the trial judge would only say the numbers of potential black jurors was less than ten. (R 761-762). Thus, the venire for Appellant's trial was made up of a percentage of black registered voters higher than that of the entire county. Appellee maintains that a jury pool composed of 6.393% black registered voters is reasonably representative of a community made up of 7.487% black registered voters. Compare, Duren v. Missouri, 439 U.S. 357, 58 L.Ed.2d 579, 99 S. Ct. 664 (Venires comprised of 15% of women in population made up of 53% women eligible for jury service held not reasonably representative). In Bryant v. State, 386 So.2d 237 (Fla. 1980) this Court had occassion to scrutinize the representation of blacks on grand juries. It was established that during the period from 1974-1975, the black population of Palm Beach County ranged from 13.4% (1977 and 1978) to 14.3% (1974) of the total population. This Court found that the proportion of blacks on the Palm Beach County voters registration list ranged from 8.0% (1976 and 1978) to 9.5% (1974) of the grand juries empaneled between 1974 and 1977. While 229 jurors were of known race, fifteen of these 229 were black. The overall

proportion of blacks on these juries was 6.6%. This Court found that these statistics did not show a substantial under-representation for a significant period of time. An absolute disparity of under 10% between the eligible population and its proportion on the venire has not been found to constitute a prima facie case. United States v. Tuttle, 729 F.2d 1325, 1327 (11th Cir. 1984); Butler v. United States, 611 F.2d 1066 (5th Cir. 1980). See also, United States v. Duran DeAmesquita, 582 F.Supp. 1326 (S.D. Fla. 1984) (absolute disparity of 6.674% between blacks in population and blacks in jury pool did not satisfy prima facie test); Anderson v. Cassiles, 531 F.2d 682 (2nd Cir. 1976) (jury panel consisting of 2% black persons drawn from eligible black population of 4.4% not so unrepresentative of community as to violate constitution). Appellee maintains that the mere 1.1% disparity presented at bar does not satisfy the test as set forth in Duren v. Missouri, supra.

Appellee would also point out that Appellant has not shown that any under-representation of blacks was due to their systematic exclusion in the jury selection process. Appellant's statistics did not state what year the voter registration lists came from, or over what period of time they were compiled. As such, Appellant has not shown whether any discrepancy occurred only occassionally or in every regularly scheduled jury venire for the Eastern District, and that any under-representation was

inherent in the Eastern District/Glades District jury selection process used.

In United States v. Herbert, 698 F.2d 981 (9th Cir. 1983), the court considered the issue of whether the following federal statute violated the Sixth Amendment:

> [A]ll litigants in federal court entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.

28 U.S.C. 31861. The Jury Selection and Service Act, similar to the Palm Beach County jury district system, provided for splitting a district into divisions and using only one division's jury wheel for petit juries. The court found that a petit jury may be drawn constitutionally from only one division wherein the district court convenes and not from the whole district. Thus, the failure to transfer to prosecution from a division in which the defendants were tried to a division in which there was a higher percentage of native Americans did not amount to a systematic exclusion of native Americans and did not render this jury selection plan unconstitutional.

B.

PALM BEACH COUNTY'S JURY DISTRICT SYSTEM DOES NOT DENY EQUAL PROTECTION OF THE LAW

Appellant next contends that Palm Beach County's jury district system denies equal protection of the law to an accused charged with an offense in the Eastern District. In equal protection claims, the focus is on purposeful discrimination. United States v. Maskeny, 609 F.2d 183, 190 (5th Cir.) cert. denied 447 U.S. 921 (1980) In Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977), the Supreme Court outlined the method for proving an equal protection violation:

> The first step is to establish that the group is one that is a recognizable, distinct class, ... Next, the degree of under-representation must be proved, by comparing the proportion of the group group in the total population called to serve as grand jurors, over a significant period of time... Finally, ... a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing:

An accused must show that the procedure employed resulted in substantial under-representation. Castaneda, 430 U.S. at 494.

Initially, Appellee submits that Appellant has not established a substantial under-representation of blacks by use of the Palm Beach County jury district system based upon the statistical data presented. As such, Appellant has not made out a prima facie case of discriminatory purpose where

the statistics do not show a substantial under-representation for a significant period of time. See, e.g., Bryant v. State, supra.

Assuming this Court finds that Appellant has demonstrated a prima facie of case of invidious discrimination which would shift the burden of proof "to the State to rebut the presumption of unconstitutional action by showing that permissibly racially neutral selection criteria and procedures have produced the monochromatic result", Jordan v. State, 293 So.2d 131, 132 (Fla. 2nd DCA 1974) (quoting Alexander v. Louisiana, [405 U.S. 625] at 632, 92 S.Ct. at 1226 [1972]), Appellee submits that the jury district demarcation in the geographic center of the county is racially neutral. For an equal protection claim, the presumption of discrimination can be rebutted by proving an absence of discriminatory intent. Castaneda, 430 U.S. at 497-498. The obvious purpose of such an east/west demarcation is to eliminate lengthy travel for jurors. The legislative intent for Section 40.015, Fla. Stat. (1976), under which this administrative order was enacted provides that "the establishment of jury districts would relieve citizens of this inconvenience and would greatly reduce the costs of mileage expense incurred by the State and County". CH. 76-114, Laws of Florida. Certainly Administrative Order No. 1.006-1/80 is representative of planning not for yesterday or today alone, but for the inevitable style of western growth that has its origins in Dade County, through Broward

County, and which is now making its way through Palm Beach County. The present equidistent line does not exclude white jurors from the west district, nor black jurors form the east district. Appellant's equal protection claim must fail.

C.

THE PALM BEACH JURY DISTRICT SYSTEM DOES NOT CONFLICT WITH SECTION 905.01(1), FLORIDA STATUTES (1985).

Appellant contends that Administrative Order No. 1.006 - 1/80 is invalid because it conflicts with Section 905.01(1), Fla. Stat. (1985). The thrust of Appellant's argument is that Section 905.01(1) provides that the provisions governing the drawing and summary of petit jurors shall apply to grand jurors, and that therefore Appellant was entitled to trial before a petit jury summoned and called from the same geographical manner as the grand jury. Appellee maintains that this argument is without merit.

Section 40.015, Fla. Stat. (1985) clearly authorizes the creation of jury districts within a county. Therefore, since Administrative Order no. 1.006 - 1/80 is a valid enactment pursuant to §40.015, the procedure set forth under §40.015 for creation of separate jury districts within a county is not at variance with §905.01 which states that the grand and petit juries shall be drawn in the same manner. Rather, §40.015 is a statutory grant of discretion to the judiciary in those counties with populations over 50,000 to create separate juries and must

be read in pari materia with §905.01 where both statutes regulate the drawing, summoning and procurement of jurors.

> [S]tatutes which relate to the same or to a closely related subject or object are are regarded as in pari materia and should be construed together and compared with each other. Alachua County v. Powers, 1351 So.2d 32 (Fla. 1977).

Ferguson v. State, 377 So.2d 709, 710 (Fla. 1979). Appellee further submits that because §40.015 is more specific than §905.01 in its application, it is controlling in those counties with populations of 50,000 or more. See, Adams v. Culver, 111 So.2d 665 (Fla. 1959). Thus, according to these basic tenets of statutory construction, it is evident that §905.01 and §40.015, as well as Administrative Order no. 1.006 - 1/80 are compatible with each other.

D.

THE PALM BEACH COUNTY JURY DISTRICT SYSTEM IS CONSTITUTIONALLY CREATED BY GENERAL LAW AND IS NOT AN UNLAWFUL DELEGATION OF AUTHORITY.

Appellant claims that the legislature, by enacting §40.015, has created a constitutionally unlawful delegation of authority by special law. Appellant relies on Article III, §11(a)(1), (5), (6), Article I, §§16, 22, Article V, §§1,2 6(b), Florida Constitution. Initially, Appellee submits it is a well established axiom of statutory interpretation that in

construing a statute, courts must first look to the plain meaning of the statute itself. St. Petersburg Bank and Trust Company v. Hamm, 414 So.2d 107 (Fla. 1982). "[T]he legislative intent is the polestar by which the courts must be guided, and no literal interpretation should be given that lends to an unreasonable or ridiculous conclusion or purpose not designated by the legislature. State v. Miller, 468 So.2d 1051, 1053 (Fla. 4th DCA 1985). It is the Appellant's burden to show the instant statute is unconstitutional as "every presumption is indulged in favor of the validity of the legislative enactment in question." Shelton v. Reeder, 121 So.2d 145, 151 (Fla. 1960).

The gravaman of Appellant's claim is that a law affecting jurisdiction or venue of Florida courts be only by "general law", Article III, §11(a)(6); and that there shall be no special law or general law of local application pertaining to, "petit juries, including compensation of jurors, except establishment of jury commissions," Article III, §11(a)(5). Consequently, Appellant argues that §40.015 is not a general law, and is therefore in violation of these two constitutional provisions.

The legislature is fully empowered to authorize activities by judicial officers not inconsistent with the limitations imposed by the Constitution. State v. ex rel. Kennedy

v. Lee, 274 So.2d 881 (Fla. 1973). Appellee submits that §40.015 is a general law consistent with Article III, §§11(a)(5), (6), and therefore does not violate the separation of powers guaranteed by Article II, §3.

Appellee submits that §40.015 does no more than regulate the qualifications of jurors. Article I, §22 specifically provides that the qualifications and number of jurors, not fewer than six, shall be fixed by law. This provision specifically empowers the legislature to regulate the qualifications of jurors.

Moreover, contrary to Appellant's assertions, §40.015 is clearly a general law.

> A statute relating to subdivision of the state or to subjects, persons or things of a class, based upon proper distinctions and difference that inhere in or are peculiar to the class, is a general law... .
>
> A special law is a statute relating to particular persons or things or other particular subjects of a class; a local law is a statute relating to particular subdivision or portions of the state or to particular places of classified locality. Local laws... use classification schemes to restrict application to particular localities.

State v. Sanford-Orlando Kennel Club, Inc. 411 So.2d 1012, 1015-16 (Fla. 5th DCA 1982). Where there is a substantial difference in population, and the classification on a popu-

lation basis is reasonably related to the purposes to be effected... it is a general law." Budgett Commission of Pinellas County v. Blocker, 60 So.2d 193, 195 (Fla. 1952). This Court has held that a population act which affects only one county, but potentially can be applied to other counties does not violate the constitutional prohibition against the enactment of special or local law, if the population classification bears a reasonable relation to the purpose of the act. Hayek v. Lee County, 231 So.2d 214 (Fla. 1970).

For example, in Lightfoot v. State, 64 So.2d 261 (Fla. 1953), this Court held that a statute providing that, in counties having a population of 315,000 or over, the grand jury shall consist of 23 jurors, of which 15 shall constitute a quorum and concurrence of 12 of which shall be required to return an indictment, is a general law because it is based upon a reasonable population classification according to population and is not arbitrary with respect to the subject matter. Similarly, in Brooks v. Town of Orange Park, 286 So.2d 593 (Fla. 1st DCA 1973), the court addressed a claim of unconstitutionality of a statute under Article III, §11(a)(5). In Brooks, the defendant argued that a statute which authorized a municipality to provide for a trial by jury if requested or transfer the cause to a competent jurisdiction was a special law pertaining to petit juries. The Court determined the statute to be a general law applicable

to all municipalities alike.

§40.015 meets the requirements established for a general law where it has statewide application in any county having a population exceeding 50,000 and one or more locations in addition to the county seat at which the county or circuit court sits and hold jury trials. Since the purpose of §40.015 is to relieve the inconvenience of persons travelling a great distance for jury duty in large counties, the population threshold of 50,000 is rational. As such, §40.015 does not contravene the proscription against special laws.

Appellant next contends that §40.015 violates Article V, § 6(b), Florida Constitution, which mandates that the county courts shall exercise the jurisdiction prescribed by general law, and that "such jurisdiction shall be uniform throughout the state". Appellant argues that §40.015 and the local administrative order enacted pursuant to it, violate the requirement that county court jurisdiction shall be uniform throughout the state. Appellee maintains that §40.015 does not violate Article V, §6(b) in that it deals with the subject matter jurisdiction, rather than geographical jurisdiction, of the county courts. Nor does Article V, §6(b) address jury districts. In the provisions dealing with the jurisdiction of the Florida Supreme Court, District Courts of Appeal, and

circuit courts, the Constitution enumerates the subject matter jurisdiction of each level of courts. Therefore, although Section 6(b) does not enumerate the specific jurisdictions of the county court, it can be assumed, on the basis of the other jurisdictional provisions, that Section 6(b) governs the subject matter jurisdiction rather than the geographical jurisdiction of the county court. Where §40.015 does not affect the subject matter jurisdiction of the county courts, it does not violate Article V, §6(b).

§40.015 is not unconstitutional under Article V, §7 which provides the legislature "may establish not more than twenty (20) judicial circuits, each composed of a county or contiguous counties and of not less than fifty thousand (50,000) inhabitants.... ." The system of jury districts authorized under §40.015 does not interfere with the existing judicial circuits, or their borders, but merely allows for the creation of jury districts within existing judicial circuits.

Appellant further argues that the statute and administrative order that authorized the jury districts in Palm Beach County are unconstitutional because they violate his right to a jury drawn from the entire county, a proposition Appellant contends is supported by Article I, §§16, 22, Florida Constitution.

Article I, §16 provides, however, that "in all criminal prosecutions, the accused shall have the right to a speedy and public trial by impartial jury in the county where the crime was committed". This section does not confer upon an accused the right to have a trial before a jury drawn from the "whole county", but rather provides that venue for the trial shall be in the county where the crime was committed. Appellant received a trial in Palm Beach County for a crime committed in Palm Beach County, and no violation has been shown.

As previously noted, Article I, §22 provides that the qualifications and the number of jurors "shall be fixed by law". Section 40.01, Fla. Stat. (1985) sets the qualifications of jurors. Section 40.013, Fla. Stat. (1985) sets forth the manner in which persons may be disqualified or excused from jury service. Neither of these statutory provisions concerning juror qualifications prescribes geographical qualifications, other than requiring that a juror must be a citizen of the State of Florida, and a registered voter in their respective county. Thus, Appellee maintains that §40.015, like §40.01 and 40.013, constitutes legislation authorized by this constitutional provision.

Significantly, Appellant's entire argument presupposes that the entire county is the "community" for purposes

of a fair cross section of the community requirement. However, Appellant has failed to advance any rationale as to why the entire county must serve as the community for jury selection purposes. Appellant's reliance on Jordan v. State, 293 So.2d 131 (Fla. 2nd DCA 1974) is misplaced. Jordan is distinguishable because the county was the political unit from which a jury was drawn. Id., at 134. The court held that where a county is the political unit from which a jury is to be drawn, the right to an impartial jury drawn from a fair cross section of the community requires that the jury be drawn from the whole county and not from political suburbs thereof to the exclusion of others. In Palm Beach County, the "community" from which the jurors are to be drawn are the two districts, and the right to an impartial jury only demands that the jury be representative of a fair cross section of the district in which a case is tried. Appellant's request for trial in the Glades District was properly denied.

POINT II

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN EXCLUDING JURORS, AND HIS EXCUSALS DID NOT CONSTITUTE A SYSTEMATIC EXCLUSION OF BLACK JURORS.

Appellant first challenges the excusal for cause of Ms. Razz, a potential juror, alleging that the court's decision was arbitrary and capricious. Appellee maintains that no abuse of discretion can arguably be found.

In the instant case, during voir dire, the prosecutor asked the potential jurors if there was anybody who had a medical problem that would cause him difficulties. (R 462). In response to this question, potential juror Razz indicated she had suffered a heart attack. (R 462). Ms. Razz indicated that she wore a pacemaker, and that she was "on doctor's orders", apparantly referring to being under a doctor's care. Ms. Razz stated that she didn't tell her doctor that she had jury duty but she thought she was strong enough. (R 462). Ms. Razz stated she had to see her doctor periodically. (R 462). Later, during Vernon Amos' vior dire, and upon being asked how she was doing that day, she replied, "Pretty good. Not too good". (R 703). She said her pacemaker wasn't bothering her right now but she didn't know how it would act later. (R 703) The State challenged Ms. Razz for cause

because of her heart condition and argued that due to the length and stress of this trial, she would not be an appropriate juror. (R 749). Both Leonard Spencer and Vernon Amos objected, pointing out that she was a black juror. (R 749-750). The trial court didn't construe Ms. Razz's answers to be affirmative indication that she was feeling well. Rather, the court stated that he took her response as a negative response. (R 750). The court disagreed with Appellant's interpretation that she hadn't said she had any problems serving on this jury. (R 751). As the trial court observed, Ms. Razz was a juror with a heart problem who would be put through a three to five week trial, perhaps even sequestered at the end. (R 751). The trial judge found:

> I'm going to grant the challenge for cause because I believe that Ms. Razz, sitting there with a pacemaker, and having observed her with regard to these matters, I am concerned about putting anybody through these matters under that set of facts. (R 753).

The court observed that her pacemaker was monitored by being tied into a telephone and that there was no reason to put someone like this through an ordeal. (R 756).

It is well established that the competency of a challenged juror is a mixed question of law and fact and is to be determined by the trial judge in his discretion, and

manifest error must be demonstrated before the judge's decision will be disturbed. Christopher v. State, 407 So. 2d 198 (Fla. 1981). See also, Fla. R. Crim. P. 3.300(c). Although Appellant argues the trial court's excusal of Ms. Razz interfered with his right to have a jury selection that does not discriminate against any particular class of people, Appellee would point out that there is not one scintilla of evidence that the decision to remove Ms. Razz was racially motiviated. Nor does the record aupport Appellant's proposition that the trial judge discriminated against persons who wore pacemakers. Appellee submits that pacemaker wearers hardly represent a distinctive or cognizable class such that equal protection or a fair cross section of the community requirement of the Sixth Amendment applies. See, Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); Castaneda v. Partida, 430 U.S 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). Finally, Appellee maintains that the record belies any other classification of the trial judge's conduct besides one of conern for this juror's health and her ability to sit through a trial of this magnitude. Under these facts, it cannot be said that the trial judge abused his discretion.

Appellant next contends that the trial judge's actions in excusing jurors who did not follow his instructions

during voir dire were arbitrary and capricious when compared with his actions post-selection, after the jurors had been sworn, in not excusing jurors who failed to obey these same instructions. Appellant again argues he was unable to obtain a jury selection process that drew on a fair cross section of the community where two of the jurors excused by the trial judge during vior dire were black. Appellee maintains that Appellant's argument is without merit where the trial judge excused caucasians as well as blacks during this pre-selection phase, and where Appellant has not shown these excusals were racially motivated. Moreover, Appellee maintains that the judge's actions were not arbitrary where the trial judge treated all jurors alike before they were sworn, by excusing them; and treated all jurors alike after they were sworn at a different stage of the proceedings, by not excusing any of them.

The record reflects that, during a recess, the jury was instructed to return to the jury assembly room and to take their recess on any floor other than the fourth floor. (R 748). After this recess, the judge advised the parties that the bailiff had seen three members of the panel during the recess on the fourth floor. (R 776). Ms. Razz, a black juror, was one of these jurors. (R 776) Ms. Pearson, another black juror, and Mr. Kilbare, a white juror, had also come

come upstairs early. (R 776-778). The court excused all three jurors, explaining that it was extremely critical that the jurors agree to abide by instructions on the law. As the trial court indicated, if the potential jurors couldn't follow his instructions before the case began, the court could not anticipate that they could follow his instructions in this case. (R 779). The next morning before court started, counsel for Appellant Spencer indicated he had arrived early and observed two persons from the venire "sitting" in the courtroom, wondering if that was where they were supposed to be. (R 1374). The judge was also advised that some other jurors were found on the fourth floor. (R 1375). The court stated he intended to follow the same plan. (R 1375). When the prospective jurors returned, the court excused the two persons who had been in the courtroom plus the two others who had been outside the courtroom on the fourth floor. (R 1388-1390). The court stated his reason for doing this was that it was very important for jurors to follow the court's instructions. (R 1390-91).

Appellee submits that the trial judge did not abuse his discretion in excusing this total of seven jurors, which included two black jurors, where they demonstrated they could not follow the law. Moreover, in reality, only one black juror was excused under this policy, as the trial court had

previously granted a challenge for cause to excuse Ms. Razz, due to her health problems. The conduct of the jurors is the responsibility of the court and the court is allowed discretion in dealing with any problems that arise. Orosz v. State, 389 So.2d 1199 (Fla. 1st DCA 1980). Thus, for example, in Orosz, the appellate court found that the judge's dismissal of a sworn juror, who had been observed sleeping, without the express consent of the defendant, was not an abuse of discretion.

The jury system is based upon the assumption that jurors will endeavor to follow the court's instructions. McGee v. State, 304 So.2d 142 (Fla. 2nd DCA 1974). Appellant has not demonstrated that any systematic exclusion of blacks existed, as both white an black jurors alike were excused for this reason. Thus, Appellant has not shown an abuse of discretion by the trial judge. Moreover, Appellant has wholly failed to show any prejudice resulting from the exclusion of these potential jurors.

Finally, as to the sworn jurors who were not excused, the trial judge's actions were not arbitrary, as he was clearly of the opinion that his instructions, last given the previous Wednesday and Friday, were somewhat confusing and not fresh in the jurors minds. (R 1489, 1491) The court indicated that the jury assembly room had tried to reach the court but that the

jurors did what they thought the judge had said. (R 1489). Although these jurors were not admonished, the Appellant did not request an admonishment nor did he object to this procedure. (R 1491).

Dealing with the conduct of jurors is left to the sound discretion of the trial judge. Doyle v. State, 460 So. 2d 353 (Fla. 1984). There is absolutely no showing that these jurors who returned to court early were exposed to any outside influence by virtue of returning early. The judge's treatment of these sworn jurors does not appear arbitrary or inconsistent with his earlier conduct, as he believed his instructions to these particular jurors were confusing. Appellant has not pointed to any prejudice flowing from the lack of exclusion of these jurors. Certainly, there has been no argument made that these jurors didn't follow the law given at the conclusion of the case.

Appellant has not shown a systematic exclusion of blacks by the trial judge, and both white and black jurors were treated alike. Moreover, as Appellant acknowledges, the jury which ultimately tried him consisted of three black jurors. (AB 48).

POINT III

APPELLANT'S RIGHT TO CONFRONTATION WAS NOT DENIED BY ADMISSION INTO EVIDENCE OF THE NON-HEARSAY TESTIMONY OF DETECTIVE OETINGER AS TO EXTRA-JUDICIAL IDENTIFICATION MADE BY WITNESSES.

Appellant argues that his right of confrontation was denied by the admission into evidence of the testimony of Detective Oetinger that three witnesses identified Appellant from a photographic line-up. Appellant also argues that this evidence was inadmissible hearsay under Section 90.801 (2)(c), Fla. Stat. (1985). Appellee maintains that this argument is without merit where the statements were not hearsay as the witnesses testified at trial and were available for cross-examination, as to the strength of their identifications, although Appellant chose to conduct only a brief cross-examination on the issue of identity.

Appellant argues that the testimony of Detective Oetinger that three witnesses identified Appellant was hearsay. Detective Oetinger testified at trial that Exhibit 45, a photo line-up containing Appellant's photo, was shown to Mark Nordman, Allen Sedenka, and Terry Howard. (R 3381). Oetinger testified that Exhibit 45 was shown to Terry Howard on June 13 and that Howard selected two photographs he thought looked similar

to the tall male perpetrator, one photograph of which was that of Appellant. (R 3394). Oetinger testified that Exhibit 45 was shown to Mark Nordman on June 13 and that Nordman made a careful study of the photographs and selected Appellant's photo as being one of the two persons involved in the crimes at the English Pub. (R 3395-97). Nordman signed and dated this photo. (R 3390). Oetinger testified that Exhibit 45 was also shown to Allen Sedenka on June 13. (R 3398). Oetinger testified that within a few seconds, Sedenka immediately picked out Appellant Spencer. (R 3399). Sedenka signed and dated the back of this photo. (R 3399). Oetinger identified Appellant Spencer in court as the person whom Nordman and Sedenka selected. (R 3400).

Section 90.801(2)(c), Fla. Stat. (1985) provides in relevant part:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (c) One of identification of a person made after perceiving him.

Appellee submits that Oetinger's testimony as to identifications made by Nordman and Sedenka was admissible where both Nordman and Sedenka testified at trial and were subject to cross-examination concerning the statements. Appellee maintains that the testimony of Oetinger as to Howard's identification

of Appellant, where although Howard testified at trial he did not testify as to an identification of Appellant Spencer, was harmless.

Contrary to Appellant's assertions that none of these three identification witnesses were ever asked on direct examination as to identification of Appellant, the record reveals otherwise. Mark Nordman testified that he was able to describe what the black males looked like to the police. (R 2091). Nordman testified that the photos of the two suspects were displayed to him in a group of nine photographs when he went down to the sheriff's office. (R 136). Nordman testified that the officers asked him to select the two black males that he had observed. (R 2136). Nordman testified that he made a positive identification. (R 2136). Similarly, Allen Sedenka testified on direct exam that he was able to make a photographic identification of both suspects that robbed him and that he was positive of his identification. (R 2240). Sedenka testified that he was shown photographs between 11:30 a.m. and 12:00 p.m. and that he was able to pick out the tall male. (R 2247).

Thus, as to these two witnesses, Nordman and Sedenka, it is clear that they testified at trial and that an opportunity to cross-examine them concerning their statements existed, had Appellant chose to exercise this opportunity

to its fullest extent. Appellant did cross-examine Nordman as to when he made this identification. (R 2144). Appellant also challenged Nordman's observations of the black males racing up and down Military Trail. (R 2145). Appellant clearly had the opportunity to cross-examine the witness on his identification, his ability to observe, and his level of certainty. Appellant, however, chose not to ask questions such as to clothing worn or physical characterists, although this would have related to identity. As to Allen Sedenka, Appellant Spencer did in fact exercise his opportunity to cross-examine Sedenka concerning his identification. (R 2247). Appellant inquired as to how many times Sedenka had been shown photographs and as to when Sedenka made the identification. (R 2246-47). Appellant engaged in only a brief cross-examination as to identity although greater opportunity existed. The opportunity to challenge this witness' ability to observe presented itself, although Appellant chose not to avail himself of it.

Detective Oetinger's testimony as to the extra-judicial identifications by Nordman and Sedenka was admissible under this Court's decision in State v. Freber, 366 So.2d 426 (Fla. 1978). The issue in Freber was whether evidence of a prior out-of-court identification is admissible when the witness is unable to identify that defendant at trial. Mrs.

Hayes, the identification witness, testified that on the morning of the burglary she observed the defendant in her bathroom. Mrs. Hayes testified that later on in the morning of the burglary the deputies brought a suspect to her home. She testified that she identified the suspect as the burgler at that time and that she had been positive. However, when asked to identify the burglar in court, she was uncertain. The State then called the two deputies to testify that the defendant was the man whom they had brought to the victim's home and that Mrs. Hayes had identified the defendant as the burglar. This Court rejected a hearsay argument similar to that sub judice, that the deputies could not testify to Mrs. Hayes' identification:

> We hold that if the original identifying witness testifies at trial concerning a prior identification, the testimony of a witness who observed the identification is admissible as substantive evidence of identity.

State v. Freber, 366 So.2d at 427. Later, in Downer v. State, 374 So.2d 840 (Fla. 1979), this Court reaffirmed Freber, supra, and held that an extra judicial identification made by a witness, who was unable to make an in court identification, was admissible despite its hearsay characteristics, provided that the identification witness is present at trial and available

for cross-examination. Downer, 366 So.2d at 426. See also, A.T. v. State, 448 So.2d 613 (Fla. 3rd DCA 1974) (police officer's testimony concerning extra-judicial identification of juvenile by victim admissible although victim had neither the past nor present ability to identify defendant at trial).

Thus, it is clear that section 90.801(2)(c) is applicable regardless of whether the declarant is able to identify the defendant in court or whether the witness admits or denies or fails to recall making the prior identification. Brown v. State, 413 So.2d 414 (Fla. 5th DCA 1982).

Cases construing Fed. R. Evid. 801 (d)(i)(c) provide guidance on this issue as Fed. R. Evid. 801(d)(i)(c) is similar to §90.801(2)(c). United States v. Cueto, 611 F.2d 1056 (5th Cir. 1980) is indistinguishable from the case at bar. In Cueto, each of the identification witnesses testified at trial that he had made a photo identification, but none of the witnesses indicated who the photo depicted. The government attempted to link one witness' statement to the defendant by presenting the testimony of an FBI agent who had shown the photos to the witness. The agent testified that the witness correctly identified the person in the photo as the defendant. The government did not present any testimony about who appeared in the photos that the other two witnesses identified. The Fifth Circuit concluded that the agent's testimony that the defendant

was the person portrayed in the photo that the witness identified did not constitute hearsay.

Thus, Appellee maintains that Oetinger's testimony that Sedenka and Nordman identified Appellant from a photo lineup was not hearsay, and did not deprive Appellant of his Sixth Amendment right to cross-examine the witnesses on identity where ample opportunity existed to do so.

As to Oetinger's testimony that Terry Howard was shown Exhibit 45 and was only able to select two photographs that resembled the Mr. Grocer suspect, one of which was that of the Appellant, Appellee notes that Howard was not questioned on direct exam as to his ability to make an identification of the tall male. However, Appellee submits that any error by admitting into evidence Oetinger's testimony as to Howard's identification was harmless in light of the ambiguous nature of Howard's identification and other evidence of Appellant's positive identification at Mr. Grocer. Certainly, Howard's identification was not positive, as he could only decide on two photographs which resembled the tall male. This "identification" was hardly conclusive as to Appellant and clearly not prejudicial. More significantly, however, was that Appellant's identification at the scene of Mr. Grocer was established by other competent evidence. See, e.g., Melton v. State, 404 So.2d 798 (Fla. 3rd DCA 1981) (statement attributed to

deceased placing defendant at scene of crime was inadmissible hearsay but error harmless where presence at scene established by other evidence). Howard testified that the tall male brought a Mountain Dew soda to the counter and set it down. (R 1852). Sgt. Richter examined this soda can for latent prints and testified that the left finger and left thumb prints of Appellant Spencer were found on the can. (R 2539). Thus, any error in Oetinger's testimony as to Howard's uncertain identification was harmless.

Appellant contends that the admission of Appellant's photo line-up, Exhibit 45, into evidence during Detective Oetinger's testimony denied him of his sixth amendment right of confrontation. Appellee would point out that Appellant never objected to the non-introduction of the photo pak during the testimony of identification witnesses Nordman and Sedenka. Indeed, the first time the issue was raised was later during Appellant's motion in limine to preclude police officer's testimony as to the identification of his client by these witnesses. (R 2293-94, 2296-97). As such, Appellant's objection was untimely. See, e.g., G.E.G. v. State, 417 So.2d 975 (Fla. 1982) (defendant who fails to object to non-introduction of evidence may not be heard to complain of error on appeal). Indeed, the State had no objection to Appellant being allowed to recall the identification witnesses for further cross-examination if he wished, but Appellant specifically stated he did not want

the opportunity to recall the witnesses for further cross-examination. (R 2340, 2344). Where counsel fails to take advantage of the opportunity to cure error, such error will be deemed to be invited and will not warrant reversal. Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied 428 U.S. 911.

Moreover, Appellee submits that the confrontation clause of the Sixth Amendment by its terms restricted to witnesses and does not encompass physical evidence as well. Strahorn v. State, 436 So.2d 447 (Fla. 2nd DCA 1986). See also, State v. T.L.W., 457 So.2d 566 (Fla. 2nd DCA 1984) (in accord); Harrison v. State, 403 So.2d 565 (Fla. 3rd DCA 1981); (in accord); State v. Armstrong, 363 So.2d 38 (Fla. 2nd DCA 1986) (in accord). The photo pak was properly admitted through the testimony of Oetinger, who provided the authentication for the exhibit, and whose testimony made it a relevant exhibit. (R 3380-3390).

Appellant's convictions must be affirmed.

POINT IV

THERE EXISTED SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS ON THE ISSUE OF IDENTITY.

When it is shown that the jurors have performed their duty faithfully and honestly and have reached a reasonable conclusion, more than a mere difference of opinion as to what the evidence shows is required for this Court to reverse. Hitchcock v. State, 413 So.2d 741 (Fla. 1982). On appeal from conviction, this Court will review the record for the purpose of determining whether it contains substantial, competent evidence, which, if believed, will support the finding of guilt by the trier of fact; the weight of the evidence is ordinarily a matter which falls within the exclusive province of the jury to decide, and this Court will not reverse a judgment based upon a jury verdict when there is competent evidence which is also substantial in nature to support the jury's verdict. Rose v. State, 452 So. 2d 521 (Fla. 1982), cert. denied 103 S.Ct. 1883; Welty v. State, 402 So.2d 1159 (Fla. 1981).

Appellant moved for a judgment of acquittal arguing that the police officer's testimony as to identifications of Appellant made by witnesses was insufficient. (R 3523-29).

Initially, Appellee would point out that of the 13 count Indictment (R 5217-21), Counts V and X, grand theft, were nolle prossed. (R 385). Counts VI and VII, possession of a firearm by a convicted felon, were severed from this trial. (R 95-96). Thus, it was stipulated that the counts charged in the Indictment would be renumbered. (R 387-90, 4026-27). Appellant was found guilty, as renumbered, of Count I, first degree murder of Allen McAnich; Count II, robbery with a firearm of Allen McAnich; Count III, attempted first degree murder with a firearm of Terry Howard; Count IV, robbery with a firearm of Terry Howard; Count V, first degree murder of Robert Bragman; Count VI, Robbery with a firearm of Robert Bragman; Count VIII, Aggravated assault of Allen Sedenka; and Count IX, robbery with a firearm of Allen Sedenka. (R 5530).

As to Counts I - IV, which occurred at the Mr. Grocer location, Appellee maintains that this Court need not reach the issue of whether Detective Oetinger's testimony that Terry Howard made an identification of Appellant is sufficient to support these convictions, where there is other competent evidence of identification to support these convictions, consisting of Appellant's fingerprints found on the can of Mountain Dew that he set on the counter. (R 2536-39)

Howard testified that the taller male walked over

and got a soda out of the cooler in the back (R 1851-52); although the single sodas are kept in front. (R 1958) Howard testified that the tall male brought the soda to the counter and set it down next to the pack of cigarettes which the short male had requested. (R 1852, 1850-51). When the police arrived, Howard informed them that the tall male had set the Mountain Dew can on the counter. (R 1870). Det. Poje testified that when he arrived, this soda can was cold and the outside has started to sweat as if it was just taken out of a cooler. (R 2389). Sgt. Richter processed the soda can for prints and obtained two latent prints from the can (R 2450-2455). Richter identified those prints as belonging to Appellant. (R 2539). Thus, the evidence shows that these fingerprints could have only been made at the time of the crime, where Howard observed the tall man pick the can up, leave the fingerprints, and set it down; and where the only two prints found on the can were identified as belonging to Appellant. Thus, Appellee submits there is sufficient evidence of identification as to Counts I - IV, where Oetinger testified that Howard selected two photographs, one of which was that of Appellant, and where Appellant's prints were found on the soda can.

As to Counts V - IX, Appellee maintains that Oetinger's testimony that Mark Nordman and Allen Sedenka positively identified Appellant from a photo line-up shortly after the commission

of the crimes (R 3394-97, 3398-3400) constitutes sufficient evidence of identity.

"[U]nder the new "Evidence Code" it apparantly makes no difference whether the witness admits or denies or fails to recall making the prior identification", for the prior identification to be considered as substantive evidence. Brown v. State, 413 So.2d 414, 415 (Fla. 5th DCA 1982). This evidence is not hearsay and can be considered as substantive evidence even though the identification was made from a photo pak and not "real life," United States v. Cueto, 611 F.2d 1056 (5th Cir. 1980); United States v. Sisto, 329 F.2d 929 (2nd Cir.), cert. denied 377 U.S. 979 (1964).

Appellee maintains that a witness' testimony that a prior extra-judicial identification of a defendant was made is sufficient evidence of identification to support a conviction. Although Appellant contends that Brown v. State did not pass on the sufficiency of such testimony to sustain a conviction, Appellee points out that Appellant has overlooked that in Brown, the only competent evidence of the defendant's identity, after the involuntary confession was excluded, was the prior identification by the witness of the defendant. Thus, although the court reversed the conviction finding it error to admit the confession, the court stated, "[b]ecause there was other sufficient evidence to sustain Brown's conviction", it was remanding the

case for a new trial. Brown v. State, 413 So.2d at 416. Appellant appears to argue that because there was other corroborating evidence tending to show the truthfulness of the original statements of the witness in Brown, that the evidence was sufficient to support a conviction. However, Appellee would point out that in Brown, the victim recanted the prior identification, such that the court properly looked for other indicia of reliability. Thus, Brown stands for the proposition that evidence of an extra-judicial identification is sufficient, even though it has been later recanted, if there were other circumstances tending to show the truthfulness of the prior identification. Appellee submits that the instant case presents an even more compelling facts on which to find that Oetinger's testimony on identification is sufficient, as none of the witnesses at bar recanted this identification. Thus, Oetinger's testimony is reliable and no concerns exist as to the truth of the prior identifications.

State v. Freber, supra, also supports Appellee's position that a witness' testimony as to extra-judicial identifications made by a victim are sufficient to support a conviction. In Freber, the only evidence as to identity of the defendant was the testimony of the victim that she had identified the suspect that the deputies brought to her home after commission of the offense, and the testimony of two deputies that the victim identified the defendant as the perpetrator. Significantly,

at trial, the victim could only testify that the defendant resembled that perpetrator. Yet on these facts, it is significant to note that this Court did not find the evidence to be insufficient. This court found solid rationale on which to overrule Willis v. State, 208 So.2d 458 (Fla. 1968) (limiting this type of evidence to merely serving a corroborating function), in favor of the policy of allowing this evidence in as substantive evidence of identity:

> In our view, an identification made shortley after the crime is inherently more reliable than a later identification in court. The fact that the witness could identify the respondent when the incident was still so fresh in her mind is of obvious probative value.

State v. Freber, 366 So.2d at 428. The policy interests highlighted in this Court's opinion in Freber, which allow the evidence in as substantive evidence, also favor a finding that this evidence is sufficient to support a conviction. First, as previously noted, the need for corroborating evidence of identity was rejected in favor of allowing this evidence in as substantive evidence. Second, society's interests would be best served in allowing this evidence to be found legally sufficient. There are many typical situations where a witness' memory no longer permits a correct identification and he can only testify as to having made a previous identification.

Additionally, there may be instances where before trial the witness identifies a suspect and because of fear refuses to acknowledge his previous identification. Without a finding that non-hearsay testimony under §90.801(2)(c) is sufficient evidence of identification, convictions in the situations illustrated above would be impossible to obtain.

Appellant's reliance on State v. Moore, 485 So.2d 1279 (Fla. 1986) is misplaced. Moore holds that prior inconsistent statements of identity, standing alone, do not constitute sufficient evidence to sustain a conviction. It should be noted that in Moore, supra, the identification testimony was admittedly perjured. This Court approved the district court's decision, Moore v. State, 473 So.2d 686, 687 (Fla. 4th DCA 1984), which required corroborating evidence of identification where a witness recants the prior identification. Similarly, in Brown v. State, supra, the court looked for corroborating circumstances of truthfulness in the recanted identification. Moore, supra, is entirely distinguishable from the instant case, as it construes a different Section, section 90.801(2)(a), Fla. Stat. (1983), involving prior inconsistent statements. Notably absent in the instant case is a witness' recantation of his identification, and the reliability problems associated with such a recantation. Appellee requests this Court to reject Appellant's attempt to once again relegate

identification evidence admitted under §90.802(2)(c) to serving a merely corroborating function, and find that the evidence of identification, including Nordman's and Sedenka's testimony that they were positive in their photo identification (R 2097, 2136, 2240, 2247) to be sufficient.

POINT V

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S CHALLENGES TO THE CONSTITUTIONALITY OF FLORIDA'S CAPITAL PUNISHMENT LAWS AND HIS CHALLENGE TO THE IMPOSITION OF THE DEATH PENALTY FOR CRIMES COMMITTED BY BLACKS AGAINST NON-BLACKS.

In this issue Appellant challenges the constitutionality of the Florida capital punishment statutes, §§ 921.141, 922.10, and 781.04, Fla. Stats. Binding precedent compels rejection of the four grounds enumerated by Appellant.

A. Death Electrocution does not constitute cruel and unusual punishment.

Appellant contends that § 922.10 Fla. Stat. is unconstitutional in that death by electrocution constitutes cruel and unusual punishment. This argument was rejected by this Court in Booker v. State, 397 So.2d 910, 918 (Fla.), cert. denied, 454 U.S. 957 (1981), where it was held that death by electrocution does not constitute cruel and unusual punishment citing Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

B. The mitigating factors listed in §921.141 Fla. Stat. are not too vague nor restrictive.

Appellant's claim that the statutory mitigating factors are too vague and that insufficient emphasis is given to non-

statutory factors is without merit. In Proffitt v. Florida, 428 U.S. 242, 257-258 (1976), the United States Supreme Court held the mitigating factors are not too vague and they are adequate to channel sentencing discretion. In Peek v. State, 395 So.2d 492, 497 (Fla. 1980), this Court stated:

> While we do not contend that the statutory mitigating circumstances encompass every element of a defendant's character or culpability, we do maintain that the factors, when coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his or her entitlement to a sentence less than death.

Therefore, the Appellant's contentions are foreclosed by the Proffitt and Peek decisions.

C. The use of the aggravating factor under §921.141(5)(d) passes constitutional muster.

Appellant argues that use of the felonies listed in the statutory aggravating factor under § 921.141(5)(d) fails to "genuinely narrow the class of persons eligible for the death penalty." This argument was recently rejected by the United States Supreme Court in Lowenfield v. Phelps, ___ U.S. ___, 42 Cr.L.3029, 3032-3033 (Decided January 13, 1988). The Louisiana Statute challenged in Lowenfield is very similar to the Florida Statute. The Court in rejecting the argument stated:

> [T]he fact that the aggravating circumstances duplicated one of the elements of the crime does not make the sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing

> phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

Id., 42 Cr.L. at 3033. Thus, this argument is without merit.

D. Section 921.141 Fla. Stat. is constitutional on its face and as applied in Florida.

The constitutionality of § 921.141 was confirmed by the United States Supreme Court in Proffit v. Florida, supra. Further, Appellant's discrimination claim has been rejected numerous times by this Court. And this Court's view was recently confirmed by the United States Court's decision in McCleskey v. Kemp, ___ U.S. ___, 95, L.Ed.2d 262 (1987).

Appellant contends that his sentences of death violate the equal protection clause of the Fourteenth Amendment alleging that persons who murder white victims are more likely to be sentenced to death than persons who murder black victims, and that black murderers are more likely to be sentenced to death than white murders. Appellant further contends that such a sentence is arbitrary and capricious in violation of the Eighth Amendment. Appellant offered no evidence that the trial judge in his case acted with a discriminatory purpose nor did he offer specific evidence that would support an inference that racial considerations played a part in his own sentence. The United States Supreme Court has expressly rejected this claim under a Fourteenth Amendment and Eighth Amendment analysis in McCleskey v. Kemp, 481 U.S. ___, 95 L.Ed.2d 262, 107 S.Ct. ___ (1987).

Thus, Appellant's claim must fail. See, McCrae v. State, 12 F.LW. 310 (Fla. June 18, 1987); Roberts v. State, 12 F.L.W. 325 (Fla. July 2, 1987); Thomas v. State, 421 So.2d 160 (Fla. 1982).

POINT VI

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTIONS REGARDING DEATH QUALIFIED JURORS AND BIFURCATED JURY.

The question left open by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 368 (1968), and raised in Appellant's brief was answered, and Appellant's arguments rejected by the Supreme Court in Lockhart v. McCree, 476 U.S. ___, 90 L.Ed.2d 137 (1986), where it was held that the Constitution does not prohibit the states from 'death qualifying' juries in capital cases." Id., 90 L.Ed.2d at 147. The court explained:

> [G]roups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the "Witherspoon-excludables" at issue here, are not "distinctive groups" for fair cross-section purposes.
>
> "Death qualification," unlike the wholesale exclusion of blacks, women, or Mexican-Americans from jury service, is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial...
>
> Furthermore, unlike blacks, women, and Mexican-Americans, "Witherspoon-excludables" are singled out for exclusion in capital cases on the basis of an attribute that is within the individuals control. It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as

> they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Because the group of "Witherspoon-excludables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, "death qualification hardly can be said to create an appearance of unfairness."
>
> * * * * *
>
> In sum, "Witherspoon-excludables," or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair cross-section requirement...It is for this reason that we conclude that "Witherspoon-excludables" do not constitute a 'distinctive group" for fair cross-section purposes, and hold that "death qualification" does not violate the fair cross-section requirement. [Footnotes omitted.].

Id., 90 L.Ed.2d at 147-150. With reference to the use of a unitary jury, the Court stated:

> [T]he removal for cause of "Witherspoon-excludables" serves the State's entirely proper interest in obtaining a single jury that could impartially decide all of the issues in McCree's case ... We have upheld against constitutional attack the Georgia capital sentencing plan which provided that the same jury must sit in both phases of a bifurcated capital murder trial, Gregg v. Georgia, 428 US 153, 158, 160, 163, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), and since then have observed that we are "unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." Spaziano v. Florida, 468 U.S. 447, 464, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984).

> [I]n most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase; if two different juries were to be required, such testimony would have to be presented twice, once to each jury ...
>
> Unlike the Illinois system criticized by the Court in Witherspoon, and the Texas system at issue in Adams, the Arkansas system excludes from the jury only those who may properly be excluded from the penalty phase of the deliberations under Witherspoon, supra; Adams, supra; and Wainwright v. Witt, 469 U.S ___, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985). That State's reasons for adhering to its preference for a single jury to decide both the guilt and penalty phases of a capital trial are sufficient to negate the inference which the Court drew in Witherspoon concerning the lack of any neutral justification for the Illinois rule on jury challenges.

Id. 90 L.Ed.2d at 152-153. The Lockhart opinion reversed the Eighth Circuit's decision in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985).

This Court has repeatedly rejected Appellant's argument on the authority of Lockhart. See, Dougan v. State, 470 So.2d 697 (Fla. 1985), cert. denied, ___ U.S. ___, 89 L.Ed.2d 900 (1986); Lambrix v. State, 494 So.2d 1143 (Fla. 1986); Wasko v. State, 505 So.2d 1314, 1317 (Fla. 1987); Diaz v. State, 513 So.2d 1045 (Fla. 1987); Masterson v. State, 12 F.L.W. 603 (Fla. Dec. 10, 1987). This claim is, thus, without merit.

POINT VII

THE TRIAL COURT DID NOT ERR IN ACCEPTING THE JURY'S RECOMMENDATION AND IMPOSING A SENTENCE OF DEATH.

The primary standard for this Court's review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appears strong reason to believe that reasonable persons could not agree with the recommendation. Tedder v. State, 322 So.2d 908 (Fla. 1975). The standard is the same regarding whether the jury recommends life or death. LeDuc v. State, 365 So.2d 149 (Fla. 1978).

In the instant case the jury recommended by a 9 to 3 vote that Appellant be sentenced to death on Count I for the murder of Allen McAnich; and by a 7 to 5 vote that Appellant be sentenced to death on Count V for the murder of Robert Bragman. (R 4902-03). The trial court, after finding five (5) aggravating circumstances to be applicable and zero (0) mitigating circumstances, accepted the jury's recommendation and sentenced Appellant to death on Count I. (R 5618-22). Similarly, as to Count V, the trial court accepted the jury's recommendation and sentenced him to death after finding four (4) aggravating circumstances to be applicable and zero (0) miti-

gating circumstances. (R 5623-27).

Appellee would initially point out that there are two aggravating circumstances found by the court in each murder conviction, which are clearly valid and unchallenged by Appellant - that the defendant was previously convicted of a felony involving the use or threat of violence to the person (R 5618-19, 5623); and that the crime for which the defendant is to be sentenced was committed while he was engaged in or an accomplice in the commission of or an attempt to commit or inflight after committing or attempting to commit the crime of robbery. (R 5618-19, 5623-24).

Advancing to Appellant's argument that the trial court erred in improperly doubling the aggravating factors that the crime for which the defendant is to be sentenced was committed while he was engaged in a robbery and that the crime for which the defendant is to be sentenced was committed for financial gain under Count I, Appellee maintains that the trial court correctly found both factors to exist beyond a reasonable doubt where each factor was based on different facts. In Oats v. State, 446 So.2d 90, 95 (Fla. 1984), this court held, "These two circumstances must be considered cummulative and may not be considered individually when the only evidence that the crime was committed for pecuniary gain was the same evidence of the robbery underlying the capital crime". See also,

Maxwell v. State, 433 So.2d 967 (Fla. 1983); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Palmes v. State, 397 So. 2d 648 (Fla. 1981), cert. denied 102 S.Ct. 369; Perry v. State, 395 So.2d 170 (Fla. 1980).

The trial court's sentencing order under Count I reveals these two aggravating factors to be based on different facts:

> B. The crime for which the Defendant is to be sentenced was committed while he was engaged in or an accomplice in the commission of or an attempt to commit or in flight after committing or attempting to commit the crime of robbery.
>
> The facts of the case leave no reasonable doubt that LEONARD SPENCER along with VERNON AMOS was engaged in the commission of the robbery at the "Mr. Grocer Convenience Store" at the time proprietor ALLEN McANICH was shot to death. (R 5616).
>
> * * * *
>
> D. The crime for which the Defendant is to be sentenced was committed for financial gain.
>
> The efforts to open the cash register and the taking of TERRY HOWARD'S wallet leave no doubt that LEONARD SPENCER and VERNON AMOS were attempting to take money resulting in a financial gain. (R 5619).

In the instant case, the State charged Appellant in Count II of the Indictment (R 5217) with robbery of Allen McAnich of

cigarettes. The evidence at trial revealed that only a pack of cigarettes worth $1.45 was stolen from the Mr. Grocer. (R 1850, 1927). However, the motivation and the financial gain sought by Appellant was clearly the money in the cash register, although his efforts in opening up the cash register were unsuccessful. (R 1858-59, 1927-35). Thus, the pecuniary gain factor was based on different facts and circumstances than the robbery for which Appellant was convicted. Whereas the pecuniary gain factor is supported by the evidence of Appellant's unsuccessful effort to steal the money from the cash register, the actual robbery underlying the capital crime consisted of a pack of cigarettes. The trial court did not improperly double up aggravating circumstances based on the same facts, and these two factors may properly be counted separately.

Appellant also argues that the trial court erred in finding the aggravating factor of "avoiding arrest." The trial court found this aggravating factor applicable under both Count I and Count V:

> E. The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.
>
> This circumstance could apply if a defendant kills his victim to avoid later recognition or the possible outcrying at the time of the

> offense that might bring help. Inasmuch as ALLEN McANICH gave absolutely no resistance and was complying with all the orders given him and coupled with the obvious attempt to kill the other witness to the crime, TERRY HOWARD it appears clear beyond a reasonable doubt that the murder was to prevent later identification and calling for help after departure. Both acts designed to prevent a lawful arrest. (Count I, R 5619).
>
> * * * *
>
> C. The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.
>
> This circumstance could apply if a defendant kills his victim to avoid later recognition or the possible outcrying at the time of the offense that might bring help. In the facts it appears clear that VERNON AMOS shot and killed ROBERT BRAGMAN to assist LEONARD SPENCER in making good his getaway to avoid or prevent a lawful arrest. ROBERT BRAGMAN was struggling (intoxicatedly) with LEONARD SPENCER to try to keep LEONARD SPENCER from taking the keys to ROBERT BRAGMAN'S truck. This was causing a critical delay in the Defendant's escape and rather than waist (sic) anymore time VERNON AMOS stopped the struggle by killing ROBERT BRAGMAN. (Count V, R 5624).

In order to support a finding that a murder was committed for the purpose of avoiding arrest, where the victim is not a law enforcement officer, the state must prove beyond a reasonable doubt that the dominant motive for the murder was the elimination of a witness. Correll v. State, 13 F.L.W. 34 (Fla. Jan. 14, 1988); Doyle v. State, 460 So.2d 353 (Fla. 1984);

Menendez v. State, 368 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978), cert. denied 459 U.S. 981 (1982). Based on the evidence in the instant case, this Court can only reach the inescapable conclusion that this factor is supported beyond a reasonable doubt.

Considering the entire chain of criminal events leading up to the murders of Allen McAnich and Robert Bragman, it is clear that the dominant theme for each murder was witness elemination. It must be remembered that Appellant and his co-defendant left their community of Belle Glade and traveled to West Palm Beach in an hour plus drive in an obvious attempt to avoid the recognition inherent in their own community. They entered Mr. Grocer and shot Allen McAnich once. As Terry Howard testified, he never heard McAnich's voice arguing or refusing the requests of these defendants. (R 1867). Indeed, Howard never heard the clerk say anything to them at all. (R 1867). There is absolutely no other conclusion but that McAnich was shot because he was a witness and could possibly identify Appellant. This conclusion is supported by the evidence that the only remaining witness, Howard, was shot twice (R 2172-74) and left for dead. The present case does not present the situation as in Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) where a robbery simply got out of hand, as was indicated by the defendant stabbing

the victim more than 30 times while in an apparant frenzy. At bar, there was no struggle or heated exchange between the victims and Appellant. Appellant's actions, from leaving Belle Glade to avoid detection, to shooting both witnesses to the robbery who offered no resistance, evidence his intent to kill these witnesses to avoid arrest.

As to Count V, at the time that Robert Bragman was murdered, Appellant was in flight from the earlier robbery and murder at Mr. Grocer. Appellant and his co-defendant had stolen Howard's vehicle (R 1863, 1914) and abandoned it at Curtis Bowlen's residence. (R 1962 - 65). Thus, they were in need of transportation. Robert Bragman, however, refused to give up his keys to Leonard Spencer and they struggled next to Bragman's truck located at the English Pub. (R 1974 - 77). It is evident that this delay was increasing the danger of their detection. Robert Bragman was then shot and killed. John Foster testified that after the gunshot, the black male who was struggling with the victim got into the truck on the driver's side while the other black male got in on the passenger's side. (R 1984). Appellee maintains that this aggravating factor of avoiding arrest is clearly established by this evidence which reveals that the defendants were in flight to avoid arrest and that Bragman's struggles were increasing their delay, as well as calling attention to them. Appellee maintains that the aggravating factor of avoiding arrest properly applied to the murders

of both victims.

The trial court correctly found that both murders were cold, calculated and premeditated as well. As to Count I, the trial court's sentencing order finds as to this aggravating factor that:

> On this record there is no reasonable doubt that the State has proved this aggravating circumstance. As the State indicated in closing argument "the murder was committed with no more emotion or thought than it takes to swat a fly." There was no struggle, name calling or hot blood involved. There was absolutely no moral or legal justification for the murder and the entry of the store after the one hour plus ride from Belle Glade to West Palm Beach carrying firearms demonstrates the calculated and premediatated manner in which the crime was committed. (R 5619-20).

As to Count V, the trial court found this factor to be likewise supported by the record:

> On this record there is no reasonable doubt that the State has proved this aggravating circumstance. There was a struggle but no name calling or hot blood involved. The struggle itself involved LEONARD SPENCER and not the defendant VERNON AMOS. There was absolutely no moral or legal justification for the murder. Carrying firearms, the aborted second shot attempt and the deliberation necessary to draw and fire the derringer pistol demonstrates the calculated and premeditated manner in which the crime was committed. (R 5625).

Appellee submits that the trial court correctly found this factor to apply, although Appellant argues this is not the type of execution murder to which this factor ordinarily applies. As this Court has previously stated, this factor "ordinarily applies in those murders which are characterized as execution or contract murders, although that description is not intended to be all-inclusive. McCray v. State, 416 So.2d 804, 807 (Fla. 1987) [citing Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), cert. denied 457 U.S. 1111].

Certainly, Appellant's commission of the crimes in a different community than his own, and the carrying of weapons involve a great measure of calculation and planning. Appellant had the entire journey to Mr. Grocer to reflect on what he was about to do. Indeed, even the orchestration of events which led up to the murder demonstrate the calculation involved. While Amos kept McAnich busy by asking for cigarettes (R 1847-48, 1850) Appellant moved to the rear of the store and looked about. (R 1851-52). Appellant brought his soda to the counter and set it down, and in a deceptive maneuver made as if to leave the store. (R 1852-54). Appellant grabbed Howard around the neck and put a gun to his side. (R 1854). Howard hit the ground and heard a gunshot. (R 1856). The victim, McAnich, never said anything at all to

the perpetrators. (R 1867). McAnich was shot one time at close range. (R 2560, 3106, 3109). When Howard said he couldn't open the register, the perpetrators removed his wallet and keys and shot him. (R 1863-64). Appellant left the store in Howard's car, headed in the direction of the English Pub (R 1918), which was later abandoned, most likely becuase it was susceptible to being identified. Appellant and his co-defendant had to formulate another plan to escape and needed transportation. Due to Bragmans attempt to retain his keys, he was shot in the head one time at close range (R 3092-93, 3089). The derringer weapon which was used to kill Bragman (R 2737-38, 2753), contained one bullet which was struck by the firing pin but did not fire. (R 3309-10).

Appellee maintains that the trial court correctly found the cold, calculated and premediatated factor to be supported by the record. In each count, the murder victim was killed with a single shot at close range in an execution style. The close distrance at which shots are fired has been held to be properly considered in determining whether the factor of cold, calculated, and premediatated exists. Squires v. State 450 So.2d 208 (Fla. 1984) cert. denied, 105 S.Ct.268. As to both counts, although Robert Bragman offered minor resistance, there was no or frenzied argument which escalated into a shooting spree. The manner in which the Appellant and his co-defendant carried arms, and killed the

victims, as a matter of course, qualifies as cold, calculated and premeditated.

In the instant case, the victim testimony that was heard occurred during the sentencing hearing conducted before the trial judge only. (R 4962-66; 4966-4971, 4972-4973). Appellee would initially point out that Appellant did not object to victim testimony when the prosecutor indicated he was going to present this testimony (R 4960-62), and that this issue is procedurally barred. Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988).

In Booth v. Maryland, 107 S.Ct. 2529 (1987), the Court held that introduction of victim impact evidence to a capital punishment sentencing jury violated the Eighth Amendment. Appellee maintains that any error in admission of this brief testimony, which spans no more than ten pages of the record, is harmless under this Court's analysis in Grossman v. State, supra. As noted in Grossman, the distinction between Booth and the instant case is that the sentencer that heard the victim impact evidence in Booth was the sentencing jury; whereas in the present case it was the trial judge required to give great weight to the recommendation of death. Appellant has misinterpreted Booth, in a wholly overbroad manner. The Booth decision rested upon Maryland law, mandating that victim impact information be contained within pre-sentence investigation

reports, in all felony cases, and that such information "shall be considered", by both the sentencing court, or jury. Booth, 96 L.Ed. 2d at 445-446; State v. Post, 513 N.E. 2nd 754, 757-758, n.1 (OH 1987); State v. Bell, 360 S.E. 2nd 706, 713 n.4 (S.C. 1987). Furthermore, the Booth decision was based on considerably detailed evidence of the victim's children's difficulty in coping with their parents' murder, including economic losses and psychological services. Booth, 96 L.Ed.2d at 445, 456; The record herein, demonstrating brief references to the victims' age, children left behind, and the loss of family members, did not constitute evidence of the type of devastation to the victim's family evident in Booth. See, State v. Brown, 358 S.E. 2nd 1 (N.C. 1987) (prosecutor's argument referring to rights of victim's family, as well as those of the defendant, not reversible); Bell, 360 S.E. 2nd at 713 (victim's sister's testimony, as to her fear of defendant, not Booth error); Hill v. Thigpen, 667 F. Supp. 314, 338, n.4 (N.D. Miss. 1987) (testimony of victim's widow, that victim had two children who were close to their father, not "prejudicial" to defendant under Booth). It is clear beyond a reasonable doubt that the judge would have imposed the death penalty in absence of the victim impact evidence.

At bar, the trial judge's sentencing orders indicate his consideration of aggravating circumstances was limited to

those enumerated in teh statute. The written findings present no indication of reliance on the victim impact testimony. Moreover, the trial judge found 5 aggravating factors to be applicable under Count I, and four aggravating factors to be applicable under Count V, two of which are unchallenged and clearly valid, in comparison with no mitigating factors. Thus, Appellee maintains the balance in favor of imposing the death sentence is overwhelming. Finally, as in Grossman, supra, the record shows that the jury did not receive the improper victim impact evidence, but nevertheless recommended the sentences of death by 9 to 3 and 7 to 5 votes. In view of the balance of aggravating factors and the fact that the jury's recommendation was entitled to great weight, any error in receipt of the evidence is harmless.

Appellee further submits that the death penalty is proportionate as compared with other cases imposing the death penalty. See, e.g., Remeta v. State, 13 F.L.W. 245 (Fla. Mar. 31, 1988) (death sentence appropriate where defendant killed clerk of convenience store during robbery); Rogers v. State, 511 So.2d 526 (Fla. 1987) (death penalty affirmed where victim was killed during flight from robbery of grocery store); Griffin v. State, 474 So.2d 777 (Fla. 1985) cert. denied, 106 S.Ct. 869 (death penalty affirmed for killing of convenience store clerk). Burr v. State, 466 So.2d 1051 (Fla. 1985)

(death penalty affirmed where convenience store clerk killed during robbery); Herring v. State, 446 So.2d 1049 (Fla.1984), cert. denied, 105 S.Ct 396 (death penalty imposed where defendant shot and killed convenience store clerk).

The trial court correctly sentenced Appellant to death on the basis of five aggravating circumstances under Count I and four aggravating circumstances under Count V. The trial court's orders clearly reflects that he considered the mitigating evidence but failed to find any mitigating factors present in either court - "Even giving the benefit of proof to 'reasonable conviction'rather than to the State's high burden of proof this Court found no mitigating circumstances nor combination thereof that would weigh against the aggravating ones."(R 5620, 5625). Dr. Blackman's testimony that defendant "possibly" suffered from a temporal lobe seizure (R 4747, 4756-57), based upon a head injury received in prison and where the doctor had no opportunity to examine Appellant independently at the time the injury occurred (R 4754), was properly found by the trial court not to prevent the capacity of Appellant to conform his conduct to the requirements of law or to rise to the level of constituting an extreme mental or emotional disturbance. (R 5620-22, 5625-27). The finding or not finding of a specific mitigating circumstance is within the discretion of the trial court, and reversal is

not warranted simply because an appellate court draws a different conclusion. Stano v. State, 460 So.2d 890, 894 (Fla. 1984), cert. denied 471 U.S. 1111 (1985); Smith v. State, 407 So.2d 894, 901 (Fla. 1981), cert. denied 456 U.S. 984 (1982). It was in the trial judge's discretion to grant the expert witness' testimony little or no weight. Lucas v. State, 376 So.2d 1149 (Fla. 1979). In the instant case, the judge simply found that Appellant's evidence of mental disturbance did not rise to a sufficient level to be weighed as a mitigating circumstance. There is absolutely no showing that the possibility that Appellant suffers from epilepsy impaired Appellant. On the contrary, the facts reveal a carefully planned and orchestrated robbery. As to any other aspect of the defendant's character or record which would serve in mitigation, the trial court found Appellant's age not to be mitigating (R 5621, 5626) where he was old enough to understand the difference between right and wrong; nor was his criminal record insignificant to be considered as mitigating. (R 5621, 5626-27). The entire orders are devoted to rejecting the applicability of mitigating factors and finding insufficient evidence to support their existence.

The trial court correctly sentenced Appellant to death, where there were no mitigating factors found. Even if the trial court improperly considered the three aggravating

factors challenged by Appellant, such error is harmless in view of the fact that there were no mitigating factors present and there was present present at least one or more aggravating factors which are listed by the statute. Sireci v. State, 399 So.2d 964 (Fla. 1981); Elledge v. State, 346 So.2d 998 (Fla. 1977). Where several aggravating factors are present, and no mitigating factors, death is presumed the appropriate penalty. State v. Dixon, 283 So.2d 1 (Fla. 1973) cert. denied, 416 U.S. 943 (1974).

CONCLUSION

WHEREFORE, based upon the argument and authorities cited herein, Appellee respectfully requests that the judgment and sentences of death be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Answer Brief has been furnished by United States Mail to Nelson E. Bailey, Esquire, 324 Datura Street, Commerce Center, Suite 300, West Palm Beach, Florida 33401, this 1st day of June, 1988.

Of Counsel