No. 71,540

IN THE SUPREME COURT OF FLORIDA

ALPHONSO GREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

Appeal From A Judgment And Two Sentences Of Death Entered By The Circuit Court Of The Thirteenth Judicial Circuit

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Statement of the Case

Defendant/Appellant Alphonso Green was indicted by a grand jury in Hillsborough County for two counts of first-degree murder in the deaths of Robert J. Nichols and Dora Virginia Nichols on October 10, 1986. (R2240) Mr. Green pleaded not guilty on October 31, 1986. (R2221)

The trial of the case began on August 25, 1987 before the Honorable Manuel Menendez, Jr., Circuit Judge. The state was represented by the Honorable Bill James, State Attorney for the Thirteenth Judicial Circuit, and Assistant State Attorney Edward J. Page. Mr. Green was represented by court-appointed counsel, Stuart W. Umbarger, Esq. The trial was conducted on August 25-27, August 31, September 1-3, September 8-11, September 15 and 16. The proceedings on September 8 and September 11 were limited to an evidentiary hearing and a charge conference respectively.

The jury found Mr. Green guilty of both counts of first-degree murder on September 16, 1987. Following a penalty phase proceeding on the same day, the jury advised that Mr. Green be sentenced to death on each count. (R2225-2228)

Judge Menendez sentenced Mr. Green to death on each count on October 23, 1987. (R2777-2781) In a written order dated January 11, 1988, he found the following aggravating factors beyond a reasonable doubt:

1. The Defendant was previously convicted of another capital felony or felony involving the use or threat of violence to the person. The trial court used each murder as an aggravating factor for the other. In addition, the trial judge considered a 12-year-old conviction for assault to commit rape.

2. The capital felony was committed while the Defendant was engaged in the commission of, or an attempt or flight after committing a robbery or burglary.

3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

4. The capital felony was committed for pecuniary gain.

5. The capital felony was especially heinous, atrocious or cruel.

6. The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R2796-2799)

Judge Menendez found no mitigating factors. (R2799-2800) He imposed the death sentence for each conviction. (R2800-2801)

Mr. Green's trial counsel filed a timely notice of appeal on November 17, 1987. (R2783) He filed an amended notice of appeal on November 25, 1987 to reflect that this Court, not the District Court of Appeal for the Second District, had jurisdiction. (R2791)

Statement Of The Facts

Jury Selection

The jury selection process for the trial of Mr. Green, a black man, resulted in the seating of no black jurors. (R355-356;2237) The state challenged three blacks peremptorily over defense objections. (R343,344,348-349)

In response to the second objection, the trial court expressed confusion about the prima facie showing for the defense to satisfy the requirements of State v. Neil, 457 So.2d 481 (Fla. 1984). The trial court concluded that the exclusion of every black would constitute a sufficient showing for Neil purposes. (R346-347) After voir dire, the trial court found that the state had made valid, non-discriminatory challenges to the three blacks. (R356)

Mr. Wendell L. Atkins, the first black challenged peremptorily, responded during voir dire that he knew Mr. Green and his mother. (R24,25,100) Mr. Atkins' former mother-in-law and a former friend also were listed as defense witnesses. (R102) Since he knew Mr. Green and some family members, Mr. Atkins said he would be "very uncomfortable" in serving. (R179-180)

Mr. Atkins also said he would impose the death penalty under appropriate circumstances. (R217) He said his relationship with Mr. Green and his family was not a close

one. (R339) He believed he could serve impartially. (R25,339-340) The trial court refused to strike Mr. Atkins for cause. (R332)

The second black challenged peremptorily, Ms. Deborah Rollins, said she was ambivalent about the death penalty and did not believe it had a deterrent effect. (R221) She agreed to follow the law and would impose the death penalty under the appropriate circumstances. (R223) She was a student in her second year at Hillsborough Community College. (R305) She wanted to help make the system work. (R222)

The state argued that its peremptory challenge of Ms. Rollins should have been permitted for several reasons. According to the State Attorney, she was opposed to the death penalty, had been sleeping during voir dire and had never worked. The trial court disagreed with those statements. (R345)

The third black challenged peremptorily, Mrs. Wessie Brown, had served on a jury in 1980 and had reached a verdict on a grand theft charge. (R66) She thought she knew two witnesses listed by the defense. (R94,105) One of the possible witnesses was not the person she knew. (R95) The other was the witness or his son. (R105) Defense counsel told the trial court that Mrs. Brown knew the witness. (R352) Mrs. Brown said she would not give the witness' testimony any more or less weight by virtue of her acquaintance. (R105)

The state argued that its peremptory challenge of Mrs. Brown should be upheld for various reasons. First, she knew two defense witnesses. (R349) Defense counsel told the trial court he did not intend to call one of the witnesses at all. (R352) Second, she did not use a correct pen or pencil in completing the jury questionnaire. The trial court determined that she completed the form correctly. (R349-350) Third, she had worked for the General Telephone Company for 16 years. Mr. James opined that her employment for 16 years in an entry level position showed she was minimally qualified to serve. (R350-351)

The trial court found her acquaintance with the defense witness an appropriate reason for permitting the peremptory challenge. (R352) The prosecutor asked no questions of Mrs. Brown regarding her familiarity with either defense witness. Meanwhile, two white jurors who knew several defense witnesses were selected without any inquiry from the state either. All of the questioning with regard to the venire's familiarity with prospective witnesses was conducted by the trial court, not the state. (R146-186;190-251)

As a result, Mr. Richmond was selected as a juror even though he had met a defense psychiatrist on several occasions. **(R359,99)** Mr. Klein knew four witnesses listed by the defense. **(R95,98)** The prosecutor asked Mr. Richmond only about his feelings with respect to lawyers and the death penalty. (R180,226) He asked Mr. Klein about his familiarity

with members of law enforcement and the death penalty. (R163-164,224) Like Mrs. Brown, Mr. Richmond and Mr. Klein said in response to the trial court's questioning that their acquaintance with defense witnesses would not influence their decision. (R95-96,98,99)

The trial court questioned whether the state needed a valid reason to exercise its peremptory challenges of blacks. In any event, it found that no valid Neil objection had been established and that valid reasons untainted by racial motivations justified the state's challenges. (R352,356)

During its voir dire the trial judge told the venire that its penalty phase verdict was "only advisory in nature and not binding upon the Court. . ." The trial court also informed the venire that the jury's recommendation "is given great weight and deference" in the determination of punishment. (R86-87)

The Murders

On the night of October 10, 1986, Mr. Douglas Atkins heard first a knock on his window, then his doorbell ring. (R620-621) It was a black man. The man apparently was wearing no shoes or shirt and his trousers were rolled up. (R663) After the doorbell rang a couple of times, the figure passed his apartment on the west side. (R623) He heard loud knocking on the door next to his. (R624)

Mr. Atkins next heard begging and pleading through the door linking his apartment with the home of Robert J.

Nichols age 70 and Dora V. Nichols, age 71. (R629) Mr. Atkins left the apartment and went to the home of Mr. Oliver Lee Black, where he armed himself with a barbell. (R633) Upon returning, he heard drawers opening and closing in the Nichols' home. (R638) Mr. Atkins took his girlfriend, Ms. Cynthia Blanton, to Mr. Black's home and returned with a rifle. (R642-643) He heard nothing inside the Nichols' home and could see nothing as the lights were off. (R644)

Mr. Atkins and Ms. Blanton lived in an apartment created from part of a house owned by Mr. and Mrs. Nichols. (R611) The Nichols rented one of two duplex apartments near their home to Appellant, Mr. Alphonso Green, and his girlfriend, Ms. Cassandra Jones. (R492-493) The duplex occupied by Mr. Green and Ms. Jones was west of the apartment occupied by Mr. Atkins and Ms. Blanton. (R614; State exh. 1,2,3)

Mr. Black returned to his home near the Nichols' duplex in the northeast section of Tampa at about 10:30 p.m. on October 10. As he pulled up to his house, a sweating black man passed by his car. (R527-528) Although Mr. Black had seen Mr. Green in the neighborhood, Mr. Black did not recognize the man as Mr. Green. (R535) Neither Mr. Atkins or Ms. Blanton identified Mr. Green as the man who knocked on their window. (R583-677)

Mr. Black visited a friend and returned about 30 minutes later. (R530) Mr. Black armed himself with a pistol and accompanied Mr. Atkins to the Nichols' home while Mrs. Black

and Ms. Blanton drove off to call the police. (R646-647) Mr. Atkins and Mr. Black entered the house. (R660) Upon seeing Mrs. Nichols they decided a murder had occurred and left the house. (R661)

Tampa police arrived at the Nichols' home at about 12:30 a.m. on October 11. (R803-804) They found no sign of forced entry. They found Mrs. Nichols dead in the hallway. (R900-901; State exh. 11-A) Mr. Nichols was found in a bedroom. (R900-901; State exh. 11-C) Mrs. Nichols was stabbed 14 times, three of which were lethal. (R1056) Mr. Nichols was stabbed 28 times, five of which were lethal. (R1072)

The Alleged Threat

Earlier in the evening of October 10, a Friday, Ms. Jones accompanied Mr. Green to the Nichols' home, where they paid $250.00 for rent. (R698,701) The couple paid the rent under an agreement dated October 4. It stipulated that $250.00 would be paid on October 10 or the couple would vacate the duplex. (State exh. 37).

The Nichols' son, a trial lawyer in Orlando, recalled that his parents began having problems collecting the rent from Mr. Green and Ms. Jones in mid-September, 1986. (R492) During the testimony of Jack Britt Nichols, the state elicited a conversation he had with his parents the day before their deaths. Essentially, he testified that Mr. Green threatened Mrs. Nichols. The trial court denied a defense hearsay objection after listening to a proffer of Mr.

Nichols' testimony. (R452-477,502)

Mr. Nichols testified that he received telephone calls in September and early October regarding his parents' problem in collecting the rent. **(R494,499)** He counselled his parents to file a complaint for eviction and have it served by **a** sheriff's deputy. (State exh. **14-B;R495,497)** The summons was issued on September 29, 1986. (State exh. 14-B; R497) The trial court sustained a hearsay objection to conversations preceeding the issuance of the summons. (R497-499)

During the evening of October 9, Mr. Nichols heard from his parents regarding the latest developments with Mr. Green and Ms. Jones. (R501-502) They had gone to Mr. Green's apartment to discuss payment of the rent. Based on the fact that his parents spoke faster than usual, Mr. Nichols concluded that their confrontation with Mr. Green occurred shortly before the call. (R501) With that predicate, he testified:

> But on that particular evening, and as I recall, -- my memory is somewhat refreshed -- it was the 9th that they called and indicated to me that they had been over there to try to get this thing resolved. And in the course of talking with Alphonso Green, he had told my mother -- stated to my father, 'Get this woman out of my sight. I don't want to see her again. And if she ever comes over here again, I'm not going to be responsible for what I do to her,' or words to that effect.

MR. UMBARGER: Your Honor, I object to that as being hearsay.

THE COURT: That objection is overruled at this time. (R502)

During the proffer before the testimony was presented to the jury, Mr. Nichols said he "got the impression" the threat was made just before he discussed it with his parents. (R457) He did not know how much time had passed as his parents did not indicate it. (R462-463) Mr. Nichols expressed the greatest concern during the telephone conversation. Mrs. Nichols gave her son the impression that she did not believe Mr. Green would carry out any threat. (R458) Mr. Nichols was impeached by his deposition testimony on the date of the telephone conversation. (R516-518)

On the basis of the proffer, the state argued that the statements of the victims constituted excited utterances. (R466-468) The defense argued that the proximity was not shown between the alleged threat and the Nichols' account of it. (R475) The trial court overruled the objection. (R476)

According to Mr. Nichols, Mr. Green told his parents during the same conversation on October 9 that he would pay $250.00 the next day if the Nichols would permit Mr. Green and Ms. Jones to remain another week. (R503) Mr. Green obtained an advance of $250.00 from his employer on October 10 and endorsed the check to the Nichols to fulfill the agreement.

(State exh. 4-E) It was found in Robert Nichols' wallet. (R504)

Ms. Jones testified that she was unaware of any argument between Mr. Green and the landlords. (R772) Mr. Green denied threatening Mrs. Nichols. (R1710) No one appeared angry when they paid the rent, Ms. Jones testified. (R779)

The Butcher Knife

After paying the rent, Ms. Jones went to the home of her uncle, Mr. Beulah Battles, for a fish fry. Mr. Green did not accompany her. (R713-714) Instead, he told her he intended to go with a friend, Mr. Ernie McCleod, to move refrigerators and stoves. (R702)

After Ms. Jones returned to the duplex from the fish fry, Mr. Green entered their apartment at 10:30 p.m. or 11:00 p.m. He entered by pushing the back door out of the frame. (R714;716-717) Ms. Jones had lived with Mr. Green more than four years. (R691-692) He did not appear upset. (R725) He was wearing trousers and shoes, but she could not recall whether he was wearing a shirt. Mr. Green told her he had run home with a friend from the Boston Bar. He was sweating. (R726) Mr. Green replaced the frame on the door, put on a clean shirt and went outside to sit on the front porch. (R727-729)

Whether Mr. Green took a butcher knife with him when he left the apartment became one of the focal points of the trial. The testimony of Ms. Jones, a state witness, with

regard to the butcher knife played a recurring role.

She testified during the state's case-in-chief that she could not recall the location of the knife (State exh. 17-C) before Mr. Green went onto the front porch. (R742-743) On re-direct examination by the state she denied telling Det. James S. Noblitt or her uncle, Mr. Battles, that Mr. Green took a large butcher knife off the kitchen table when he left the duplex. (R782-783) Defense counsel objected to the state's impeaching its own witness. The objection was overruled. (R783-784) Ms. Jones also denied telling Det. Noblitt that she noticed a knife was missing about the same time she realized Mr. Green was no longer sitting on the front porch. (R784)

During a proffer when he appeared as a state witness, Mr. Battles could not recall telling detectives that Ms. Jones told him that Mr. Green took a large knife with him when he left the duplex. (R797) The trial court sustained a defense objection to hearsay. (R802)

The state next attempted to introduce Ms. Jones' purported statement through the testimony of Det. Noblitt. During a proffer, Det. Noblitt testified regarding an interview with Ms. Jones on October 11. He testified that Ms. Jones told him she noticed the largest butcher knife missing from its place in a wooden holder after Mr. Green left the duplex on the night of October 10. (R1180-1181) The trial court sustained the defense objections to hearsay and the state's

impeachment of its own witness, Ms. Jones. (R1183)

Det. Noblitt, a policeman for 12 years and a detective for five, (R1143) testified to the jury minutes later the knife's significance became evident after an initial search of Mr. Green's apartment on October 11:

> . . . Through my investigation and our interviews with myself, Detective Grossi and Cassandra Jones, we did form reason to believe and have suspicion that that knife was utilized in this crime. (R1191)

Mr. Page followed this unsolicited statement with:

> Q. And how did you know or what prompted you specifically to get that knife that you got, the butcher knife?
>
> A. Ms. Jones -- Cassandra Jones identified that knife as the one --

The trial court sustained an objection to the hearsay testimony and threatened a mistrial. (R1192) The defense moved for a mistrial, but the motion was denied. (R1193)

Ms. Jones' statement again surfaced during a sidebar conference while Mr. Battles testified as a defense witness. During cross-examination, Mr. James again began questioning Mr. Battles about his conversation with Ms. Jones on October 10. The trial court sustained another hearsay objection. (R1558) At a sidebar conference Mr. James again proffered Ms. Jones' purported statement about Mr. Green's taking the butcher knife. (R1560) The trial court sustained the objection again. (R1561)

Finally, the state raised Ms. Jones' alleged statement during Mr. Page's cross-examination of Mr. Green:

> A. That knife didn't kill the Nichols, and it didn't leave my house.
>
> Q. It didn't leave your house?
>
> A. No.
>
> Q. Why would Cassandra Jones tell Detective Noblitt that, then?
>
> A. She didn't.

Defense counsel again objected. It was sustained. (R1791) Defense counsel moved for a mistrial again. Again it was denied. (R1885-1886)

The Statement

Mr. Green testified and denied killing Mr. and Mrs. Nichols. He also denied telling the police that he stabbed the victims. (R1647) He admitted being present when the Nichols were murdered and testified that he attempted to stop their assailant, known to him only as "Bobby." (R1608-1609)

Mr. Green testified that he cashed his paycheck on October 10 and met a friend at a bar. (R1582-1583) He also received an advance of $250.00 from his employer to pay his rent. (State exh. 4-E) Mr. Green and another friend **pur**-chased $20.00 worth of rock cocaine and smoked it. Mr. Green went to the duplex he shared with Cassandra Jones. They went to the Nichols' home and paid the rent. (R1585-1586) Mr. Green told Ms. Jones he intended to help a friend move appli-

ances on the evening of October 10. Actually, he had decided to visit another woman. (R1588)

On his way to the woman's house, he met two other women, purchased a $20.00 rock of cocaine for them and returned to his friend's home. (R1589-1590) He went to the other woman's house with his friend, then went to two other bars. At the second bar he met a man known to him only as Bobby. (R1591)

On an earlier occasion Mr. Green had met Bobby in the parking lot of the bar, where Bobby directed customers to rock cocaine dealers. Bobby was looking for a place to live so Mr. Green took him to meet Mr. and Mrs. Nichols. They showed Bobby the empty duplex apartment adjacent to Mr. Green's, but refused to rent it to him as they rented only to couples. (R1592-1593)

On the night of the murders, Mr. Green smoked a $10.00 rock of crack cocaine behind a bar and went home. He intended to change clothes, see Mr. Nichols to discuss money owed him for various jobs and proceed to the woman's house as originally planned. (R1597) Bobby and Mr. Green jogged to the corner of Columbus Drive and 34th Street in Tampa. Mr. Green told him to wait there as Ms. Jones did not permit visitors. (R1597-1598)

Mr. Green, unaware that Ms. Jones had returned home, entered through the back door of the apartment by pushing in the door. (R1600) He replaced the door frame, donned a clean

work shirt and sat on the front porch. (R1602) He intended to go to the other woman's house, spend the night and go to work early the next morning. (R1605)

While sitting on the porch he saw a light in the Nichols' house and went to their door to discuss the money owed him. (R1604) He and Mr. Nichols agreed that they owed him $50.00. Mrs. Nichols, unaware that Mr. Green had paid the rent earlier in the evening, protested paying him for the odd jobs. While the Nichols and Mr. Green discussed the matter, someone knocked on the front door. (R1607-1608)

When Mr. Nichols opened the door, Bobby either punched or stabbed him. Mr. Nichols ran through the dining room toward the rear of the house. Mrs. Nichols said, "Oh, God, don't let him kill us." (R1608)

Mr. Green, who is left-handed, charged Bobby and grabbed the knife with his right hand. The two men struggled until Mr. Green fell to his knees and wrapped his shirt around his bleeding hand. (R1608-1609)

Mr. Green, still intoxicated by the cocaine, expected Mr. Nichols to return with his gun. (R1610-1611) He next recalled seeing Mrs. Nichols on the floor and heard Bobby moving through the house. Mr. Green cold with fear, began trembling, crying and praying. He ran from Mrs. Nichols to Mr. Nichols, not knowing what to do. (R1612) He never touched anything in the house. (R1612-1613) No fingerprints lifted at the scene compared with Mr. Green's. Three latent

fingerprints did not compare to any known person's. (R1048-1050)

Mr. Green panicked. He looked out the front window and saw a white man, Mr. Atkins apparently, standing on the corner with a rifle in his hand. (R1612-1613) He first tried to exit through the garage, then ran out the back door, over two fences, down the alley and went to the home of a friend, Thomas Turner. He told Mr. Turner and his wife, Christine, he had been in a bar fight. Mr. Turner lent him a shirt and Mr. Green returned to his empty apartment. (R1613-1616)

Mr. Green feared the Tampa police due to the deaths of other black men in their custody. (R1617-1618) He spent the night with relatives, then went to an aunt's home in St. Petersburg. (R1619,1621) A cousin drove him to another cousin's home in Palmetto. (R1623) He attended a social gathering in Palmetto. During the gathering he recalled talking to Frank James, a friend of Ms. Jones' cousin. (R1628)

Leon James, the brother of Frank James, testified during the trial after he was arrested for failing to appear as a state witness. Leon James related that Mr. Green told him on October 17 that he had killed his landlord. Mr. Green also told him, Leon James testified, that he was under the influence of drugs and did not know what he was doing. (R559) Mr. Green testified that Mr. James lied and that he never spoke with him. (R1805-1806;1658)

Mr. Green made his way to the home of another cousin, Bessie Williams, in Fort Lauderdale. (R1629) Mr. Green told her and her husband he was involved in a murder. (R1442, 1447-1448) He surrendered to the Fort Lauderdale police the next day. (R1639)

Det. Noblitt and Sergeant Robert Price flew to Fort Lauderdale to interview Mr. Green. (R1101-1103) Mr. Green gave them basically the same account related in his testimony. (R1107-1109; 1202-1211) However, both detectives testified that Mr. Green recanted his original story, saying Bobby did not exist and that he stabbed the victims when they refused to return his rent check. (R1112-1113;1202-1211) Both officers also testified that Mr. Green said he cut his right hand on a rivet protruding from the handle of the knife. (R1211; State exhibit 17-C)

Det. Noblitt carried a tape recorder to Fort Lauderdale, but he did not use it during Mr. Green's interview. (R1221) Nor did the detectives request that Mr. Green write the statement. (R1125)

Mr. Green denied killing the victims or telling the detectives that he did. (R1647) Mr. Green maintained that Det. Noblitt fabricated the confession and that he and Sergeant Price were lying. (R1648;1805-1806)

The Impeachment

Mr. Green was impeached with a prior conviction, a prior statement regarding the effect of cocaine on him and his

description of the assaillant, Bobby, among other things (R1667-1668;1680-1681;1735-1736)

One of the attacks on Mr. Green's credibility arose out of his purported consideration of the intoxication defense. During Mr. Page's cross-examination of Mr. Green, Mr. Page asked whether he had difficulty deciding:

> [w]hether to say, 'I was too intoxicated because of cocaine' as opposed to, 'Whether I did it or not'? (R1653)

When Mr. Green denied having any difficulty "deciding what defense [he] would take in this case," Mr. Page introduced State exhibit 64, a handwritten Motion for Re-Appointment of Counsel. (R1654) The motion recited that "the Defendant and Defense Attorney have not been able to agree on a line of defense." (R2422) The motion made no mention of intoxication as a defense. The state produced no evidence to prove the inconsistency it asserted during Mr. Page's cross-examination of Mr. Green.

Defense counsel made no objection to this line of questioning. (R1653-1658) Nor did defense counsel object or move for a mistrial when the state failed to produce evidence during its rebuttal case to support this impeachment. (R1881-1961)

Det. Noblitt also was impeached with conflicts and omissions in his report and notes. Mr. Green's account of sustaining the wound to his right hand was not contained in Det.

Noblitt's interview notes. (R1488) Mr. Green's purported statement about cutting his hand on the knife's rivet was not recorded in Det. Noblitt's notes or report, even though he considered the statement pertinent. (R1490,1507) The report and notes, defense exhibits 2 and 48 respectively, were admitted into evidence. (R1485)

Dr. Lee R. Miller, an associate medical examiner, testified that the protruding rivet on State exhibit 17-C could have caused the wound to Mr. Green's right hand. (R1079) A defense expert later testified that the wounds to Mr. Green's right hand were caused by a blade, not the rivet protruding from the side of the knife. (R1837) Dr. John Feegel, a former Hillsborough County Medical Examiner, also testified that the wound on Mr. Green's right hand was indistinguishable from defense wounds on both victims. (R1838)

The Penalty Phase

The penalty phase of Mr. Green's trial consisted of one witness' testimony. Michael Foster, Esq. testified that he prosecuted Mr. Green for rape, false imprisonment and kidnapping in 1974 while employed as an Assistant State Attorney in Hillsborough County. (R2113)

Mr. Foster recalled that Mr. Green initially was convicted of rape and false imprisonment. (R2116, State exh. 68) However, one witness who testified against Mr. Green recanted her testimony with respect to his committing a similar offense. (R2116-2118) When the remaining Williams

rule witness and the victim of the offense expressed reluctance to testify in another trial, a plea bargain was struck. (R2121) Mr. Green pleaded nolo contendere to a charge of assault with intent to commit rape. He was adjudicated guilty and placed on three years' probation. (R2125-2126; State exh. 69)

Mr. Foster later joined a Tampa law firm which employed Mr. Green as a maintenance man. Mr. Green was a reliable and hard worker. (R2135)

The trial court conducted a charge conference for penalty phase instructions. During the conference the trial court decided it would:

1. Instruct that the jury could consider as an aggravating circumstance that the capital felony was committed for the purpose of avoiding a lawful arrest. The trial court overruled defense counsel's objection to this instruction. (R2148-2149)

2. Instruct that the jury could consider whether the murders were "especially heinous, atrocious or cruel." The trial court refused to provide the clarifying language tendered by defense counsel defining those elements, (R2149) viz:

> This aggravating circumstance is established where the actual commission of the capital felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies--the conscienceless or

pitiless crime which is unnecessarily torturous to the victim. (R2672, Court's exh. 12)

3. Not permit jury consideration of Mr. Green's criminal history as a mitigating factor. Defense counsel argued that the jury should consider whether Mr. Green's 14-year-old conviction for assault with intent to commit rape was "significant." The trial court declined to permit the jury's consideration on the question. (R2150-2151) The trial court later found that Mr. Green's 14-year-old conviction precluded this mitigating factor. (R2799)

During summation, the state argued, all without objection, that:

1. Prison guards would be endangered if Mr. Green were sentenced to life imprisonment. "What will he do to them after he's down there, what he did to the Nichols? Kill a guard? Will he escape?" Mr. Page argued. "Who will be next?" (R2185-2186)

2. Mr. Green expressed his belief in the death penalty by executing Mr. and Mrs. Nichols. (R2187)

3. And, yes, it's two-zero right now, two for him and zero for the citizens of the State of Florida, Tampa, Hillsborough County. And I want to start evening the score by your recommendation, because Mr. Green deserves to die for what he did. And you've seen what Mr. Green did. (R2187)

The jury deliberated 10 minutes and returned unanimous

advisory sentences recommending death on each count. (R2202-2204)

SUMMARY OF THE ARGUMENT

Appellant Alphonso Green argues that he was deprived of a fair trial with regard to guilt on three general bases: the exclusion of blacks as jurors for pretextual reasons, the admission of hearsay on two vital points and the prosecution's unfounded insinuation that Mr. Green had intended to rely on the intoxication defense. Mr. Green's objections to the penalty phase proceeding focus on the lack of record support for the aggravating factors found by the trial court, improper instructions to the jury, inflammatory argument by the State and the denigration of the jury's role in the sentencing process.

Guilt Phase Errors:

The trial court permitted two black women to be challenged peremptorily by the State over defense objections for no valid reason. As a result the trial of Mr. Green, a black man, for the murders of two whites was conducted before an all-white jury.

The reasons advanced by the State for striking the two black women were clearly pretextual. With regard to Ms. Deborah Rollins, the trial court disagreed with all of the reasons advanced by the state. With regard to Mrs. Wessie Brown, two of the three reasons advanced by the state were clearly pretextual. Only her familiarity with one defense

witness appears as a valid reason for challenging her. In response to the trial court's inquiry, she said her acquaintance with one or possibly two of the defense witnesses would have no bearing on her decision. The state received similar assurances from two white members of the venire and accepted them as jurors.

The second area of error in Mr. Green's trial occurred when two hearsay statements, one directed to the means and the other to the motive for the murders, were presented to the jury. Neither statement can be considered harmless.

The first hearsay statement was attributed to Mr. Green's girlfriend, Cassandra Jones, regarding his removal of a butcher knife from their home shortly before the murders. Ms. Jones denied making the statement. The trial court excluded it following proffers by the state. The state repeatedly attempted to introduce the statement over objection. It succeeded twice, once during the testimony of an investigating detective and once during cross-examination of Mr. Green.

The second hearsay statement arose from a conversation between the victims and their son a day or two before the murders and focused on a threat allegedly made by Mr. Green. The trial court permitted its introduction under the excited utterance exception to the hearsay rule. The state failed to establish, however, a sufficient predicate for admission of the statement. That is, the state failed to make any showing

that the time period between the alleged threat against Mrs. Nichols by Mr. Green and its recounting by Mr. Nichols was sufficiently brief to justify its admission.

Mr. Green's statement to the police suggested that the murders arose during a frenzy created by cocaine deprivation. The threat, however, provided the jury with premeditation and malice aforethought not otherwise found in the record. It alone could well have buttressed the finding of guilt, mandated a finding of first degree murder as opposed to a lesser offense and contributed to the recommendation of death.

The third error in the guilt phase arose out of the prosecutor's insinuating during cross-examination of Mr. Green that he had difficulty choosing between denying he committed the murders as opposed to committing them as a result of intoxication. The record is devoid of any evidence to suggest that Mr. Green ever contemplated the intoxication offense. Even if such impeachment were proper, no evidence was produced at trial supporting the prosecution's insinuation that Mr. Green tacitly admitted committing the offense by considering the defense of intoxication.

No objection was made by defense counsel to this line of questioning. In light of its impact no objection or curative instruction should be required. The prejudice to Mr. Green's right to a fair trial coupled with the prosecution's gross overreaching justify a finding that the impeachment by insinuation constitutes fundamental error.

Penalty Phase Errors:

The trial court committed several errors during the penalty phase in terms of its instructions to the jury. Its analysis of the aggravating factors also was flawed. The state, meanwhile, contributed poison to the process by inflammatory arguments.

First, the trial court erred by finding that the murders were committed for avoiding and preventing a lawful arrest. No evidence supported that contention other than the death of the victims. In light of this Court's holdings, the absence of witnesses and the fact that the victims knew their alleged assailant do not justify the trial court's finding. Second, the trial court erred in doubling the aggravating factors that the murders were committed in the commission of a robbery or burglary with the motive of pecuniary gain. Third, the record does not support the trial court's conclusion that the murders were committed in a "cold, calculated and premeditated manner." Therefore, the trial court erred in finding six aggravating factors when the evidence supported only three. The jury should not have been instructed on all six factors either.

The trial court committed additional error with respect to penalty phase instructions by refusing to define the meaning of "especially heinous, atrocious or cruel." Defense counsel tendered an instruction drawn from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied 416 U.S. 943 (1974). As a result, the instruction considered by the jury was

impermissibly vague under the Eighth Amendment.

In addition, the trial court refused to instruct the jury that it could consider whether Mr. Green's prior conviction for assault with intent to commit rape was "significant." Defense counsel argued that the significance of the conviction and another for a misdemeanor presented jury questions and should have been considered in mitigation. The trial court disagreed, refusing to permit the jury to consider this mitigating factor. To compound the error, the trial court held that the 14-year-old conviction precluded consideration of Mr. Green's prior criminal history as a mitigating factor.

During the penalty phase summation, the state argued without objection that Mr. Green might kill a prison guard if sentenced to life imprisonment, that his killing the victims reflected Mr. Green's belief in capital punishment and that the jury could even the score by recommending Mr. Green's execution. The arguments were either unsupported by the evidence or prohibited by the decisions of this Court. Even though they drew no objection, their cummulative effect with the trial court's errors combined to deprive Mr. Green of a dispassionate and reasoned sentencing hearing.

Finally, the trial court misled the jury by telling the venire that its recommendation as to penalty was not binding. Mr. Green recognizes that this issue has been resolved by this Court against him. However, the suggestion that its decision was not binding is simply incorrect and denigrated the jury's role in the sentencing process.

For the foregoing reasons, Mr. Green urges that the judgment of the trial court be reversed and that a new trial as to guilt and penalty be ordered.

ARGUMENT

I THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL AFTER THE STATE EXCLUDED ALL BLACKS AS JURORS.

The trial court failed to declare a mistrial after the state challenged three blacks peremptorily over defense objections. As a result, an all-white jury found Mr. Green guilty of murdering two elderly whites and advised death.

Since the trial was conducted in 1986, the trial court did not have the benefit of State v. Slappy, 522 So.2d 18 (Fla.), cert. denied, __U.S. __, 108 S.Ct. 2873 (1988). The trial court expressed confusion as to the prima facie showing required of the defense, observing that the exclusion of every black would suffice. (R346-347) Against this backdrop the trial court examined the state's proffered reasons and found them untainted by racial motive. (R356)

In accordance with Slappy, 522 So.2d at 23, the defense called the trial court's attention to the peremptory challenges of Mr. Atkins, Ms. Rollins and Mrs. Brown. Striking the three blacks shifted the burden to the state to justify the challenges. Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988) But only the challenge of Mr. Atkins satisfied the Slappy test--reasonableness and the absence of pretext coupled with record support. Slappy, 522 So.2d at 23.

Ms. Rollins was a college student who wanted to help make the system work. (R222,305) She was ambivalent about the deterrent effect of the death penalty, but she would impose it under the appropriate circumstances. (R223)

The state defended its peremptory challenge of Ms. Rollins on three bases. First, it asserted her ambivalence toward the deterrent effect of the death penalty as opposition to the death penalty itself. Second, the State Attorney said she had been sleeping during voir dire. Third, the state argued that Ms. Rollins was unfit as she had never worked. The trial court disagreed with all three reasons given. (R345) Thus, the reasons given lacked record support. Slappy, 522 So.2d at 23.

Mrs. Brown, on the other hand, worked for the General Telephone Company for 16 years. (R350) She also had served as a juror in 1980. (R66) She thought she knew two witnesses listed by the defense, but she said she would give their testimony no more or less weight due to her acquaintance. (R105) Defense counsel told the trial court that Mrs. Brown apparently knew one penalty phase witness. (R352)

The state defended its peremptory challenge of Mrs. Brown on three bases. First, she knew two defense witnesses. (R349) Defense counsel told the trial court that one of the witnesses would not be called at all. (R352) Second, she did not use the correct pen or pencil in completing the jury questionnaire. (R349-350) Third, her 16-year tenure at an

entry level position with General Telephone Company indicated a lack of qualifications. (R351)

Not one of the reasons had record support. Defense counsel's decision against using one of the witnesses meant Mrs. Brown apparently knew one and she would not give his testimony any greater or lesser weight. (R105) Second, the trial court found she completed the questionnaire properly. (R349-350) Third, no valid inference can be drawn by tenure in a position with regard to ability to serve, especially since she had served on another jury. (R66)

Aside from their reasonableness, the justifications given by the state for excusing Ms. Rollins and Mrs. Brown smacked of pretext. Ms. Rollins did not work; Mrs. Brown did not work at the right job. Neither reason had any relationship to the facts of the case. Slappy, 522 So.2d at 22.

Of the six reasons given by the state with regard to excusing Ms. Rollins and Mrs. Brown, the trial court found four unsupported by the record. A fifth, Mrs. Brown's job tenure, lacked record support as well. The failure to use the correct writing utensil, aside from the trial court's finding to the contrary, was simply frivolous. Slappy, 522 So.2d at 22-23.

The only arguably valid reason given for excusing either woman arose out of Mrs. Brown's knowing one of the defense witnesses. The trial court conducted its own extensive voir dire and determined that Mrs. Brown knew one or two of the defense witnesses. The trial court also determined that two white men who were selected for the jury, Mr. Richmond and

Mr. Klein, also knew defense witnesses. (R99,95,98)

Thus, the state's proffered reason for excusing Mrs. Brown appears pretextual. It was "a challenge based on reasons equally applicable to jurors who were not challenged." Slappy, 522 So.2d at 22.

Ms. Rollins and Mrs. Brown indicated no hint of unfairness or partiality toward a member of their own race. Id., Blackshear, 521 So.2d at 1084. In light of the absence of record support coupled with the obvious pretexts advanced by the state for challenging both black women, the judgment below should be reversed and the case should be remanded for a trial untainted by racial animus.

II. HEARSAY STATEMENTS INTRODUCED BY THE STATE DEPRIVED MR. GREEN OF A FAIR TRIAL.

A, The State Repeatedly Introduced A Statement Attributed To Ms. Jones Despite The Trial Court's Rulings Against Its Admissibility.

The state went to extraordinary lengths to introduce a hearsay statement regarding whether Mr. Green removed a butcher knife from his apartment before the murders. The state's use of the purported statement, despite the trial court's repeated rulings on its inadmissibility, deprived Mr. Green of a fair trial.

The state called Ms. Jones as a witness. (R688) During the state's redirect examination she denied telling her uncle, Beulah Battles, or Det. Noblitt that she had seen Mr. Green take a large butcher knife when he left the apartment to sit

on the porch. (R782-783) Ms. Jones also denied telling Det. Noblitt that she noticed the knife was missing about the same time she realized Mr. Green was no longer sitting on the front porch. (R784)

Ms. Jones' alleged statements clearly constituted hearsay. They were statements made by Ms. Jones "offered in evidence to prove the truth of the matter asserted." §90.801(1)(c), Fla. Stats. (1986). That is, the state attempted to show through Ms. Jones that Mr. Green removed the butcher knife from the apartment. This allegation formed the conerstone of the state's circumstancial evidence against Mr. Green.

The purported statements arose several times during the course of the trial after Ms. Jones denied making them. (R782-783) In sequential review, the statement appeared:

1. During a proffer of Mr. Battles' testimony. Mr. Battles could recall Ms. Jones' making no statement regarding Mr. Green's removing one of the knives from the apartment. (R797) The trial court sustained the objection. (R802)

2. During the testimony of Det. Noblitt, the state again proffered Ms. Jones' purported statement. (R1181) The trial court again sustained the hearsay objection. (R1183)

3. Shortly after the state's unsuccessful proffer of Det. Noblitt's testimony, he testified that his investigation, including the interview of Cassandra Jones, gave him reason to believe that the knife was utilized in the crime. (R1191)

4. Again during Det. Noblitt's testimony, the prosecutor asked him, "What prompted you specifically to get that knife that you got, the butcher knife?" Det. Noblitt replied, "Ms. Jones -- Cassandra Jones identified that knife as the one --" The trial court threatened a mistrial if the state continued in its efforts to circumvent the hearsay ruling. The trial court denied a defense motion for a mistrial. (R1192-1193)

5. When Mr. Battles was called as a defense witness, the state again proffered the statement allegedly made by Ms. Jones on October 10. (R1560) The trial court sustained another hearsay objection. (R1561)

6. During the cross-examination of Mr. Green, he testified that the knife did not leave his house. Mr. Page asked, "Why would Cassandra tell Det. Moblitt that, then?" Another defense objection was sustained. (R1791) Another motion for mistrial was denied. (R1885-1886)

The motions for mistrial made during Det. Noblitt's testimony and following the improper question by Mr. Page should have been granted. Mr. Page should have known Det. Noblitt would refer to Ms. Jones' statement in response to the question. Indeed, no other response appears possible.

Mr. Page's statement on cross-examination was equally prejudicial to Mr. Green. Mr. Page's question to Mr. Green actually was a statement. Mr. Page became a witness, exerting his credibility as an officer of the court against that of the accused.

A similar situation arose in Coleman v. State, 420 So.2d 354 (Fla. 5th DCA 1982). In Coleman, the prosecutor bolstered the identification of the state's key witness by arguing that it was sufficiently detailed to justify the arrest of the defendant on a BOLO alert. The statement was unsupported by the record, just as Mr. Page's recollection of Ms. Jones' statement lacked record support. In reversing, the court found a reasonable doubt existed as to whether the improper remark contributed to the conviction. Coleman, 420 So.2d at at 356. Given the significance placed by the state on its exhibit 17-C, the same result follows in this case. See, Brown v. State, 524 So.2d 730 (Fla. 4th DCA 1988).

The significance of Ms. Jones' purported statement regarding the knife is directly proportional to the state's efforts to introduce it by hook or by crook. If a reasonable possibility exists that the statement regarding the knife contributed to Mr. Green's conviction, it should be reversed. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). Within the context of this case, the knife took on a great significance as the evidence against Mr. Green was not overwhelming in any sense.

True, the state introduced evidence that Mr. Green confessed to Sergeant Price, Det. Noblitt and Mr. Leon James. Mr. Green testified, however, and denied making the statements attributed to him or even talking with Mr. James. Mr. Green's testimony was impeached on several points. Likewise, Det. Noblitt's testimony did not square with his notes and

report in 34 instances. (R1292-1311)

No corroborating evidence tied the knife to the crime. It was tested for blood, but none was found. (R1277-1278)

If Mr. Green took the knife with him when he left the apartment, the jury could have inferred he used it in murdering Mr. and Mrs. Nichols. The state never legitimately established, though, that he took the knife with him. But after listening to the questions put to Ms. Jones, the offerings of Det. Noblitt and Mr. Page's question to Mr. Green, the jury might very well have believed that he took the knife with him and killed the Nichols with it. Nothing properly in evidence supports that idea other than Mr. Green's repudiated statement to Det. Noblitt. (R1207)

Since the evidence as a whole was contested, especially in light of Mr. Green's repudiation of his alleged confession, the repeated references to Ms. Jones' purported statement cannot be deemed harmless. This case does not involve a hearsay statement in the context of an unrebutted confession coupled with circumstantial evidence presenting an overwhelming portrait of guilt. ~~cf~~ Roman v. State, 475 So.2d 1228, 1233 (Fla. 1985) cert. denied 475 U.S. 1090 (1986). Instead, the circumstantial evidence does not preponderate toward either party's version of the truth. The inadmissible testimony regarding the knife could have easily weighted the scale in favor of the state.

Accordingly, a new trial is the only appropriate remedy.

B. The Trial Court Erred By Permitting Testimony Of An Alleged Threat By Mr. Green To Be Introduced Into Evidence As An Excited Utterance.

The trial court permitted the victims' son, Jack Britt Nichols, to testify over defense objection with regard to a telephone conversation he had with his parents. His parents told him that Mr. Green had threatened Mrs. Nichols at some point before the telephone conversation on October 8 or October 9. The trial court found the conversation to fall within the excited utterance exception to the hearsay rule, 590.803 (2), Fla. Stats. (1986).

The trial court's ruling with respect to the conversation constituted prejudicial error as the state failed to establish a proper predicate for the testimony. In particular, the state failed to establish the time period between the alleged threat and the telephone conversation.

In State v. Jano, 524 So.2d 660 (Fla. 19881, a child made unsolicited statements alleging child abuse by her father, the defendant. In Jano v. State, 510 So.2d 615, 619 (4th DCA 19871, the court held that the state failed to show that the time period between the event and the utterance was "sufficiently short under the facts to fall within the limits of the exception." This Court agreed with this reasoning and affirmed. Jano, 524 So.2d at 663. This Court set no time frame for determining whether an event and an utterance are sufficiently close.

Jano compels the finding that admission of the alleged threat constituted error in this case. True, Mr. Nichols' "got the impression" that Mr. Green made the threat immediately before his telephone conversation with his parents. (R457) He did not know when the alleged threat was made, though, since his parents did not indicate it. (R462-463) In fact, some time must have passed since Mr. Green's alleged statement was made at his apartment. (R456) The Nichols called from their home and talked to their son on different extensions, a practice necessitated by the elder Mr. Nichols' poor hearing. (R453)

Whether the elder Mr. Nichols remained excited after the alleged utterance or became excited in the course of recounting the episode for his son does not appear in the record. Mr. Jack Nichols testified that his father found Mr. Green menancing due to his size and demeanor. During the telephone conversation Mr. Nichols' mother appeared less concerned. (R458) Thus, the elder Mr. Nichols' excitement could have arisen in the recounting of a distant conversation. This possibility has two distinct effects, both of which undermine the statement's admissibility.

First, excitement upon recounting takes the statement entirely out of the "excited utterance" exception. Jano, 524 So.2d at 663. Second, it undercuts Mr. Nichols' only reason for assuming the alleged threat was made immediately before the telephone call -- his father's excitement.

Finally, Jano compels a finding of error due to the circumstances to the extent they were shown. The victims were adults engaged in an attorney/client conversation with their son. (R453) The deliberative nature of such a conversation weighs against the sort of excited utterance contemplated by §90.803(2).

The failure of the state to lay a proper predicate to justify the excited utterance exception also compelled reversal in Hargrove v. State, 530 So.2d 441 (Fla. 4th DCA 1988), a first-degree murder case. In Hargrove, a witness testified that an unknown declarant said the defendant returned with a weapon after an initial fight and before the shooting. Since the state failed to establish that the declarant made the statement while perceiving the event or immediately after it or while still under the stress of excitement caused by the event, the statement should not have been admitted. Hargrove, 530 So.2d at 442. See also, G.M. v. State, 530 So.2d 461 (Fla. 5th DCA 1988).

Mr. Green does not suggest that all evidentiary errors justify reversal. In this case, however, the error cannot be deemed harmless. The prejudicial effect of the remark falls on three issues -- the determination of guilt, the degree of the offense and the penalty. Its probative value to guilt establishes a malice aforethought not otherwise found in the record. Its probative value to the degree of the homicide

elevates a colorably frenzied act directed by a mind depraved by cocaine into one of premeditation. Compare §782.04(1)(a) and §782.04(2), Fla. Stats. (1986). The impact on the issue of penalty can hardly be questioned. It suggests the offense was cold and calculating while eroding any mitigating factor arising out of mental capacity. §§921.141(6)(b),(f), Fla. Stats. (1986).

Only a new trial can remedy such prejudice.

III THE STATE COMMITTED FUNDAMENTAL ERROR BY INSINUATING THAT DEFENDANT ONCE INTENDED TO RELY ON THE INTOXICATION DEFENSE.

The State impeached Mr. Green by suggesting he once intended to rely on intoxication as a defense. Since no objection or curative instruction could cure the prejudice to Mr. Green resulting from this impeachment by insinuation, a new trial should be ordered.

The practice of impeachment by insinuation places the prosecutor's representation of facts outside the record before the jury for consideration. Specifically, Mr. Page asked:

> Didn't you have some difficulty about whether to say, 'I was too intoxicated because of cocaine' as opposed to, 'Whether I did it or not'? (R1653)

Thus, Mr. Page's question constitutes an implied representation that Mr. Green once asserted his intention to rely on the intoxication defense. By introducing State exhibit 64,

Mr. Green's Motion for Re-Appointment of Counsel, Mr. Page appears to be supporting his representation by a sworn statement admittedly written by Mr. Green. (State exh. 64; R1654). Actually, the motion mentions nothing of the intoxication defense, only Mr. Green's inability to agree with his public defender on a "line of defense." (R2422) The length of Mr. Page's interrogation on this point, more than four pages in the trial transcript, renders unlikely that its import was ignored by the jury.

Straight v. State, 397 So.2d 903, 909 (Fla.) cert. denied, 454 U.S. 1022 (1981), suggests that this line of cross-examination was improper. It sought to undermine the theory of the defense, not prove or disprove a material fact in issue. Even if Mr. Green's consideration of the intoxication defense could be material or relevant, the state's impeachment by insinuation of unproved facts was clearly improper.

The practice of impeachment by insinuating facts, regardless of whether the facts did not exist or were true but not proved, has been held "condemnable." Smith v. State, 414 So.2d 7 (Fla. 3rd DCA 1982). In Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978), the court of appeal reversed for a new trial after the prosecutor failed to produce evidence of a prior conviction raised during the cross-examination of the defendant. In Marsh v. State, 202 So.2d 222 (Fla. 3rd DCA

1967) the prosecutor asked the defendant whether he told a woman of his intention to steal a safe, The state failed to produce the woman as a witness and the court of appeal reversed the conviction.

Smith, supra, 414 So.2d 7, takes the position that the defendant's failure to move for a mistrial constitutes a waiver. The contemporaneous objection rule should not control this issue for several reasons, however.

First, the question posed by Mr. Page guts Mr. Green's credibility as a witness and the sincerity of his defense. As was the case in Marsh, supra, 202 So.2d 222, no curative instruction could dispel the idea that Mr. Green had once admitted the offense, but intended to rely on intoxication as an avoidance of liability. Since the trial court could not cure the error, a mistrial was inevitable in any event.

Second, Smith recognize that the objection and mistrial should not be made when the question is asked. Instead, the motion should be made when the state fails to support the prosecutor's insinuation by extrinsic evidence. This places the defense in the position of objecting to the failure to produce evidence which has a prejudicial impact far in excess of its probative value. 590.403, Fla. Stats. (1986). Thus, the objection at the point the question was asked would have been premature. The objection at the point Smith requires it would have been disingenuous.

Third, the necessity of objecting at all does not appear

as clear as the court in Smith held it to be. The opinion in Dukes, supra, does not specify whether the improper cross-examination drew an objection, holding that the cumulative errors destroyed the essential fairness of the trial. The same situation exists in this case.

Since the line of cross-examination directed against Mr. Green created a far greater prejudice than those presented in Dukes or Marsh, this Court should find fundamental error. If not fundamental error in its own right, the cumulative effect of the question and the hearsay testimony admitted against Mr. Green mandates a new trial.

IV THE TRIAL COURT'S ERRORS COUPLED WITH THE STATE'S INFLAMMATORY ARGUMENT DEPRIVED APPELLANT OF A FAIR PENALTY PHASE,

The trial court committed multiple errors in Mr. Green's penalty phase, both in instructions to the jury and its findings. The state's arguments, meanwhile, served to inflame the passions of the jury. Each will be addressed separately.

A, The Trial Court's Findings Of Aggravating Factors Are Not Supported By The Record.

1. The trial court's finding that the murders were committed for the purpose of avoiding or preventing a lawful arrest is not supported by the record.

The trial court's written findings take the position without reciting any factual basis that Mr. Green killed the Nichols for the purpose of avoiding or preventing a lawful arrest.

(R2798) The findings are clearly erroneous as they equate the absence of witnesses with a motive for the murder, an assumption this Court has rejected.

In Jackson v. State, 502 So.2d 409, 411 (Fla. 1986) cert. denied, __U.S. __, 107 S.Ct. 3198 (1987), the Court cited Riley v. State, 366 So.2d 19 (Fla. 1978) and held:

> [T]he mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.

Likewise, the fact that the victims knew the assailant does not establish this aggravating factor. The state must show the elmination of witnesses was at least a dominant motive. Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986) [quoting] Caruthers v. State, 465 So.2d 496, 499 (Fla. 1985). It failed to make any such showing.

Det. Noblitt's testimony of Mr. Green's confession provides the only basis for any motive in the death of Mr. and Mrs. Nichols. Det. Noblitt testified that Mr. Green had spent all of his money on cocaine, needed more cocaine and wanted more cocaine. He went to the Nichols' home in an attempt to retrieve the check for $250.00 he had given them earlier. When Mrs. Nichols balked, he stabbed her, then Mr. Nichols. (R1207-1208) In a light most favorable to the state, then, nothing in the evidence suggests that Mr.

Green's motive was anything more than a frenzied response to a need for cocaine coupled with the frustration encountered in obtaining the money for it.

Accordingly, this aggravating circumstance must fall.

2. The trial court unlawfully doubled the aggravating circumstances that the murders were committed in the commission of a robbery or burglary with their being committed for pecuniary gain.

The trial court found that the murders were committed during the commission of a robbery or burglary and that they were committed for pecuniary gain. (R2797-2798) Since both aggravating circumstances arose out of the same episode they should have been considered as a single aggravating circumstance. Mills v. State, 476 So.2d 172, 178 (Fla. 1985), cert. denied, __ U.S. __, 106 S.Ct. 1241 (1986). Indeed, the trial court's findings with respect to both aggravating circumstances are, for all practical purposes, identical. (R2797-2798)

Accordingly, the two aggravating circumstances should be considered as one. Id.

3. The trial court's finding that the murders were committed in a cold, calculated and premeditated manner should not stand.

The trial court also found that the murders were committed "in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (R2799) The evidence did not establish the "heightened" premeditation neces-

sary to support this finding. Phillips v. State, 476 So.2d 194, 197 (Fla. 1985); Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984), cert. denied, 471 U.S. 1120 (1985). As the Court held in Floyd, supra, 497 So.2d at 1214, [citing] Bates v. State, 465 So.2d 490, 493 (Fla. 1985), cert. denied, ___U.S. ___, 108 S.Ct. 212 (19871, this aggravating circumstance is reserved primarily for murders characterized as execution or contract murders or those involving the elimination of witnesses.

The trial court was entitled to find from Det. Noblitt's recitation of Mr. Green's alleged confession that Mr. Green took the knife with him when he went to the Nichols' home. (R1207-1208) However, the trial court was not justified in finding that Mr. Green planned in advance to kill the victims or that he went to the victims' home with the clear intention of killing them. The evidence showed that the victims died only when Mrs. Nichols balked at returning the rent check. (R1208)

These facts do not support the "heightened" premeditation required by this Court's decisions. This factor also should fall.

B. The Trial Court's Instructions To The Jury Deprived Mr. Green Of A Fair And Reasoned Penalty Phase Proceeding,

1. The instruction on whether the murders were "especially heinous, atrocious or cruel" was unconstitutionally vague.

The trial court's instructions during the penalty phase failed to provide the jury with the clarifying language necessary to breathe meaning into whether the murders were "especially heinous, atrocious or cruel." As a result, the instruction on this element failed to satisfy the Eighth Amendment's certainty requirement as required by Maynard v. Cartwright, __ U.S. __, 108 S.Ct. 1853 (1988).

Defense counsel proffered an instruction drawn from the clarifying construction set forth in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). (R2672) The trial court refused to give the instruction. (R2149)

The failure of the trial court to instruct in accordance with Dixon provided the jury with an unconstitutionally vague explanation of "especially heinous, atrocious or cruel." As noted in Maynard, the Dixon language was sufficient to save this aggravating circumstance from vagueness under Proffitt v. Florida, 428 U.S. 242, 256 (1976). The absence of this clarifying language might well have prompted the jury to return its unanimous recommendation for death after only 10 minutes of deliberation. (R2202-2203)

Accordingly, a new penalty phase should be ordered.

2. Whether Mr. Green had a 'significant history of prior criminal activity' presented a jury question.

Over defense counsel's objection, the trial court refused to instruct on the mitigating circumstance of whether Mr. Green had "no significant history of prior criminal activity" in accordance with 5921.141 (6)(a) Fla. Stat. (1986). (R2150-2151) The refusal of the trial court to instruct on this mitigating factor added to the unfairness of the penalty phase proceeding as a whole.

Mr. Green must concede that the state established his conviction for assault with intent to commit rape beyond a reasonable doubt. Much of the penalty phase evidence, however, explored the circumstances of Mr. Green's nolo contendere plea to the charge. (R2114-2131) As a result, the jury should have been permitted to determine whether his prior criminal record was insignificant enough to be considered in mitigation. The evidence strongly suggested that Mr. Green's nolo contendere plea resulted from pragmatic considerations to avoid the risk of retrial rather than an admission of guilt. (R2125-2126)

As this Court held in Robinson v. State, 487 So.2d 1040, 1043 (Fla. 1986), trial courts should permit sentencing juries to consider mitigating circumstances when a reasonable jury could find them. This Court urged against a restrictive approach to a jury's consideration of mitigating factors.

The trial court's refusal to permit jury consideration of this mitigating factor arose out of Mr. Green's earlier conviction for assault with intent to commit rape. Although

an anomaly at first blush, a conviction for such an offense does not automatically preclude a jury's consideration of whether a defendant had a significant history of criminal activity. Significance, like reasonableness, necessarily invites a jury's consideration. For the same reason, the trial court committed error in refusing to consider this circumstance in its weighing of the aggravating and mitigating factors. (R2799)

The trial court should be ordered in a retrial of the penalty phase to weigh Mr. Green's history of prior criminal activity and make a judgment on its significance. In addition the trial court should be ordered not to instruct on the aggravating factors discussed in Argument IV A -- that the murders were committed to avoid arrest and were cold, calculated and premeditated.

C. The Prosecutor's Comments During The Penalty Phase Appealed To The Passions Of The Jury And Deprived Mr. Green Of A Fair Sentencing Hearing.

During the penalty phase summation, the state made three inflammatory arguments which exceeded the limits of advocacy. Even though the comments drew no objection, motion for mistrial or request for a curative instruction, they were clearly improper and constitute fundamental error.

The most serious statements concerned the possibility that Mr. Green would kill a prison guard if sentenced to life imprisonment. Mr. Page also suggested that Mr. Green could escape and kill again. "Who will be next?", Mr. Page asked.

(R2185-2186) Under the circumstances the jury well might have felt a threat to their individual well-being in response to this question.

This Court condemned a variation of the "whom will he kill next" argument in Teffeteller v. State, 439 So.2d 840, 844-845 (Fla. 1983), cert. denied, 465 US. 1074 (1984). In that case the prosecutor argued that the defendant would kill again when paroled. This Court reversed the death penalty and ordered another penalty phase proceeding. The same result should follow in this case notwithstanding the absence of any objection below by defense counsel. Each of these arguments is so outrageous that nothing short of a sua sponte mistrial was appropriate once any was uttered.

Mr. Page next attributed a belief in the death penalty to Mr. Green. Essentially, Mr. Page argued that Mr. Green expressed his belief in the death penalty by executing Mr. and Mrs. Nichols. (R2187) As already argued, the evidence entirely fails to support the finding of execution-style murders. Nothing in the evidence suggested any belief in the death penalty on the part of Mr. Green.

Finally, Mr. Page urged a death recommendation by the jury, consisting of 12 white Hillsborough County citizens, by arguing that, "It's two-zero right now, two for him and zero for the citizens of the state of Florida, Tampa, Hillsborough County." (R2187) Mr. Page proceeded to say the time had come "... to start evening the score by your recommendation." (R2187) This argument resembles a plea for tribal unity more

than it does a prayer for retribution. Retribution is a valid basis for the death penalty. "Evening the score" is not valid unless all crimes resulting in death are to be punished by death. Until then, this argument serves only to inflame.

Under the circumstances, Mr. Page's remarks were so "fundamentally tainted that neither an objection nor retraction could entirely destroy their sinister influence." Coleman, supra, 420 So.2d at 356. Even if the remarks did not rise to the level of fundamental error, their effect contributed to an essentially unfair sentencing proceeding. Accordingly, another sentencing procedure should be ordered.

D. The Misleading Comments Of The Trial Court And The State With Regard To The Jury's Sentencing Function Denigrated It In Light Of Caldwell v. Mississippi, 472 U.S. 320 (1985).

Misleading comments by the trial court and Mr. Page during voir dire denigrated the jury's role with regard to the sentencing phase to Mr. Green's prejudice. Since the comments diluted the jury's sense of responsibility, the judgment should be reversed for a new trial. Adams v. Wainwright, 804 F.2d 1526, 1530 (11th Cir. 1986), reversed, Dugger v. Adams, __ U.S. __, 109 S.Ct. 1211 (1989).

The trial court told the venire that the jury's penalty verdict would be only advisory in nature and not binding even though it would be given great weight and deference. (R86) Mr. Page later discussed the jury's role in the death senten-

cing process and noted:

> . . .just because you recommend it doesn't mean it's going to be imposed by the Judge. (R235-236)

Trial counsel made no objection to these statements.

Mr. Green concedes that this Court has upheld instructions on the apportionment of responsibility between the jury and trial judge. Grossman v. State, 525 So.2d 833, 839-840 (Fla. 1988), Ford v. State, 522 So.2d 345, 346 (Fla. 1988) and Garcia v. State, 492 So.2d 360, 366 (Fla. 1986), cert. denied, __ U.S.__, 107 S.Ct. 680 (1986). The comment of the trial court in this case, however, more precisely tracked the trial judge's statements at issue in Adams to the effect that the jury's recommendation was not binding. Under Tedder v. State, 322 So.2d 908 (Fla. 1975) a jury's recommendation in many cases is binding.

The reversal of Adams by the Supreme Court did not reach the question of whether the jury had been misled as to its role. Adams, __U.S. at __, 109 S.Ct. at 1215, n.4. However, the crux of the Supreme Court's decision in Adams turned on the procedural bar raised by the defendant's failure to object to the instruction at trial or on appeal. For that reason, the precise scope of Caldwell remains unclear when viewed in light of the facts of this case.

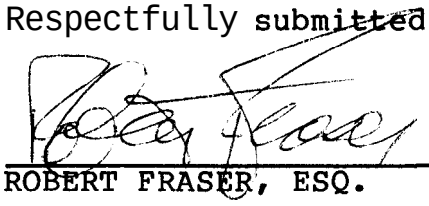
Accordingly, Mr. Green submits that the jury's recommendation of death was skewed by the misleading statements of the trial court and the prosecution during voir dire. Taken

alone or in the context of the other penalty phase errors, the misleading comments cannot be deemed harmless and another sentencing hearing should be held.

CONCLUSION

For the reasons set forth in this brief, Appellant Alphonso Green requests that the judgment and sentence of death entered by the Circuit Court of the Thirteenth Judicial Circuit be reversed and the case remanded for a new trial on all issues.

Respectfully submitted,

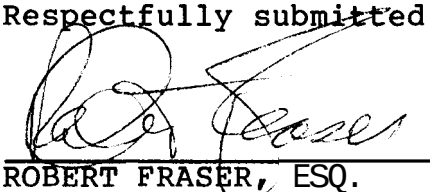


ROBERT FRASER, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, 1313 N. Tampa Street, Tampa, Florida, 33602, on this 8th day of May, 1989.

Respectfully submitted,



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