IN THE SUPREME COURT OF FLORIDA

VERNON AMOS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 69,928

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

AMY LYNN DIEM
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida
(407) 837-5062

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS

(Continued)

TABLE OF CONTENTS

(Continued

TABLE OF CITATIONS

STATUTE

OTHER AUTHORITY

PRELIMINARY STATEMENT

Appellant Vernon Amos was the defendant tried jointly with co-defendant Leonard Spencer in the Ciminal 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 except that Appellee may also be referred to as the State.

The following symbols 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 (2) two through (13) thirteen 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 checkout 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 testified 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 gun shot. (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 cash register saying to open up the case register. (R. 1858, 1874, 1877). He heard two

different voices. (R. 1858, 1874). 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 he 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 walllet. (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 headlight which enable 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 was 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 north 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 Raod 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 cash register would beep if soemone 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 alot of police who appeared interested in a light colored car left in his driveway. (R. 1962-63). This car had pulled onto 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 Batchelor 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 taller 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 imposible 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 male 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 on to 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 exist the store. (R. 2025-26).

Later that evening, in the early morning hours of 2:00 a.m., 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 existing the driver's door and proceeding north into A & M Auto Parts. (R. 2031). These 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 Blvd. and then made a left turn onto 49th Terrace and proceeded north. (R. 2032). Anderson returned to hs 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 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 return. 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, Amos, 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. Sedenkda went to the Kentucky Fried Chicken at Belvedere Road and Military Trail, called 911, and informed them that he spotted 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 the tall 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. 2187). The short male, who appeared nervous (R. 2239), 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 & Glass, he saw the brake lights go on. The driver then switched seats with the pasenger. 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 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. 2279). 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 suspects' 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. 2884). The suspects had their attention focused on getting away from Newcomb. (R. 2285). 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. 2559). 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 lcoated 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 lcoated at the English Pub. (R. 2772, 2795).

Dr. Benz, the medical examiner, performed autopsies on Allan 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 was 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 2-2 1/2 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 wound 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 ealry 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 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, Fitigerald 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. Nordman signed and dated the back of the photo. (R. 3390). 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

I. The trial court properly denied Appellant's motion for judgment of acquittal where the State presented evidence of Appellant's participation in the underlying felonies of robbery; including evidence from which it could be concluded that Appellant was the triggerman for both killings.

II. Any restriction on Appellant's right to testify, in the form of a pre-testimony proffer, is not reversible error where Appellant did not proffer the substance of his testimony such as to insure meaningful appellate review. Moreover, the record amply supports the trial judge's finding that Appellant was attempting to create reversible error on the record by an insincere request to testify. After the trial judge announced his requirement that Appellant must first proffer his testimony before he could testify, Appellant personally indicated that he did not want to testify and that nothing was preventing him from testifying. It was not until counsel requested an opportunity to speak with his client on his decision not to testify, that Appellant suddenly changed his mind and stated that he wished to testify but was unable to in light of the court's restrictions. This trial tactic was an effort by Appellant to force the trial judge to grant a severance which was unnecessary.

III. The trial court properly denied Appellant's motions 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. An absolute disparity of 1.1% does not constitute a gross disparity or significant under representation of a distinctive group in the community. Appellant has not demonstrated an intentional discrimination such as to satisfy his equal protection challenge. The Palm Beach County Jury District System passes constitutional muster under the Florida Constitution.

IV. The trial judge did not abuse his discretion in the excusal for cause of a black juror whose responses indicated she had a health problem 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 instructions.

V. Appellant's right to confrontation was not denied by the testimony of identification witnesses that they made an identification from a photo lineup, which was not in evidence at the time that they testified. Appellant's objection that this testimony denied him his right to confrontation, made <u>after</u> these witnesses had already testified, was untimely.

VI. The trial court did not abuse its discretion in denying Appellant's motion for mistrial made after the co-defendant commented during opening statement that Appellant had a conversation with police, where the <u>substance</u> of Appellant's statement was not brought before the jury and where the comment,

taken in proper context, was made to show the sequence of events leading up to Spencer's arrest.

VII. Appellant's active involvement in the robberies, including assisting Spencer in the Mr. Grocer robbery and facilitating their escape by shooting Mr. Bragman during Spencer's attempt to rob him of his keys; and his reckless indifference to human life as shown by his participation in armed robberies, evinced a degree of culpability such that the imposition of the death penalty was proper.

VIII. The trial court properly excluded evidence irrelevant to Appellant's character, record, or circumstances of the offense. The testimony that Appellant cooperated with police after he had been induced by a promise not to recommend the death penalty, for which the officer had no authority to make, does not bear favorably on Appellant's character. Moreover, the evidence of Appellant's "cooperation" was minimal, where he shifted the entire blame for the crimes to Spencer such that the investigating officer could not even believe Appellant's version of the events. Any error was harmless.

IX. The trial judge's override of the jury's recommendation of life on Count I was proper where no reasonable person could differ with the Court's sentence, in light of the strong evidence of aggravating factor presented to the court, in contrast with the weak evidence of mitigation presented. Appellant's mother's testimony, which demonstrated Appellant had a <u>normal</u> childhood,

and could lawfully and honestly provide for his children, was not a reasonable basis upon which to recommend a life sentence.

X. The trial court correctly imposed a sentence of death under Count V upon finding three (3) aggravating factors and zero (0) mitigating factors. The trial judge considered mitigating evidence but found that it did rise to a level such as to support a finding of a mitigating factor.

XI. Any error in considering one victim's testimony that Appellant should not be allowed to commit this crime again, which spanned no more than 1 page and which was considerd by the trial judge only, was harmless. The advisory jury did not hear this evidence yet returned a recommended sentence of death on Count V. It is clear the judge would have imposed the same sentences in absence of this very brief, and insignificant testimony.

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

XIII. 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.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO ALL COUNTS.

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).

The test to be applied in judging the sufficiency of the circumstantial evidence is whether the evidence is not only consistent with guilt but also inconsistent with any reasonable hypothesis of innocence. Ross v. State, 474 So.2d 1170 (Fla. 1985); Pinder v. State, 366 So.2d 38 (Fla. 2nd DCA 1978), approved 375 So.2d 838 (Fla. 1981). It must be remembered that the test is not whether the appellate court can think of a reasonable hypothesis of innocence, but rather whether the evidence was such that the jury might have reasonably concluded there was no reasonable hypothesis of innocence. In moving for a judgment of acquittal, a defendant admits all facts introduced in evidence, and every fair and reasonable inference must be drawn

in favor of the State. See, e.g., Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975), cert. denied 428 U.S. 911 (1976). Appellee maintains that the facts sub judice are inconsistent with any "reasonable" hypothesis of innocence.

Appellant contends that the trial court erred in denying his motion for judgment of acquittal alleging that the evidence fails to establish that Appellant participated in the criminal activities of Leonard Spencer. Appellee submits that there exists substantial, competent evidence from which the jury could have found Appellant guilty of premeditated murder in the first degree as the person who pulled the trigger of the gun which shot Allen McAnich in Count I.

At bar, the record reveals that Terry Howard was having a beer at Mr. Grocer when Appellant and Leonard Spencer walked in. Appellant walked up to the counter and asked for a pack of cigarettes while Spencer got a soda from the cooler. (R. 1849, 1857). Spencer walked to the rear of the store and was looking around the store. (R. 1851). As the clerk got the cigarettes, Spencer set a Mountain dew soda down next to the cigarettes. (R. 1852). Spencer acted as if he was going to leave, but instead, grabbed Howard around the neck and put a gun to his side. (R. 1852-55, 1895-96). Howard was forced to the ground and heard a shot. Although Howard could not be certain where the shot came from, he testified that if it had come from the person right beside him he should have been able to tell. (R. 1856, 1879-

82). His ears would have rang. (R. 1888). Howard acknowledged that in his deposition he testified that Spencer couldn't have fired the shot because he was busy putting Howard on the floor and still had ahold of Howard. (R. 1888). Howard testified that when he was grabbed, Amos was still in front of McAnich across the counter. (R. 1899). Dr. Benz, the medical examiner, testified that the wound to McAnich entered the chest and angulated downward. (R. 3106). Although McAnich was 5 feet 10 inches tall (R. 3120), the medical examiner believed that the victim was probably leaning forward when shot in the chest, and that the person who shot McAnich had to be standing in front of victim. (R. 3127). During the State's argument on Appellant's motion for judgment of acquittal, the prosecutor argued the evidence supported a finding that Appellant pulled the trigger and shot McAnich. (R. 3558-62).

Thus, Appellee maintains this evidence excludes Appellant's hypothesis of innocence that Spencer shot McAnich and that Appellant did not participate in these activities. The shot entered the clerk from across the counter, where Howard last saw Appellant standing. Howard thought that if the gun had been fired by Spencer who was standing near him, his ears would have been ringing. (R. 1888). In Griffin v. State, 474 So.2d 777 (Fla. 1985), cert. denied 106 S.Ct. 869, this Court held that evidence that the victim was shot two times at close range with a particularly lethal gun, without apparent provocation, was

sufficient to support finding of premeditation. McAnich's death did not result from a shootout during a robbery which got out of control. Rather, it was a premeditated execution which occurred during the robbery. Proof of the element of premeditation for first degree murder does not require that thought or reflection of any specific duration be shown. Middleton v. State, 426 So.2d 548 (Fla. 1982), cert. denied 103 S.Ct. 3573. Appellant's actions of deliberately firing one shot into the chest of McAnich at close range, who did not resist Appellant in any way and who did not even speak to Appellant, (R. 1867), during the course of a robbery which was proceeding smoothly, support a finding that Appellant committed the murder in Count I with premeditation, See, Oats v. State, 446 So.2d 90 (Fla. 1984) (evidence of robbery of convenience store clerk who died from single shot fired to head at close range sufficient to support premeditation); White v. State, 446 So.2d 1031 (Fla. 1984) (sufficient evidence af premeditation existed where defendant killed grocery store clerk during robbery).

Moreover, the evidence supports the conclusion that, even if Appellant did not pull the trigger, he was a principal to the murder of McAnich in Count I and to the crimes convicted of in Counts II - IV where he aided and abetted Spencer in the commission of these crimes. The evidence reveals that Appellant was an active participant in the robbery in the course of which

McAnich was killed, and consequently, was guilty of first degree felony murder.

The law of principles and the felony murder doctrine combine to make a felon liable for the acts of his co-felons. Adams v. State, 341 So.2d 765 (Fla. 1976), cert. denied 434 U.S. 878 (1977). Appellee maintains that it is clear both Appellant and Spencer were engaged in the common scheme of committing a robbery of Mr. Grocer when McAnich was killed. During the course of the robbery of Mr. Grocer, Appellant and Spencer attempted to kill Terry Howard, robbed him of his wallet and keys, and stole his car.

After Howard was forced to the ground, he heard two voices saying, "Open up the cash register." (R. 1857-58, 1874). He heard one voice saying to open up the cash register which came from behind the counter, and heard another voice from outside of the counter. (R. 1858, 1874, 1877). It is undisputed from the record that Spencer was standing near Howard when he grabbed Howard and forced him to the ground. Howard testified that he heard one man say, "Where's the keys to that car out front". (R. 1862). The questions that were directed to him about his keys and wallets, came from further away, near where McAnich was laying. (R. 1902).

Appellee submits that Appellant had the intent to commit the robbery and that he actively assisted in its commission. Appellant's actions belie his argument that he was

merely present at the scene. Appellant was indisputedly present during the commission of all the crimes. He and Spencer travelled all the way from Belle Glade to West Palm Beach. Taken in a light most favorable to the State, his actions in asking for cigarettes were clearly a ploy to get the register drawer open while Spencer cased the store. After the clerk was shot, Appellant and Spencer commanded Howard to open up the cash register. Appellant asked Howard for the keys to his car as the questions came from farther away and Spencer was located near Howard. When Appellant and Spencer left the store, they fled in Howard's stolen vehicle. Bobby Helvey observed them leaving the store quickly and running to a car. (R. 1913-14). The short man got in the passenger side. Helvey identified Appellant from a photo lineup. (R. 1916). The description of the short man's clothing (R. 1917-1918), matched the desciption of the clothes Appellant was wearing when he was found hiding in a junked vehicle, (R. 2402-2406, 3177-3179), after he had fled from police. (R. 2282-2284).

Where Appellant had the intent to commit the underlying felony and was involved in the criminal enterprise his convictions must be affirmed. Thus, for example, in Hall v. State, 403 So.2d 1321 (Fla. 1981), the defendant and Ruffin were indicted for the murder of Hurst and Coburn. This Court upheld the conviction for the murder of Hurst where the evidence showed that either Hall or Ruffin killed Hurst, and that the other was an

aider and abettor. In Hall, the defendant had told a deputy how on the previous day, he and Ruffin had sat in a grocery store parking lot looking for a car to use to commit a robbery when they abducted the victim. Hall drove her car while Ruffin followed in his own car. They stopped in a wooded area where Ruffin beat, sexually assaulted, and killed the victim. This Court found that these facts supported the jury's conclusion that even if the defendant did not pull the trigger, he was a principal to the crime of murder. In Hall v. State, 403 So.2d 1319 (Fla. 1981), during the joint trial with Ruffin for the killing of Deputy Coburn, the evidence presented was that a woman and her daughter could only say that she saw Hall and Ruffin approach the deputy and that as they approached, one of the defendant put a bag on the ground. No one saw the deputy shot. The two men fled the scene and were later apprehended. At trial, the State did not prove who did the actual shooting but instead based its case on the theory that either Hall or Ruffin did the shooting and that the other helped. To substantiate this theory, the prosecutor presented evidence of the abduction, rape and shooting of Hurst which occurred shortly prior to Coburn's death. This Court found:

> These facts alone are sufficient to demonstrate beyond a reasonable doubt that the two men engaged in a common scheme. As such each was a principal to the death, and the fact that the State did not prove which of the two fired on Coburn does not necessitate either's acquittal. By actively operating

> together each was guilty of the acts of the other.

Johnson v. State, 403 So.2d at 1320.

The trial court properly denied Appellant's motion for judgment of acquittal as to Counts V-IX where Appellant's and Spencer's joint venture continued as they fled from the crime spree committed at Mr. Grocer. As to Count V, the murder of Robert Bragman, and Count VI, the robbery of Robert Bragman, the evidence reveals that Appellant himself shot Bragman as Spencer robbed Bragman of his keys. Appellant and Spencer had abandoned the vehicle taken from Mr. Grocer (R. 1963-65), and were headed north. (R. 1967). In attempting to escape from the crimes already committed, they were in obvious need of transportation to return to Belle Glade. At 12:10 a.m., John Foster was sitting in the parking lot of the English Pub in a space directly behind a truck by which a tall black male and a white male were fighting. (R. 1974). The tall black male, and white male, later identified as Robert Bragman, were fighting over some keys which the black male was trying to take. (R. 1975-76, 1977). The struggle started at the rear of the truck and worked itself forward near the truck's door. (R. 1976). More scuffling occurred near the door and Foster then heard a bang. (R. 1978). After the gunshot, he observed a second, shorter black male located on the other side of the door. (R. 1979, 1985-86). The struggle for the keys occurred within a foot or two of the second black male. (R. 1979). The shorter black male near

the door ran around the truck and got in on the passenger side, while the black male who had been struggling for the keys got in on the driver's side. (R. 1984). The two black males appeared to be talking to each other while inside the truck. Foster observed the lights to the truck come on. (R. 1985). Foster testified that it was impossible for the tall black male to have shot Robert Bragman as both of his hands were busy trying to get the keys. (R. 1985, 1991). Mark Nordman observed Appellant and Spencer running from the parking lot at the same time as Robert Bragman was killed. He had just engaged in a short drag race with two black males and an unknown white male which started and finished at the English Pub parking lot. (R. 2088, 2089, 2138). The two black males in a Brown Camaro, later identified as Appellant and Spencer, returned to the parking lot but Nordman over shot the entrance and had to turn around. While he was on his way back, he heard a gunshot. (R. 2089). When Nordman returned to the parking lot, he saw these same two black males running from the dumpster area. (R. 2090). There was a white male on the ground and these black males were taking flight on foot. (R. 2149). Nordman gave a description of the suspects to police. (R. 2091). He identified Appellant at 4:30 a.m. who was located in the rear of a police car as one of the black males he had seen earlier. (R. 2092-93). Three to four days later, Nordman viewed photo lineups of the suspects. (R. 2093, 2135). Nordman was asked to make an identification of the two black

males he saw. (R. 2136). Nordman testified he made an identification and was positive. (R. 2136, 2143). Detective Creston testified that Bobby Helvey, Terry Howard, and Allen Sedenka also identified Appellant as the person they observed. (R. 3463, 3470-71, 3473-74, 3475).

Appellee maintains that the evidence reveals that Appellant shot Robert Bragman as the victim and Spencer struggled over keys, and that the jury could have properly found this act was done with premeditation and deliberation. Certainly, Appellant had sufficient time to reflect on his plan of action while he watched Spencer and Bragman struggle over the keys. The record reveals that although Bragman was shot only once, the derringer which killed Bragman was fired twice; one bullet misfiring. (R. 3304, 3310). Appellant clearly intended to shoot Bragman as he pulled the trigger twice. Bragman was causing a delay in their escape from the earlier crimes. As Dr. Benz, the medical examiner, testified, Bragman died from a bullet that entered the left side of his face fired from close range. (R. 3093, 3098). This derringer was left in Bragman's truck. (R. 2795).

Appellee maintains that the jury could have properly convicted Appellant of the premeditated murder of Bragman where he fired one shot into Bragman's head at close range. See, e.g., Griffin v. State, supra. Moreover, the verdict is sustainable on a felony murder theory where Bragman's death was effected during

the robbery. See, e.g., Johnson v. State, 484 So.2d 1347 (Fla. 4th DCA 1986), review denied 494 So.2d 1151 (evidence that defendant had intent to commit robbery and was involved in criminal enterprise to perpetrate robbery and kidnapping, was sufficient to sustain conviction of felony murder in absence of evidence that defendant withdrew from criminal enterprise); Brumbley v. State, 435 So.2d 381 (Fla. 1984) (where defendant held gun on victim throughout most of episode, while companion relieved victim of his valuables, and since robbery and subsequent flight resulted or included murder, defendant guilty of felony murder).

As to Count VI, robbery with a firearm of Bragman, the evidence revealed that not only did Appellant intend to commit the robbery, he actively assisted in its success. Appellant and Spencer needed transportation to escape and had to find a vehicle. When Bragman resisted the robbery by trying to retain the keys, and caused a delay in their escape, Amos assisted Spencer in the robbery by shooting the victim and ending his struggles. They both then got in the truck.

When Appellant and Spencer were unable to get the truck out of the parking lot (R. 2087), they fled from the English Pub parking lot on foot. (R. 2086, 2089-90). Five-tenths of a mile down the street near the Kentucky Fried Chicken (R. 2444), Allen Sedenka heard a broadcast description of the suspects of the English Pub shooting on his police scanner. (R. 2179-80).

Sedenka spotted two black males in a hurry who were exiting the wooded area north of the English Pub on Military Trail. (R. 2181). Sedenka stopped at the Kentucky Fried Chicken, called the police, and told them he spotted the suspects. (R. 2181). As he was put on hold, the suspects came closer. (R. 2181). When it looked like they were going to cross the street to his side, Sedenka got into his car. Sedenka was not able to leave because the tall black male, Spencer, put a gun to his head. (R. 2181-82). Sedenka testified that the shorter male, Amos, told him to do what he was told or he would be shot. (R. 2182). Sedenka abandoned his car and walked south. (R. 2182). Spencer got in on the driver's side while Amos got in on the passenger side. (R. 2183). As Sedenka testified, his passenger door was locked and he didn't open it. (R. 2183). Sedenka observed his car stop, and Amos and Spencer switch seats. (R. 2189). Sedenka didn't observe either black male point a gun at the other, didn't hear any threats between them, or observe any indication of physical domination by one over the other. (R. 2197). Sedenka later made a positive photo identification of both of the suspects. (R. 2239-41).

Appellee submits the trial court properly denied the motion for judgment of acquittal as to Counts VIII, aggravated assault of Sedenka; and Count IX, robbery with a firearm of Sedenka (both defendants were found not guilty of Count VII, attempted kidnapping of Sedenka). Appellant and Spencer, now in

flight on foot from the crimes committed at Mr. Grocer and the English Pub, were still in need of transportation to aid their escape. Appellant intended to commit these crimes, and actively participated in their commission. Appellant specifically directed Sedenka to do as he was told or be killed. Although Appellant characterizes this statement as made in fear of Spencer, the record belies Appellant's assertion that he was afraid of Spencer's homicidal nature. Rather, the statement was made by Amos to assist in the robbery of Sedenka and to cause him well-founded fear, and Amos' demeanor was more properly characterized as highly excited and nervous. (R. 2239, 2248-49). Appellant asked Spencer to open the passenger door for him (R. 2254), which was locked. Appellant wanted in the car, and was clearly not in fear of Spencer, who exhibited no indication of domination over Appellant. Moreover, Amos was ultimately the person who drove the getaway car away.

When a suspect in any manner attempts to escape or evade a threatened prosecution by flight, concealment, or resistance to lawful arrest, such fact is relevant to the consciousness of guilt which may be inferred from such circumstance. Straight v. State, 397 So.2d 903 (Fla. 1981), cert. denied 102 S.Ct. 556. Flight from the vicinity of the crime is a fact from which guilt can be inferred. Spinkellink v. State, supra. It is reasonable to infer that Appellant fled from the scene of Mr. Grocer, from the English Pub parking lot, and from police who

chased the stolen vehicle to the Dyer Dump area, as a result of consciousness of guilt on his part. There was overwhelming evidence of Appellant's participation in this criminal enterprise, and the trial court properly denied the motion for judgment of acquittal as to all counts.

POINT II

NO REVERSIBLE ERROR IS DEMONSTRATED WHERE APPELLANT FAILED TO PROFFER HIS ALLEGED PRECLUDED TESTIMONY AND WHERE APPELLANT ATTEMPTED TO FORCE THE TRIAL COURT INTO ORDERING AN UNWARRANTED SEVERANCE.

Counsel for Appellant maintained during trial that he did not think Appellant was going to take the stand and testify. (R. 3370). After the State rested its case, defense counsel indicated he was still not in a position to know if his client would be taking the stand. (R. 3493, 3615). Co-defendant Spencer requested that if Appellant testified, he be allowed to take Appellant's deposition first. (R. 3685). Defense counsel for Amos again stated he didn't know if his client would testify. Defense counsel indicated Appellant would be exercising his right to remain silent (R. 3688), whereupon the following occurred:

> THE COURT: Unless the State wants to comment on this -- and I'll allow you to do that -- my thought would be that if the defense announces that they're going to call Mr. Amos to testify, then I suppose we can take a recess at that point and you can take a deposition of him at that time, Mr. Bailey.

What's your thought about that.

MR. BOUDREAU: I object to that vehemently, Your Honor, and would move for a msitrial based on such a situation.

Of course, it's only prospective at this point in time. However, I do not believe that they are entitled to depose my client; and my client -- if that deposition is taken, my client will -- if that situation arises, my client will invoke his right to remain silent at that depositon and will not speak.

And I do not believe the Court can compel him to speak at that deposition.

MR. BAILEY: We are back to being at trial --

THE COURT: Well, perhaps what we could do then is required you to proffer your client's testimony outside the presence of the jury, if your client decides to testify. And then we'll decide whether a deposition needs to be taken after that.

We'll address these matters further then on Monday by the sound of it.

What else, Mr. Bailey?

MR. BAILEY: I'm simply asking for a full opportunity confront the witnesses against me. I would note for the record judge, that according to --

THE COURT: Well, that's what you've already raised with regard to this.

What else now, other than that particular isssue.

MR. BAILEY: I just want to note for the record that according to the codefendant's attorney's opening statement to the jury, he'd obviously be a witness against me, specifically against my client.

> THE COURT: Well, I don't know whether or not, based upon what Mr. Boudreau said, it can be necessarily assumed that he's going to be a witness against Mr. Spencer, or not. I don't think there's any question but what, based upon what Mr. Bordreau has suggested, there will be an indication strongly that whatever happened Mr. Amos was just an innocent, perhaps frightened tag along with regard to whatever happened.
>
> I don't know whether he's going to testify to what happened or not; but just the fact that whatever did go on he was afraid and that's the only reason he was there, I don't know necessarily it will impend upon your client; but we'll address these matters.
>
> MR. BOUDREAU: Your Honor?
>
> THE COURT: Yes, sir.
>
> MR. BOURDREAU: Just for the purpose of the record, if the Court requires me to make a proffer of my client's testimony, if he was to testify, prior to him testifying, I will invoke his right to remain silent and the privilege of the communication between me and my client and will not divulge that information in the form of a proffer. That's absolutely his right under the constitution and the laws of the United States of America.

(R. 3688-89). The trial court asked Appellant to research this issue. (R. 3689). The trial court indicated that if counsel intended to call Appellant as a witness, that it would be discretionary with the court as to whether to have any witness' testimony proffered. (R. 3689). After the charge conference was held, the court asked defense counsel if he had researched the court's proposal that he proffer his client's testimony. (R. 3766). The court instructed defense counsel to proffer Appellant's testimony before he testified. (R. 3767). The court

indicated that he was not precluding Appellant from testifying but merely sought a proffer of his testimony. (R. 3768). Counsel indicated he was going to exercise his right to remain silent as it relates to a proffer. (R. 3769). It should be noted Appellant had still not yet indicated that he wanted to testify. (R. 3769-70).

The next morning, on November 18, 1986, after the evening recess, defense counsel for Appellant indicated that his client advised him that they would not be putting on a case. (R. 3784). Defense counsel requested more time to discuss this with his client. (R. 3784). The court inquired of Appellant as to whether he understood he had an absolute right to remain silent, while Appellant stated he understood. (R. 3784). The court informed Appellant that it was his decision alone as to whether or not to testify and that no one could prevent him from taking the stand. (R. 3785). Appellant indicated he understood this. The trial judge then inquired of Appellant as to whether he wanted to testify in this case. Appellant indicated he didn't want to testify. (R. 3785). Appellant stated that nobody had threatened him or coerced him from testifying. (R. 3786). Appellant didn't want further additional time to discuss this with his lawyer. (R. 3787). However, defense counsel wanted further time to talk with his client as to whether he would be testifying. (R. 3788). Defense counsel was again given more time to speak with Appellant. (R. 3868-69). The court again

stated that he was not precluding Appellant from testifying and was only requiring a proffer of his testimony. (R. 3869).

After the afternoon recess was taken, counsel for Appellant informed the court that they were going to be putting on a case. (R. 3876). Defense counsel stated he would be calling Appellant. (R. 3877). The court asked Appellant to proceed with his proffer and defense counsel told the court he would not make a proffer of his testimony. (R. 3877). Counsel indicated his client did not want to engage in any pretrial or pre-testimony discovery by the state or co-defendant. (R. 3878). The trial judge again informed counsel he needed to proffer his testimony. (R. 3878-79). The State responded that the proffer was simply an opportunity for the court to make rulings on objections in advance, as to irrelevant or sympathetic matters. (R. 3879). The State argued that Appellant's testimony was bound to be inculpatory to co-defendant Spencer and that it wanted to make sure Amos' testimony did not contain any matters that would be objectionable and which would violate Spencer's right to a fair trial, such as comments on Spencer's failure to testify or on statements made to police authorities. (R. 3879-80). The Court stated he had inquired of Appellant several times as to whether he understood he had the right to testify and that Appellant had indicated he had made up his mind not to testify. (R. 3882). The judge instructed that the testimony from the proffer could be used to impeach Appellant during cross-

examination by the parties as to inconsistencies. (R. 3885-87). Defense cousnel then indicated that based on these conditions, his client would not testify. (R. 3888). The following occurred:

> THE COURT: Now, the -- I have told you from the outset what the situation was going to be with regard to Mr. Amos testifying, if that's what he wanted to do. You have all known these matters for several days with regard to Amos' testifying.
>
> Mr. Amos, or you, on his behalf, have told me several times that he was not going to testify, then he was going to testify, that he's not going to testify. (R. 3888).
>
> * * * *
>
> THE COURT: Mr. Amos, you have heard the discussions that we've had with regard to whether you were going to testify or not. Is that correct?
>
> DEFENDANT AMOS: Yeah.
>
> THE COURT: Now, you have in effect told me through your lawyer that you were going to testify. Is that correct?
>
> DEFENDANT AMOS: Yeah, was.
>
> THE COURT: And you are now through your lawyer telling me that you are not going to testify. Is that correct?
>
> DEFENDANT AMOS: Under the circumstances, right.
>
> THE COURT: All right. Now, what are the circumstances that you determine that prevent you from testifying or that make you decide rather than prevent you but that make you decide that you are not going to testify?

DEFENDANT AMOS: Uh, because of the fact that the State and the co-defendant wants transcriptions of this pretrial testimony.

THE COURT: And why does that concern you?

MR. BOUDREAU: Your Honor, I'm going to object to this line of questioning. I don't think this is part of any prior questioning, any required questioning of the court as it relates to my client.

THE COURT: I'm going to overrule you objection.

Why does that concern you that the State and the defense want copies of your testimony?

MR. BOUDREAU: Your Honor, may I speak with my client before he answers that?

THE COURT: Yes, sir.

THE COURT: For the purposes of the record now, you have had an opportunity to talk with your lawyer about the question I asked you.

Now why does it concern you that a transcript of your testimony would be available to them?

DEFENDANT AMOS: Because of this -- its against my rights to testify prior to the original trial, and I have a right to remain silent.

THE COURT: With no emotion whatsoever involved in it, I will indicate to defense counsel that I believe you are simply trying to establish for the purpose of this record something you didn't really intend to do or something that your client didn't intend to do, and that is testify in this case.

I believe from what I am viewing with regard to these proceedings that this is an effort by the defense to establish if you will, what can be considered to be reversible

error on this record and for no other purpose.

(R. 3888-91). The court found that he had reason to question an honest desire on Appellant's part to testify. (R. 3892). The court again informed Appellant that he had the right to testify which Appellant stated he understood. (R. 3893). The State responded that the proffer would in no way be a discovery procedure with broad parameters because cross-examination would be limited to the scope of direct. (R. 3897-98). The court also informed counsel that the proffer would not be a discovery deposition and that cross-examination would be limited to the proffer. (R. 3899). Defense counsel indicated his client would not be testifying with the proffer required as a condition precedent. (R. 3895).

Initially, Appellee would point out tht contrary to Appellant's argument, the trial court did not abuse its discretion in denying Appellant's pretrial and renewed motion to sever. The granting or denying of a motion for severance is normally a discretionary matter for the trial court. Crum v. State, 398 So.2d 810 (Fla. 1981). Certainly, co-defendant Spencer's defense was not antagonistic as it related to Amos. Spencer did not put the blame for the crimes on Amos, rather, Spencer claimed he wasn't present when the murders were committed in that he allegedly got in his car and left before the robbery at Mr. Grocer occurred. (R. 1809-1810). In Crofton v. State, 491 So.2d 317 (Fla. 1st DCA 1986), the court held that it was not an

abuse of discretion to deny the severance motion, despite the defendant's claim of the possibility of antagonistic defenses, where no direct evidence implicating the defendant was offered by the co-defendant and this defense was known prior to the judge's ruling rather than arising during the course of trial. Spencer's theory of defense, based on a claim that Spencer left Mr. Grocer before the crimes occurred and was not present during the subsequent events, did not implicate Appellant such that a severance was warranted.

Moreover, assuming arguendo that Appellant's and co-defendant's defenses were anatagonistic, hostility among defendants or an attempt by one defendant to escape punishment by throwing the blame on a co-defendant is not sufficient reason, by itself, to require severance. McCray v. State, 416 So.2d 804 (Fla. 1982). While severance is necessary to promote a fair determination of guilt or innocence, McCray, supra, a fair determination of guilt is not foreclosed merely because co-defendants blame one another for what transpired. O'Callaghan v. State, 492 So.2d 691 (Fla. 1983). Moreover, an accused's decision to testify is unrelated to a determination of the propriety of severance. O'Callaghan, 492 So.2d at 695. As the United States' Supreme Court observed in Richardson v. Marsh, 481 U.S. ___, 109 S.Ct. ___, 95 L.Ed.2d 176, 187 (1987):

> Joint trials play a vital role in the criminal justice system, accounting for the almost one third of federal criminal trials in the past five years. [Citation ommitted] ... It would

> impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes, where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability -- advantages which sometimes operate to the defendants' benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

Thus, Appellee maintains that Appellant has not demonstrated an abuse of discretion and that severance was not required for a fair determination of guilt.

Appellant appears to argue that severance was necessary at bar in that the trial court was seeking to give Spencer pretrial or pre-testimony discovery of Appellant by requiring that Appellant first proffer his testimony outside the presence of the jury with Spencer being guaranteed the right of cross-examination and the use of any inconsistencies in Appellant's proffered testimony at trial. Appellee acknowledges that a co-defendant is not entitled to discovery from another defendant subject to the same pending criminal charges as the defendant in a joint trial as he still enjoys his privilege against self-incrimination. Indeed, the present case does not present the situation where the defendant from whom discovery is sought has

entered a guilty plea prior to his desired testimony or has received immunity, such that his right to self-incrimination no longer exists. Spencer's right to confrontation would have been satisfied by cross-examination when and if Appellant took the stand. However, Appellee submits that the instant case presents a situation where Appellant attempted to manipulate the trial court into granting a severance where none was required or necessary. At bar, the trial court specifically found that Appellant did not want to testify in this cause and that defense counsel's efforts were calculated to sandbag the trial judge by creating reversible error on this record. (R. 3891). It is well established that a defendant should be estopped from claiming error, as a party may not invite error and then be heard to complain of that error on appeal. Pope v. State, 441 So.2d 1073 (Fla. 1982). A defendant cannot create at trial the very situation which he then complains of on appeal and expect the court to reverse. White v. State, 446 So.2d 1031, 1036 (Fla. 1984). See also, McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, McCray v. Florida, 102 S.Ct. 583 (defendant cannot take advantage on appeal of situation he created at trial). It should be noted that even after the trial judge announced his requirement that Appellant proffer his testimony should he take the stand, Appellant nonetheless indicated that he did not want to testify and that he was not threatened or coerced from testifying. It was not until defense counsel sought further

opportunity to speak with his client on his testifying, during the course of a recess, that Appellant then indicated he wanted to take the stand but could not do so in light of the court's required proffer.

Appellee submits that to reverse these convictions under the present circumstances would be to frustrate the laudable purposes behind joint trials. Appellee would compare the present situation to the defense strategy employed in Talavera v. Wainwright, 468 F.2d 1013, 1014 (5th Cir. 1972) wherein after his motion for severance was denied the defendant called the co-defendant as a witness during a joint trial, whereupon the co-defendant was forced to exercise his right to remain silent in front of the jury. In Talavera v. State, 227 So.2d 493 (Fla. 2nd DCA 1969), affirmed in part, quashed in part 243 So.2d 595 (Fla. 1971), the Court held that the full import or the right to compulsory process may well make it incumbent upon a trial judge to grant a severance when one defendant seeks to compel the testimony of one or more co-defendants, but that the defendant who seeks to call a co-defendant should not be able to precipitate a severance merely on that bare allegation that he is going to call a co-defendant, whereupon after severance is granted, there would be no way of compelling the defendant to call the witness after all. "Such a rule would permit a defendant to inconvenience the Court and the prosecution on whim". Talavera, 227 So.2d at 497. "The trial judge should also

be satisfied, in his discretion, that the severance is sought in good faith and not as a vexatious device." Talavera, 227 So.2d at 498. This Court understandably quashed the district court decision finding it error to have denied the severance and implicitly recognized that the Talavera situation presented the possibility of misuse of severance by co-defendants; however, the Fifth Circuit concluded otherwise and affirmed the federal district court's decision to grant a writ of habeas corpus.

Appellee submits that the trial judge sub judice was aware of the defense strategy which wasn't seen by the trial judge in Talavera -- an effort to provoke severance or reversible error. If anyone faced a Hobson's choice at bar, it was the trial judge, not Appellant. To reverse the present convictions where the trial judge required Appellant to first proffer his testimony effectively undermines this Court's decision in McCray, supra, and O'Callaghan, supra, that a severance is not necessary under the present facts. A reversal on the facts of the instant case which cast a shadow on the sincerity of Appellant's wish to testify, would act as a signal to the defense bar on how to achieve the unachievable - obtaining a severance where not required - by a defense request for discovery from a co-defendant.

Finally, Appellee submits that in light of the fact that severance was properly denied, and where this Court should not sanction defense manipulation, this Court should affirm

Appellant's convictions where he did not proffer the substance of his testimony either through defense counsel or personally after being sworn in. Although defense counsel offered to make a proffer, he did not insist on making a proffer nor was he prevented or precluded from making a proffer of his cleint's alleged excluded testimony by virtue of any ruling of the trial court. Indeed, the trial court wanted a proffer of Appellant's testimony and repeatedly asked for a proffer. See, e.g., Smith v. State, 217 So.2d 359 (Fla. DCA 1986) (inasmuch as trial court did not rule as to acceptance or exclusion of proffered testimony, there was no basis for claim that trial judge erred in excluding proffered testimony). However, counsel refused the trial court's request for a proffer. (R. 3877). The purpose of a proffer of proposed testimony is so that the trial and appellate courts may be able to evaluate its weight, relevancy, and competency in determining the effect of its exclusion. Nava v. State, 450 So.2d 606, 609 (Fla. 4th DCA 1984). The basis of rule is that appellate review of the exclusion of evidence that has not been proffered on the record would require improper speculation as to what the excluded witness would have said as well as what effect, if any, it would have had on the proceedings. Nava, 450 So.2d at 609. Appellee submits that any error of infringement on the right to testify is not preserved for review where Appellant did not insist on a proffer. Appellant should be foreclosed from asserting the denial of the right to

testify on appeal was error where he did not ensure a record adequate for this Court to determine whether or not the "forced" exclusion of his testimony affected the outcome of the proceedings or the substantial rights of Appellant. Federal courts have applied the Chapman v. California, 386 U.S. 18 (1967) standard to violations of the right to testify. See Alicea v. Gagnon, 675 F.2d 913, 925, (2nd Cir. 1982). See also, Crane v. Kentucky, 476 U.S. 683 (1986) (harmless error applied to trial court's exclusion of defendant's evidence regarding circumstances of his confession). Thus, as it is not known what Appellant would testify to, and whether this testimony would constitute a defense to the charges, Appellant should be precluded from asserting that the trial court's requirement of a proffer impermissibly infringed his right to testify in his own behalf. Reversible error cannot be predicated on speculation or conjecture. Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976).

POINT III

THE TRIEL CORUT 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 Sxith Amendment right to a jury trial. Taylor v. Louisiana, 419 U.S. 522, 528 (1975). However:

> To establish a prima facie violation of the Sxith 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 Appellant 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:

TOTAL FOR EASTERN JURY DISTRICT
VOTER REGISTRATION

TOTAL REGISTERED VOTERS	BLACKS	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 6.939% 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 has occasion 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 occasionally 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. §1861. The Jury Seleciton 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 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 Castandeda 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 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 relive 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 equidistant line does not exclude white jurors from the west district, nor black jurors from 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 a closely related subject or object 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 Adminstrative 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), Aricle I, §§16, 11, Article V, §§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). Counsequently, 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 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 population basis is reasonably related to the purposes to be effected... it is a general law." Budget Commission of Pinellas County v. Blocker, 60 So.2d 193, 195 (Fla. 1951). 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 in 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 interfer 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 is premised 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 sub-units 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 IV

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", apparently referring to being under a doctor's care. Ms. Razz stated she had to see her doctor periodically. (R. 462). Later, during Vernon Amos' voir 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 conditon 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 motivated. Nor does the record support 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 Amendemnt 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 classificaiton of the trial judge's conduct besides one of concern 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 voir 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. Kilbane, a white juror, had also 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. 770). The next morning before court started, counsel for Leonard 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 and 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 had 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.

POINT V

APPELLANT'S RIGHT TO CONFRONTATION WAS NOT DENIED.

Detective Diane Creston showed Exhibit 46, a photo lineup containing the Appellant's photo to Bobby Helvey, Terry Howard, and Allen Sedenka. (R. 3463). Exhibit 46 was shown to Helvey on June 13th at 5:36. (R. 3465-66). Creston testified that Helvey identified photo number two of Appellant as the person he observed. (R. 3470-71). Helvey signed the back of the photo (R. 3471), and was positive of his identification. (R. 3472). Terry Howard was shown the photo lineup containing Appellant's photograph and selected Appellant's photo. (R. 3472-73). Howard initialed this photograph and was positive of his identification. (R. 3473-74). Allen Sedenka was shown this photo lineup on June 13th at 12:44 p.m. and selected Appellant's photo. (R. 3474-75). Creston met with Mark Nordman and took him to the Dyer Dump area to make an identification. (R. 3475-76). Nordman was not told Appellant was involved in the shooting, and there was no suggestion made that he needed to pick out somebody. (R. 3487). Nordman positively identified Appellant as being at the scene of the English Pub shooting. (R. 3479).

Appellee would first point out that this identification testimony was admissible as non-hearsay under Section 90.801 (2)(c), Fla. Stat. (1985) where the witnesses testified at trial and were available for cross-examination as to the strength of their identifications had Appellant chose to exercise this

opportunity. Nordman testified at trial that he was able to describe what the black males looked like to 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. 2136). Norman testified that the officers asked him to select the two black males that he observed, and that he made a positive identification. (R. 2136). Similarly, Sedenka testified 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 selected Appellant's photo from the first photos he observed. (R. 2246-47).

Thus, as to these two witnesses, Appellant clearly had the opportunity to cross examine them as to the strength and certainty of their identifications, and their ability to observe, although Appellant chose not to cross-examine on identification. Creston's testimony as to extra-judicial identification was admissible under State v. Freber, 366 So.2d 426 (Fla. 1978). In Freber, this Court rejected a hearsay argument that the deputies could not testify as to an extra-judicial identification made by the victim. See also, Downer v. State, 374 So.2d 840 (Fla. 1979) (extra-judicial identification made by a witness, who was unable to make an in court identification, was admissible where identification witness was present at trial and available for cross-examination). 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, denies, or fails to recall making the prior identification. Brown v. State, 413 So.2d 414 (Fla. 5th DCA 1982).

Any error as to Creston's testimony that Howard made a positive identification, where Howard did not testify at trial as to any identification, is harmless where there was other identification testimony which placed Appellant at the scene of the crime at Mr. Grocer. See, e.g., Melton v. State, 404 So.2d 798 (Fla. DCA 1981) (statement attributed to deceased placing defendant at the scene of the crime was hearsay but error harmless where presence at scene established by other evidence). Bobby Lee Helvey testified that he observed two black males running to a car at Mr. Grocer at 11:30 p.m. (R. 1912-14). Helvey identified Appellant from the photo lineup later that morning. (R. 1916). Appellant was described by Helvey as wearing a black, vest-like shirt, with two-tone blue jeans. (R. 1917-1918). When Appellant was apprehended he was wearing clothing which matched this description.

Appellee would further point out that Appellant never objected to either Helvey's or Sedenka's testimony as to identification, without the photo packs admitted into evidence, as being a denial of his right to confrontation. This issue was not raised until later, during Appellant's motion in limine to preclude police officer's testimony as to identification of

Appellant by these witnesses. (R. 2295). Appellant's objection to any lack of confrontation as to the witnesses' identifications based on photo lineups, made after the witnesses had already testified, was clearly untimely. Constitutional rights may be waived if not timely presented. Ray v. State, 403 So.2d 956 (Fla. 1981).

At bar, the State had no objection to Appellant being allowed to recall the identification witnesses for further cross-examination on their identifications. (R. 2340). Appellant, who adopted the argument of co-defendant (R. 2346), did not want the opportunity to recall these witnesses to cross-examine them on the photo identifications. (R. 2344). Where counsel failed to take advantage of the opportunity to cure error, the error will be deemed invited and nor warrant reversal. Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied 428 U.S. 911.

Moreover, the confrontation clause of the Sixth Amendment is restricted by its terms to witnesses and does not encompass physical evidence as well. Strahorn v. State, 436 So.2d 447 (Fla. 2nd DCA 1986); State v. T.L.W., 457 So.2d 566 (Fla. 2nd DCA 1984).

Appellant's convictions must be affirmed.

POINT VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL AS TO A COMMENT MADE BY CO-DEFENDANT SPENCER DURING OPENING ARGUMENT.

Prior to trial Appellant filed a motion to suppress statements made by Appellant to Officer Dowdell. (R. 281-293). The State stipulated it would not use the video taped statements of Appellant set forth in Appellant's motion to suppress during trial (R. 283), and would not elicit any verbal testimony concerning the contents of Appellant's statement in its case-in-chief. (R. 285).

During opening argument by co-defendant Spencer, counsel for Spencer was attempting to show the chronological events of what happened from the point that his client allegedly returned to Belle Glade before the commission of the robbery at Mr. Grocer. (R. 1810-11). Counsel for Spencer detailed how Appellant was caught hiding inside a junked vehicle and was then taken to the Sheriff's office. (R. 1810-11). Appellant objected to the co-defendant mentioning his statement given to police. (R. 1812). Counsel for Spencer indicated that he only wanted to show that as a result of speaking with Appellant, the police began looking for Spencer's brother. (R. 1812). Counsel for Spencer did not want to comment on the substance of Appellant's statements:

> THE COURT: You would be offering his testimony against him is what you're saying?

> MR. BAILEY: No, no. I'll be offering only -- and I have him under subpeona -- Officer Dowdell, who took part in the interrogation of Vernon Amos. I would be offering testimony from Dowdell that he talked with Vernon Amos and, as a result of his conversation, he was looking for somebody who was not my client. He was not looking for my client.

Appellant's objection was overruled and motion for mistrial denied. (R. 1813-1814, 1815-16). Counsel for Spencer then argued that Appellant was brought to the Sheriff's office whereupon a police officer was flown in from Belle Glade. (R. 1814). Spencer argued that as a result of Officer Dowdell's conversation with Appellant, that Dowdell began looking for some individuals in Belle Glade that did not include Leonard Spencer. (R. 1817-18).

Florida case law states that a motion for declaration of mistrial is addressed to the sound discretion of the trial judge. Salvatore v. State, 355 So.2d 745 (Fla. 1979); Barsden v. State, 203 So.2d 194 (Fla. 4th DCA 1967). The power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity. Salvatore v. State, supra. The standard of prejudice which must be met by the defendant in order to obtain a new trial varies adversely with the degree to which the conduct of the trial has violated fundamental notions of fairness. Salvatore, supra. It should not be presumed that if error did occur it

injuriously affected the substantial rights of the defendant. Id.

Appellee maintains that the trial court did not abuse its discretion in denying Appellant's motion for mistrial where Spencer's opening statement did not mention that Appellant gave an incriminatory statement to police. It must be remembered that opening remarks of counsel do not constitute evidence. Whitted v. State, 362 So.2d 668 (Fla. 1978). All that Spencer's statement alluded to was that Dowdell had a conversation with Appellant, and that as a result of the conversation, Dowdell began looking for soemone other than Leonard Spencer. (R. 1817-18). The mere fact that Dowdell had a conversation with Appellant does not infer any culpability on Appellant's part. Significantly, the substance of Appellant's statements were not alluded to either. Counsel for co-defendant's remark was not improper where he only stated the events as he thought they would unfold at trial. See, e.g., Travieso v. State, 480 So.2d 100 (Fla. 4 DCA 1985), review denied, Perez v. State, 491 So.2d 280 (mistrial not warranted by reference in opening statement by co-defendant's counsel, detailing involvement of an alleged participant in smuggling operation as though that participant were going to be called as a witness, where case was outlined as counsel anticipated it would unfold through the various witnesses, although no one called the witness). Thus, Appellee submits that this isolated remark that Appellant had a

conversation with Dowdell after he was apprehended was not so prejudicial as to warrant a new trial. Where the nature of the remark was at most an indirect reference that Appellant had given a statement, and the substance of the statement itself was not disclosed, this remark was neither so harmful or fundamentally tainted as to require a new trial.

Should this Court find the remark to be improper, Appellee submits that the error is harmless under the dictates of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). See also, Adams v. State, 445 So.2d 1132 (Fla. 2nd DCA 1984) (error in permitting prosecutor at joint trial to refer in his opening statement to portion of first defendant's confession, which stated that second defendant suggested that they rob victim before they left lounge, was harmless in view of overwhelming evidence against second defendant). In light of the overwhelming evidence of guilt, it is clear that this isolated remark could not possibly influence the jury's verdict where Appellant was identified as fleeing from Mr. Grocer after the robbery by Bobby Helvey, (R. 3465-66), where Mark Nordman identified Appellant as fleeing the scene of the English Pub after the murder (R. 3475-79), where Appellant was identified by Allen Sedenka as robbing him of his car (R. 3475), and where Terry Howard identified Appellant from a photo lineup as being involved in the crimes at Mr. Grocer. (R. 3473-74). Appellant was chased in Sedenka's Honda, whereupon he and Spencer abandoned the car in the Dyer Dump area, and Appellant was found

hiding in a junked vehicle. In light of this evidence, only the most egregious of errors could have changed the outcome of this case.

POINT VII

APPELLANT'S ACTIVE INVOLVEMENT IN THE MURDERS, ROBBERIES; HIS RECKLESS INDIFFERENCE TO HUMAN LIFE, AND DEGREE OF CULPABILITY PERMITTED THE IMPOSITION OF THE DEATH PENALTY.

Appellant contends that the trial court's finding in its written order that Appellant met the culpability requirement of Enmund v. Florida, 485 U.S. 782 (1982) is not supported by the record. Appellee submits that Appellant's active involvement in the murder and robbery of both victims, his reckless indifference to human life, and his degree of culpability, permitted the appropriate imposition of the death penalty for both murders.

Under the relevant case law, a defendant's Eighth Amendment protection can be said to be violated, only if the evidence shows he did not kill, intend to kill, participate in the killing, or contemplate that lethal force would be used, or a life would be taken. Enmund, 458 U.S. at 797, 800. In Tison v. Arizona, 481 U.S. ___, 190 S.Ct. ___, 95 L.Ed.2d 127 (1987), the Supreme Court refined this standard, so that a defendant's Eighth Amendment rights would not bar the imposition of the death penalty of a defendant was an active participant in the crimes leading to the commission of a murder, and displayed reckless indifference to the life or plight of an eventual murder victim. Tison, 95 L.Ed.2d at 144-145; Glass v. Butler, 820 F.2d

112, 113 (5th Cir. 1987). Appellant's culpability, for which he received two sentences of death, does not offend the constitutional limits of Enmund supra, or Tison, supra.

Appellee submtis that Appellant's role as triggerman, who actually killed Mr. Bragman, established sufficient culpabilitiy to permit the imposition of the death penalty in and of itself under Count V. Tison, supra; Enmund, supra; Elledge v. Dugger, 823 F.2d 1439, 1449-1450 (11th Cir. 1981), modified, other grounds, 833 F.2d 250 (11th Cir. 1987); Tafero v. Wainwright, 796 F.2d 1314, 1318 (11th Cir. 1986); Griffin v. Wainwright, 760 F.2d 1505, 1519-1520 (11th Cir. 1985); Adams v. Wainwright, 709 F.2d 1443, 1446-1447 (11th Cir. 1983); Diaz v. State, 513 So.2d 1045, 1048 (Fla. 1987); Engle v. State, 570 So.2d 881, 883 (Fla. 1987); Garcia v. State, 492 So.2d 360, 363, 368 (Fla. 1986); Buford v. State, 402 So.2d 357, 358 (Fla. 1986). The evidence is beyond dispute that Appellant fired the shot that killed Bragman at the English Pub as Spencer struggled with the victim over his car keys. As Foster testified, who witnessed the struggle and shooting, it was impossible for the taller black male to have shot the victim as both of his hands were busy trying to get the keys. (R. 1985, 1991). After the shot, Foster observed Appellant located on the other side of the open door (R. 1979, 1985-86), within a foot or two of the struggle. (R. 1979). The bullet which killed Bragman entered the left side of his face and was fired at close range. (R.

3093, 3098). Thus, Appellant's active involvement in this murder justifies the imposition of the death penalty.

As to Count I, there was also sufficient evidence presented from which the jury could have found Appellant shot McAnich as well. Although witness Howard could not be certain where the shot which killed McAnich came from, he testified that if it had come from Spencer he should have been able to tell. (R. 1856, 1879-82). His ears would have rang. (R. 1888). Howard acknowledged that Spencer couldn't have fired the shot because he was putting Howard on the floor and still had a hold of him. (R. 1888). When Howard was grabbed Spencer, Amos was seen standing in front of McAnich across the counter. (R. 1899). The wound to McAnich's chest could have only been fired from a person standing in front of the victim. (R. 3127).

Thus, Appellee submits the trial court's statement that, "The evidence in this case demonstrates that VERNON AMOS was not a mere Earl Enmund" is amply supported by the record. The facts of Enmund, supra, are in marked contrast to the facts sub judice. Enmund's role as the getaway driver who waited outside the residence where a robbery and murder of two victims took place can only lead this Court to the conclusion that Appellant's individual culpability was significantly greater than that of Enmund. In Griffin v. Wainwright, supra, involving similar facts, the Court held that the impositon of the death penalty was proper notwithstanding the claim that the conviction

might have been based solely on jury's belief that the defendant was an accomplice to a felony murder, where the evidence was more than sufficient to support a finding that the defendant personally killed the victims in the course of a convenience store robbery by willfully shooting them.

Additionally, other evidence, including Appellant's participation in the robbery by keeping the victim busy by asking for cigarettes while Spencer cased the store (R. 1849, 1852, 1857), asking Howard to open up the cash register (R. 1857-58, 1874), and fleeing with Spencer in the stolen vehicle (R. 1913-14, 1916), demonstrates substantial involvement in the robbery of McAnich apart from his role as the triggerman. Indeed, Appellant's actions in driving Sedenka's car away from the robbery of Sedenka served to aid their escape from the Mr. Grocer and English Pub crime scenes. See, e.g., Engle v. State, supra, (imposition of death penalty on defendant convicted of murder of convenience store clerk was permissible where evidence clearly supported conclusion that he was directly involved in abduction and death of victim and that he and his accomplices were major participants in crime which necessarily contemplated use of illegal force.) Moreover, a defendant's participation in the crime of armed robbery was held to contemplate that a life would be taken in Jackson v. State, 502 So.2d 409 (Fla. 1986). In Jackson the defendant was a major participant in the armed robbery of a clerk of a hardware store, and although he was not

the triggerman, his culpability was sufficient to allow for imposition of the death penalty. Thus, the Tison, supra, rationale would permit the imposition of the death penalty on Appellant for the murder of McAnich even if Spencer had fired the murder weapon. The State made the necessary showing that Appellant intended to kill or participated in the killing, or participated in the offense with a reckless indifference to the plight of the victim, to be subject to the death penalty. Under these circumstances, Appellant was clearly a major participant in the murder and robbery of both victims, which necessarily contemplated and involved the use of lethal force. The trial court's conclusion in the sentencing order is fully supported by the record and justifies the sentences of death.

POINT VIII

THE TRIAL COURT CORRECTLY EXCLUDED EVIDENCE IRRELEVANT TO STATUTORY AND NON-STATUTORY MITIGATING FACTORS.

During Appellant's sentencing hearing, he proffered the testimony of Officer Dowdell that he met with Appellant on June 13, 1986 to take a statement from him. (R. 4625-27). Dowdell told Appellant that if he cooperated, the Sheriff's office would not recommend the death penalty. (R. 4628). Appellant told Dowdell that he was forced to do what he did at gun point by a person named Spencer. (R. 4631).

Appellant then proffered his taped statement given to police. (R. 4653). In it, Appellant stated that he rode to West

Palm Beach with a person named Spencer to find some women. (R. 4657). They stopped at the convenience store so that Appellant could get some cigarettes. (R. 463). Appellant went in to get a soda and then Spencer grabbed a customer by a headlock. (R. 4664-65). Appellant stated that Spencer shot the clerk behind the counter and the customer. (R. 4665-4667). Spencer then pointed the gun at Appellant and told him to open the register. (R. 4667-68). Appellant stated that Spencer also shot the owner of the truck at the English Pub (R. 4669-70), and that Spencer ordered Allen Sedenka out of his car. (R. 4670). Appellant stated Spencer told him to drive the vehicle (R. 4670) and that when they abandoned the vehicle he went to sleep in a junked car. (R. 4671). Detective Fitzgerald told Appellant his story didn't make any sense because if a person is going to rob a store, he parks across the street as did Appellant so nobody sees the car. (R. 4687-88). Nor did Detective Fitzgerald find it credible that Appellant would ride all the way to West Palm Beach to party with a person he hardly knew. (R. 4690).

Officer Dowdell's proffered testimony then continued. Dowdell testified that he believed Spencer might be involved because of the description of the vehicle given to them by Appellant (R. 4703), but as Dowdell acknowledged on cross-examination, he received information independent of Appellant's statement from Ed Cain that Spencer was involved (R. 4705), and that police developed a fingerprint belonging to Spencer, and

that Spencer had been identified from a photo lineup. (R. 4705-06).

Appellant argued that this evidence went to the mitigating factor of domination by another person and the level of Appellant's participation, as well as the nature of the crime and character of the Appellant. (R. 4639). The trial court found that this evidence didn't show that Appellant voluntarily cooperated by turning himself in. Rather, Appellant only cooperated after he was caught and was told he was facing the death penalty. (R. 4640). The court found this evidence neither went to the nature of the offense nor character of the defendant. The Court sustained the State's objection and precluded the defense from presenting Dowdell's testimony or this tape to the jury. (R. 4709).

In King v. State, 514 So.2d 354 (Fla. 1987), this Court stated that, "The only limitation on introducing mitigating evidence is that it be relevant to the problem at hand, i.e., that it go to determining the appropriate punishment". As this Court observed in Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), the concept of mitigation requires that the Court:

> [N]ot be precluded from considering as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offenses that the defense proffers as a basis for a sentence less than death ...

[quoting from Lockett v. Ohio, 438 U.S. 586, 604-605]. However, as noted in Lockett, 438 U.S. at 604, n. 12:

> Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense.

Appellee submits that Appellant has not shown an abuse of discretion in excluding this evidence, in violation of Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982) or Lockett v. Ohio, supra. Appellee maintains that this evidence was properly excluded where it was not relevant to a determination of the appropriate sentence. The evidence of Appellant's cooperation, induced by Dowdell's promise not to recommend the death penalty, would have been at best misleading to the jury where Dowdell had no authority to make any such recommendation of leniency. Appellant received a benefit by not having his statements admitted at trial where the State stipulated it would not use these statements in evidence. Certainly, the fact that Appellant "cooperated" after he had been apprehended and was told he was facing the death penalty, does not bear favorably on his character or the circumstances surrounding this offense. Moreover, the actual level of his cooperation was minimal, where his statements were extremely self-serving as Appellant placed all of the blame on Spencer for these crimes. To be certain, the State had other leads to Spencer's identity apart from Appellant's statement placing the entire blame on Spencer. See, e.g., King v. State, supra, (no abuse of discretion in refusing to permit defendant to

introduce evidence of lingering doubt as to defendant's guilt where not relevant to determination of the appropriate sentence); Hill v. State, 515 So.2d 176 (Fla. 1987) (no abuse of discretion in excluding testimony of defendant's mother and father which did not focus on character of defendant); Rogers v. State, supra, (effects produced by childhood trauma not relevant to defendant's character, record, or circumstances of the offense); Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985) (no error in excluding evidence of the deterrent effect of death penalty). No error has been shown when this proffered evidence is not of a kind capable of mitigating Appellant's punishment.

Appellee further maintains that any error, if at all, in excluding this evidence is harmless where Appellant's cooperation was not reasonably likely to affect the sentencing determination in Count V, in light of the finding of three (3) aggravating circumstances and zero (0) mitigating circumstances.[1] See Point IX, infra. In Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), the Supreme Court set forth the standard in determining whether mitigating evidence erroneously not considered is harmless. Appellee maintains that had Appellant presented this evidence of cooperation, that this Court cannot conclude that "it appears

---

[1] Appellant's reliance on Morgan v. State, 515 So.2d 975 (Fla. 1987) is misplaced where the judge precluded the jury from considering any evidence of nonstatutory mitigating factors.

reasonably likely" that the exclusion of this evidence "may have affected" the sentencing decision. Skipper, ___ U.S. at ____, 106 S.Ct. at 1673.

Initially, Appellee would point out that as to Count I, this issue is a non-issue as the jury recommended a life sentence when it was not even aware of this evidence. Although the judge was made aware of the evidence, his comments indicate he was not impressed with this evidence and did not find it to be mitigating at all.

As to Count V, the jury recommended a sentence of death by an 8 to 4 vote. (R. 5594). The court found three aggravating factors and no mitigating factors. (R. 5634-38). Appellee submits that in light of the weakness of this mitigating evidence, that the jury's recommendation and judge's sentence would have been the same. As to Appellant's claim that this evidence showed his minor participation and domination by Spencer, the evidence at trial was completely to the contrary. Bobby Lee Helvey, who observed Appellant and Spencer fleeing from Mr. Grocer, didn't observe Spencer pointing a gun at Appellant such as to force him in the car. (R. 1915). Curtis Bowlen, who observed Appellant and Spencer abandon Howard's stolen vehicle at his residence, observed that neither defendant had a weapon trained on the other. (R. 1966). There was no indication that one person was in physical control of the other. (R. 1967). Perhaps the most telling testimony came from Allen Sedenka, who

testified that his passenger door was locked and that Appellant went to the passenger side to get in. (R. 2183, 2239). The tape from Sedenka's 911 call indicated that Appellant said, "Open the door" (R. 2225, 2235-2238); the only reasonable inference being that Appellant was not forced to accompany Spencer but desired to go with him. Sedenka observed neither defendant with a gun in his hand, didn't hear any threats between them, and didn't observed any indication of physical domination by one over the other. (R. 2196-97). Thus, in light of this testimony, the presentation of Appellant's claim of domination by Spencer to the jury based on this evidence would have appeared incredible. Finally, as previously noted, Appellant did not cooperate with police until after he had been captured and induced to cooperate through Dowdell's promise of leniency. Given the minimal nature of Appellant's cooperation, consisting of placing the blame entirely on Spencer, such that even Detective Fitzgerald could not entirely believe Appellant's factual rendition (R. 4687-88, 4690), supports the Appellee's argument that this evidence would not have been reasonably likely to have swayed the jury from recommending death. See, e.g., Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986) (even had defendant proffered fact that he had two children for whom he cared as mitigating evidence, trial court's exclusion not likely to affect sentence in light of overwhelming evidence of aggravating factors); Tafero v. Dugger, 13 F.L.W. 161 (Fla. Feb. 26, 1986) (given four aggravating

factors and weakness of mitigating evidence consisting of residual doubt about the extent of defendant's involvement in the crime, the disparate treatment of co-defendant, and defendant's being a father, that jury would have recommended and judge imposed death sentence); White v. Dugger, 13 F.L.W. 270 (Fla. Apr. 13, 1988) (restriction of consideration of mitigating evidence harmless where it would not have affect recommendation of death sentence). See also, Delap v. Dugger, 513 So.2d 659 (Fla. 1987).

Moreover, not only would this evidence not have swayed the jury, but it would not have influenced the judge, the ultimate sentencer, to have imposed a sentence of life. Appellee would point out that the trial judge overrode the jury's recommendation of life under Count I. Assuming arguendo this evidence would have persuaded the jury to recommend life under Count V, since the trial court was aware of this evidence and considered it as to both counts, and overrode the life recommendation under Count I, had the jury recommended life under Count V, Appellee maintains that the court would have overrode any life recommendation by the jury based on this evidence where he clearly found it to be insubstantial. As the Court found in its written sentencing order under Count V, "in considering the mitigating circumstances the court did not exclude any from consideration even though certain ones were not presented to the jury." (R. 5636). The Court found:

> Although the court prevented the Defendant from having the Jury instructed on the mitigating circumstance of "extreme duress or under the substantial domination of another person" the court has considered the video-taped statement of the Defendant as well as the other matters attempted to be introduced by the Defendant on this issue. Other than the Defendant's own self-serving statements and the argument on his attorney there is no evidence supporting the Defendant's claim and the evidence introduced at trial clearly demonstrates a cooperation and joint effort by VERNON AMOS and LEONARD SPENCER throughout the entire chain of events on June 12th and 13th 1986.
>
> * * * * *
>
> Although the court did not allow the Defendant to present nor argue to the jury the issue of the "promise" of Sgt. Dowdell that the seriff would not seek the death penalty and Sgt. Dowdell would do his utmost to see that the death penalty was not imposed on the Defendant if the defendant cooperated with law enforcement the court has weighed this as a possible mitigating circumstance. The Defendant's "cooperation" does not go to the nature of the crime nor the character of the Defendant, all the "cooperation" amounted to was the Defendant accusing LEONARD SPENCER of doing all the crimes and compelling the Defendant to "go along." (R. 5637-38).

Thus, had the jury found that this evidence was weighty enough to have recommended life, it is clear that the ultimate sentence imposed would have been death where the judge plainly stated he did not consider this evidence as mitigating.

POINT IX

THE TRIAL COURT'S OVERRIDE OF THE JURY'S VOTE RECOMMENDING A LIFE SENTENCE ON COUNT I WAS NOT ERROR.

The trial judge has the ultimate decision as to whether the death penalty should be imposed, Hoy v. State, 353 So.2d 826, 832 (Fla. 1977). Where the jury's advisory recommendation is a life sentence which the court deems inappropriate under the law the court "not only may, but must overrule the jury", (emphasis supplied), Brookings v. State, 11 F.L.W. 445, 449 (Fla. August 28, 1986). The override will be sustained where the facts are "clear and convincing that virtually no reasonable person could differ", Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

"Mere disagreement with the force to be given [mitigating] evidence is an insufficient basis for challenging a sentence", Porter v. State, 429 So.2d 293, 296 (Fla. 1983); Quince v. State, 414 So.2d 185, 187 (Fla. 1982). The trial court within its discretion properly makes a determination of the weight to be applied to a mitigating factor and such discretion "will not be disturbed if supported by competent substantial evidence", State v. Bolender, 12 F.L.W. 83, 84 (Fla. January 29, 1987).

However, as Justice Shaw cogently observed in his dissent in Burch v. State, 13 F.L.W. 152, 153 (Fla. Feb. 18, 1988):

> It is the trial judge who is responsible for determining the sentence in Florida and,

> notwithstanding the jury recommendation, the determination should be based on an independent weighing of the aggravating and mitigating factors. [Citation ommitted]. The trial judge here prepared a comprehensive sentencing order wherein he examined each of the potential aggravating and mitigating factors, explained his reasoning, and rendered his factual findings on each factor and the balance to be struck between them. Those factual findings are supported by competent substantial evidence. It is not the function of this Court to substitute its sentencing judgment for that of the trial judge . . .

In the case at bar, no reasonable person could differ with the court's override. The facts adduced at trial proved extreme circumstances. Appellant and Spencer travelled from Belle Glade to West Palm Beach to commit a robbery. Appellant and Spencer entered Mr. Grocer and staged this crime. Appellant asked the clerk for a package of cigarettes (8149-50) and kept him busy while Spencer walked to rear of the store and "cased" the premises. (R. 1851-52). The clerk was killed while ringing up Appellant's cigarettes; the amount of the cigarettes had been entered into the register, but the tax button had not yet been pushed. (R. 1929-31). Consequently, the cash drawer remained unopened. Appellee submits Appellant's level of participation in the events surrounding the robbery and killing of McAnich was established with unmistakable clarity. Taken in a light most favorable to the State, there is a fair inference that Appellant requested to purchase the cigarettes in an effort to get the clerk to open the register to assist in the burglary. As noted in Point I, supra, there was evidence from which the jury could

have concluded Appellant was the triggerman. "[T]he murder was committed with no more emotion or thought than it takes to swat a fly". (R. 5630). Allen McAnich was gunned down with a single shot to the chest, and the same weapon was used to shoot the only remaining witness, Terry Howard. Terry Howard was left for dead, after his wallet and car keys were stolen. Appellant and Spencer then fled in Howard's vehicle, only to continue this joint crime spree at another location.

In sentencing Appellant to death on Count I the trial court found four aggravating circumstances and no mitigating circumstances to be established. Appellee submits that these four aggravating circumstances are valid, and that these circumstances outweighed any mitigating evidence presented to the jury, such that this mitigating evidence did not provide a reasonable basis to recommend life. The first aggravating factor found to exist by the trial judge was that the murder was committed while Appellant 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. (R. 5630). As noted above, not only was there evidence that Appellant participated in the robbery but there was evidence from which a jury could have concluded Appellant fired the fatal shot, based upon Appellant's location in front of the clerk where he was observed standing, the trajectory of the bullet, and Howard's admission that Spencer

still had a hold of him when the shot was fired. (R. 1888, 1899, 3106, 3127).

The second factor found by the Court was that this crime was committed to avoid or prevent a lawful arrest. As the court noted, "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." (R. 5630). Appellee maintains that it is clear the dominant theme for the murder was witness elimination. Appellee submits that it is fair to infer that Appellant and Spencer left their community in Belle Glade and travelled all the way to West Palm Beach to avoid the recognition inherent in their own community. They entered Mr. Grocer and shot McAnich one time. As Howard testified, McAnich never argued with these men and he never heard McAnich say anything to them at all. (R. 1867). The instant case is a far cry from Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) wherein a robbery simply got out of hand, as was indicated by the victim being stabbed more than 30 times in an apparent frenzy. Indeed, this situation was well under the defendants' control. Terry Howard was easily subdued and placed on the floor. The shooting of the sole remaining witness in an attempt to kill him also supports the conclusion that McAnich was shot to avoid the identification of

Appellant and Spencer or to prevent him from summoning help after the commission of the crimes.

The third reason found for aggravation was that this crime was committed for financial gain. This factor is overwhelmingly supported by the evidence, which includes the defendants' attempts to get the cash register open and the robbery of Terry Howard. After the commission of the crimes, the register was found squealing demonstrating that the wrong buttons had been pushed. As Howard testified, he heard two voices ordering him to open up the register but he was unable to. (R. 1857-58, 1874). This factor was not improperly doubled in relation to the aggravating factor that the crime was committed during the course of the robbery where each factor was based on different facts. The evidence relied upon to support the factor that the crime was committed during the course of the robbery was a theft of cigarettes. As to the pecuniary gain factor, however, the evidence relied on to support this fact was that Appellant and Spencer sought to rob the register of its cash, but were unable to open it. Thus, no improper doubling exists. Oats v. State, 446 So.2d 90 (Fla. 1984).

The final aggravating circumstance found by the trial court was that this crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The trial court found that there was no name calling, struggle, or hot blood involved and that Appellant and

Spencer entered the store after a long ride from Belle Glade carrying firearms. (R. 5630-31). Although the present case does not present a contract murder, McCray v. State, 416 So.2d 804 (Fla. 1982), certainly the method of killing the victim with a single, fatal shot through the chest can be characterized as an execution-style murder. The orchestration of events leading up to the killing demonstrate that the murder and robbery were well thought out in advance. Appellant and Spencer travelled from Belle Glade to West Palm Beach armed with firearms. While Amos kept the cashier busy and tried to get him to open the register, Spencer looked around. (R. 1847-48, 1850, 1851-52). Spencer, in a deceptive move, acted as if to leave the store but instead grabbed Howard around the neck and put a gun to his side. (R. 1854). McAnich was shot one time only, at close range. (R. 2560, 3106, 3109). The close distance at which shots are fired has been held to be properly considered in determining whether the factor of cold, calculated and premeditated applies. Squires v. State, 450 So.2d 208 cert. denied 105 S.Ct. 268. Thus, in light of the absence of evidence that the victim provoked the attack in any way, and the fact that McAnich was killed with one bullet during the course of a very-much-under-control robbery, Appellee submits this factor was properly applied.

At bar, although the trial court considered mitigating evidence as it was obligated to, the trial judge's sentencing order reveals that it found no mitigating circumstances to

exist. In Rogers v. State, 511 So.2d 526, 534 (Fla. 1987) this Court held that a finding that no mitigating factors exist has been construed in several different ways:

> (1) that the evidence urged in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved.

Appellee submits that the findings of the Court as to the presence of mitigating factors falls into this second category. The entire tenor of the court's order is devoted to considering the mitigating evidence presented but finding that no mitigating circumstances exist. The court stated that, "In considering the mitigating circumstances the court did not exclude any from consideration even though certain ones were not presented to the jury." (R. 5631). "Even giving the benefit of proof to 'reasonable conviction' rather than to the State's high burden of proof the Court found no mitigating circumstances nor combination thereof that would weigh against the aggravating ones." (R. 5631). The court's order then proceeds to reject the existence of mitigating factors on the evidence offered in support thereof. (R. 5631-32). Although Appellant argues that the jury could have found that Amos was a mere accomplice whose participation was minor, as a basis to recommend a life sentence, Appellee maintains that this evidence could not have influenced the jury to return a recommendation of life. The Court found

that Appellant's actions demonstrated cooperation and joint effort with Spencer throughout the entire chain of events on June 12th and 13th 1986. (R. 5632). Appellant not only accompanied Spencer during the robbery and murder at Mr. Grocer, fled with him when the crimes were complete, but aided the commission of another robbery down the street at the English Pub by killing that victim as well in an effort to escape. Appellant later drove the getaway car taken from Allen Sedenka. Thus, as this mitigating factor was refuted by the evidence, the jury could not have found it to exist so as to reasonably base a recommendation of life on it.

Appellant further argues that the testimony of the victim's mother that Appellant never had a father around, his mother sent him away to live with his grandmother, he always had a job, and that he has two children constitutes a reasonable basis for a life recommendation. Appellant's argument in essence is that he did not have a normal childhood. Appellee submits that a careful review of Joan Wilson's testimony reveals that Appellant led a very normal, happy childhood, rather than an abnormal childhood, and that reasonable juror would be hard-pressed to conclude that such a normal childhood, in light of the existence of very substantial aggravating factors, constitued a reasonable basis for the recommendation of life sentence. The fact that Appellant has two children, that he can support through lawful, honest means does not justify mitigation. Ms. Wilson

testified that Appellant lived with her until age seven and then moved to Florida to live with his father. (R. 4616). Appellant and his brother lived with his paternal grandmother in Belle Glade. (R. 4617). When Appellant was in the third grade, his mother brought him back to live with her but he wanted to return to Belle Glade to be with his brother. (R. 4618). Ms. Wilson testified that as a child, Appellant was happy and playful. (R. 4619). Appellant came from a decent family, and was not abused as a child. (R. 4623). He led a normal childhood. (R. 46 24). Ms. Wilson testified that Appellant had no problem earning money honestly or holding down a job. (R. 4625). Appellant had worked at the Foodway Market for a while, and then at Touche's, a supper club. (R. 4620). Appellant worked for Foodway until February, 1986. (R. 4622) Appellant has two children. (R. 4620). The trial court apparently concurred with Appellee's interpretation of this evidence as he found that Appellant was in the "prime of his physical abilities and certainly old enough to clearly recognize and understand the difference between right and wrong; his mother's testimony confirms these qualities." (R. 5631). The trial court specifically found that Appellant was not unable to lawfully provide for himself and his two daughers in that he suffers no mental, emotional or physical handicap. (R. 5632).

Thus, Appellee maintains that it cannot be disputed that the aggravating factors completely outweigh any mitigating

evidence presented. This Court has upheld jury overrides in two cases involving similar robbery-murders occurring at convenience stores. In Engle v. State, 510 So.2d 881 (Fla. 1987) the defendant and two others decided to rob a convenience store and abduct the clerk. The clerk's body was found the next day in a wooded area. The Court found four aggravating factors and no mitigating factors. The defendant, in a similar fashion, argued that the jury's recommendation of life was plausible because there was no direct evidence that the defendant, rather than an accomplice, actually did the killing. This Court upheld the override where it found evidence of the defendant's participation and found that it would be unreasonable to conclude the defendant played no part in the crime. Similarly, in Burr v. State, 466 So.2d 1051 (Fla. 1985), cert. denied 106 S.Ct. 201, this Court found that the trial judge did not err in overriding the jury's life recommendation in the murder of a convenience store clerk during a robbery where there were several aggravating circumstances and no reasonable basis for a jury recommendation of life. Recently in Torres-Arboledo v. State, 13 F.L.W. 229 (Fla. Mar. 24, 1988), this Court upheld an override in the presence of only two aggravating circumstances, less than that established at bar, finding that the evidence relied on to establish a recommendation of life which was the defendant's intelligence and candidacy for rehabilitation were not of such weight that reasonable people could conclude they outweighed the two

aggravating factors proven. The trial court properly overrode the jury's life recommendation where Appellant's evidence of mitigation was comparatively weak as compared with the strong, substantial aggravating factors proven at trial.

POINT X

THE TRIAL COURT PROPERLY IMPOSED A SENTENCE OF DEATH IN COUNT V, IN ACCORD WITH THE JURY'S RECOMMENDATION.

As to Count V, the jury recommended an advisory sentence of death by an eight to four vote. In its written sentencing order as to Count V, the trial court found three aggravating factors to exist and no mitigating factors. Consequently, the trial court imposed a sentence of death in accordance with the jury's recommendation. Appellee has addressed the propriety of the aggravating circumstances found by the trial court to apply to Count I in Point IX, supra. Thus, Appellee will address its argument to the propriety as the death sentence as to Count V in this point on appeal.

Appellant has not challenged the applicability of the trial court's finding that the murder was committed while Appellant 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. (R. 5635). Indeed, the record amply supports this finding where Appellant and Spencer were in flight from the earlier commission of the robbery and murder at Mr. Grocer, and were in the process of robbing Robert Bragman at

the time he was shot to death. Rather, Appellant challenges the findings that the murder was committed for the purpose of avoiding or preventing a lawful arrest (R. 5635) and that the crime was committed in a cold, calculated and premeditated manner. (R. 5635.

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 regardless of whether the jury recommends life or death. LeDuc v. State, 365 So.2d 149 (Fla. 1978).

The trial court properly found applicable to aggravating factor that the crime was committed to avoid or prevent a lawful arrest. The court stated, "on the facts it appears clear that VERNON AMOS shot and killed ROBERT BRAGMAN to assist 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] any more time VERNON AMOS stopped the struggle by killing ROBERT BRAGMAN." (R. 5635).

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).

Considering the entire chain of criminal events leading up to the murder of Robert Bragman, it is clear that the dominant theme for this murder was witness elimination. Appellant and Amos left their Belle Glade community and travelled to West Palm Beach to commit the earlier robbery at Mr. Grocer, in an obvious attempt to avoid recognition inherent in their own community. After killing Allen McAnich, and stealing and abandoning Terry Howard's vehicle, Appellant continued his flight to the scene of the English Pub. Appellant and Spencer were in need of transportation to return to Belle Glade. Robert Bragman, however, refused to give up his keys to Leonard Spencer as they struggled next to Bragman's truck. (R. 1974-77). Appellee submits that it was evident that this delay in obtaining transportation was increasing the danger of their detection. This Court can only reach the inescapable conclusion that Bragman was shot and killed to prevent a lawful arrest of Appellant, where Bragman's actions were increasing the danger of their detection. Not only was

Bragman's refusal to turn over his keys causing a critical delay in their escape, but it was also drawing attention to Appellant and Spencer. See, e.g., Gore v. State, 475 So.2d 1205 (Fla. 1985), cert. denied 106 S.Ct. 1240 (evidence, including fact that victim was killed in process of escape, was sufficient to support finding that murder was committed to prevent a lawful arrest). Thus, Appellee maintains that this finding is properly supported by the record where Bragman was killed to aid their escape.

Appellee maintains that the trial court correctly found that this murder was committed in a cold, calculated and premeditated fashion. The trial court found that, "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. 5636).

As this Court has previously held, 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].

Appellant's actions in firing one shot into the head of Robert Bragman at close range in an execution style supports a finding that the crime was committed in a cold, calculated, and premeditated fashion. The close distance at which shots are

fired has been held to be properly considered in determining whether the factor of cold, calculated, and premeditated exists. Squires v. State, 450 So.2d 208 (Fla. 1984), cert. denied, 105 S.Ct. 268. Moreover, the evidence also establishes that Appellant had sufficient time to allow for reflection on his actions. The trigger was pulled twice, although one shot misfired. In addition to the shot fired, the derringer pistol contained one bullet which was struck by the firing pin but which did not fire. (R. 3309-10). Thus, where Appellant shot Bragman in the head one time and close range with deliberation and calculation, this factor was properly found to be established.

In the instant case, the trial court's order clealry reflects that he considered the mitigating evidence but failed to find that the evidence rose to a level sufficient to find that a particular mitigating factor existed. See Point IX, supra. As the court stated, "Even giving the benefit of proof to 'reasonable conviction' rather than the State's high burden of proof the court found no mitigating circumstances nor combination thereof that would weigh against the aggravating ones. (R. 5636). The finding of a particular 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, 470 So.2d 894 (Fla. 1984), cert. denied 471 U.S. 1111 (1985); Smith v. State, 470 So.2d 894, 901 (Fla. 1981), cert. denied 456 U.S. 984 (1982). At bar, the judge

simply found that Appellant's evidence of 1) relatively minor participation, 2) Appellant's age, 3) and any other evidence of character, record, or circumstance of the offense was insufficient to be found as a mitigating circumstance. The trial judge rejected completely Appellant's age of 23, finding that Appellant was certainly old enough to recognize and understand the difference between right and wrong. (R. 5636). Appellant's prior record was not insignificant to allow it to be considered in mitigation. (R. 5636-37). No evidence existed that Appellant was under the influence of an extreme emotional disturbance. (R. 5637). Other than Appellant's own self-serving statement, there was no evidence that Appellant's participation was relatively minor. Rather, as the court found, the evidence established that Appellant cooperated with Spencer throughout the entire chain of events. (R. 5637). There was found to be no evidence that Appellant's capacity to appreciate the criminality of his own conduct was impaired (R. 5637), or that Appellant was on drugs or alcohol (R. 5637), or that he suffered any emotional or physical handicap. (R. 5637). Appellant's "cooperation" with police was likewise rejected. (R. 5637). Thus, any reasonable construction of this sentencing order reveals that the trial court rejected the existence of any mitigating factors on this record. As argued in Point VIII, there was no evidence offered to support a finding that Appellant acted under the substantial domination of another, or that the submission to the jury of eivdence as to

Appellant's cooperation with police would have resulted in a life recommendation from the jury on Count V.

Thus, even if the trial court improperly considered an aggravating factor challenged by Appellant, such error is harmless in view of the fact that there were no mitigating factors present and at least one or more aggravating presented. Sireci v. State, 399 So.2d 964 (Fla. 1981); Elledge v. State, 346 So.2d 948 (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). Appellant's sentence is proportionate with the commission of other such crimes. See, Rogers v. State, 511 So.2d 526 (Fla. 1987) (death penalty affirmed where defendant killed victim during flight from robbery of grocery store). Appellant's sentence must be affirmed.

POINT XI

THE TRIAL COURT DID NOT ERR BY ALLOWING VICTIM TESTIMONY DURING THE SENTENCING HEARING CONDUCTED BEFORE THE JUDGE ONLY.

In the instant case, the jduge heard tesitmony from Mrs. Bragman at Appellant's sentencing hearing (R. 5049), after over-ruling Appellant's objection. (R. 5048).

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 one page of the record, is harmless under the Court's analysis in Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988). 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 who was 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 (Ohio 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 a brief reference to the fact that Mrs. Bragman did not want to see this crime repeated by either defendant (R. 5049), 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, the 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 this very insignificant victim impact evidence. Indeed, the written sentencing orders reveal that the court did not even consider victim testimony as a reason for imposing the death penalty.

POINT XII

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.L.W. 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 XIII

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 (AB-62) 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 wholeshale 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.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities cited herein, Appellee respectfully requests that this Court affirm the judgments of conviction and sentences of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Assistant Attorney General
Tallahassee, Florida

Amy L. Diem

AMY L. DIEM
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Plam Beach, Florida
(407) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERITFY that a true Copy of Appellee's Answer Brief has been furnished by U.S . mail to CRAIG A. BOUDREAU, ESQ., 220 Sunrise Avenue, Suite. 207, Palm Beach, FL 33480 this 27th day of May, 1988.

Amy L. Diem

Of Counsel