IN THE SUPREME COURT OF FLORIDA

JACOB JOHN DOUGAN

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 71,755

APPELLEE'S ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 363014

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS(CONTINUED)

TABLE OF CITATIONS

TABLE OF CITATIONS(CONTINUED)

IN THE SUPREME COURT OF FLORIDA

JACOB JOHN DOUGAN Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 71,755

ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Jacob John Dougan was the defendant in the trial court and will be referred to herein as Dougan or Appellant. The State of Florida was the prosecution below and will be referred to herein as the State or Appellee.

The record on appeal contains seven volumes of docketing instruments and other filings. Volumes VIII through XXXVI contain the trial transcript of the courtroom proceedings. The seven volumes containing the docketing instruments will be referred to by the symbol "R", page number in parentheses. The trial transcript will be designated by the symbol "T" in parentheses. This is a capital case.

SUMMARY OF ARGUMENT

ISSUE I: The state attorney used his peremptory challenges to exclude three prospective black jurors for racially neutral reasons as demonstrated by the record.

ISSUE II: The defendant committed a racially motivated murder and cannot complain now that race was improperly injected into the trial proceedings.

ISSUE III: The jury was properly instructed in accordance with Florida law to consider both statutory and nonstatutory mitigating factors before voting to recommend the trial court sentence Dougan to death.

ISSUE IV: The trial court instructed the jury regarding the application of atrocious and cruel in accordance with the agreement of the parties below in response to a question from the jury. The instruction given limited consideration of the death sentence as required by the United States Supreme Court and this Court.

ISSUE V: The trial court imposed the death sentence based on an independent weighing of aggravating and mitigating circumstances. A murder motivated by racial hatred as a result of victimization is not a mitigating circumstance rationally connected to sentencing.

ISSUE VI: This Court has already determined that the imposition of the death sentence is proper where Mr. Dougan

was the actual trigger-man who killed the eighteen year-old victim. A defendant who plans to commit a cruel and atrocious murder then carries out that plan is precisely the kind of unmitigated case contemplated by this Court's decisions upholding the propriety of a death sentence.

ISSUE VII: Defense counsel properly raised the issue of pre-trial publicity during voir dire of the jury and those jurors with information regarding the case were removed from the jury. Dougan cannot demonstrate that any juror who sat on this case was so infected with prejudicial knowledge of the case that he did not receive a fair trial.

ISSUE VIII: There is no violation of the ex post facto clause by the retrospective application of the code calculated aggravating circumstance. This Court has previously rejected this claim.

ISSUE IX: The jury's sense of responsibility for their sentencing recommendation was not diminished by references to Mr. Dougan's prior trial.

ISSUE X: There is no order granting or denying a motion to suppress on appeal in this case. Dougan is barred from advancing this issue.

ISSUE XI: The parties agreed pre-trial that the jury would be instructed that the court would give considerable "great weight" to their recommended sentence. The failure to give this instruction was not made known to the court by

form of a proper timely objection and this claim may not be raised on appeal. In any event, this Court has consistently rejected this claim in every single case.

ISSUE XII: This Court has no authority to supervise the discretion of the prosecutor in seeking to impose a death sentence for Mr. Dougan.

ARGUMENT

ISSUE I

THE STATE ATTORNEY DID NOT DENY MR. DOUGAN EQUAL PROTECTION BY PEREMPTORILY EXCUSING PROSPECTIVE BLACK JURORS ON ACCOUNT OF THEIR RACE.

Dougan argues that the peremptory challenges used to exclude four black jurors violated the principles of Batson v. Kentucky, 476 U.S. 79 (1986) and State v. Neil, 457 So.2d 481 (Fla. 1984). The prosecutor's stated reasons for the exercise of his peremptory challenges meets the very strict standard of this Court as enunciated in State v. Slappy, 522 So.2d 18 (Fla. 1988), and Mr. Dougan is unable to demonstrate that the State improperly excused any jurors for nonracially neutral reasons.

The first juror excused was Errol Covan, who stated on the State's voir dire that he could not vote to impose death. (T 264). Covan suggested to Mr. Link, the defense counsel for Dougan, that he could vote to impose death. The State exercised a peremptory challenge because it was the prosecutor's judgment that unequivocal opposition to the death penalty on one day and sudden change of heart was simply incredible. (T 470-471).

Ms. Gilbert, the prospective juror who was not challenged for her similar equivocation, happens to be a

black juror who sat on the jury.[1] Likewise, Ms. Lester said she could not vote to impose death (T 268), but then changed her mind in response to defense counsel's questioning. (T 269). However, later questioning by the prosecutor revealed that Ms. Lester had a son who had been treated by a mental health expert. Ms. Lester stated she attaches great value to the opinion of this mental health expert. (T 374). The State was therefore exercising a racially neutral reason in striking this juror given the fact that there would be such testimony presented by the defendant. Ms. Lester also admits that her husband had been in trouble. (T 336). The fact that the phrase "in trouble" raises more questions than it answers is due to the failure of defense counsel to adequately develop the record not the racist behavior of the prosecution.

The third, and final, juror whom the prosecutor allegedly discriminated against was Ms. Sloan. The reasons advanced by the prosecutor and quoted extensively in the brief of appellant at pages 34-35 adequately demonstrate racially neutral basis for exclusion. (T 600-601). There is nothing racist about properly excluding a juror who could not vote for death in any circumstance, who had to testify

---

[1] The record does not reveal the race of Ms. Gilbert, however, the undersigned assistant attorney general has confirmed this fact by telephonic communication with the prosecutor, Stephen Kunz. Absent a system of video taping of voir dire and a Hitleresque racial classification system, this Court *is going* to have to rely on such facts in determining neo questions.

for her brother at trial, and who also works for HRS. Once again, if the record is inadequate as to Ms. Sloan it is the defense counsel's failure to further question her regarding what nature of judicial proceedings she testified in and whether her HRS employment demonstrated a liberal or anti-prosecution attitude. However, the second and third reasons are only surplusage given her equivocation on whether she could vote to impose death.

The voir dire proceedings reveal the State's consistent goal was to obtain a jury that could vote to recommend death if the circumstances warranted it. There is no evidence that the State was seeking any other social or economic classification. However, the record is clear that defense counsel for Dougan blatantly sought to exclude jurors solely on the basis of race and admitted it. (T 603). Mr. Link defended his conduct by saying that only a white defendant could have challenged the exercise of peremptory challenges against white jurors. This is not the law of Florida under State v. Slappy. This Court, rightly or wrongly, has confused the requirements of Batson with the right of an individual juror to sit in a case. This Court should bear in mind it was defense counsel's exercise of peremptory challenges in the infamous McDuffie case which lead to the acquittal of police officers by an all-white jury which prompted the pressure for the Neil claim. The United States Supreme Court may resolve this issue in Alabama v. Cox, Case No. 88-630, if a pending petition for writ of certiorari is granted.

ISSUE II

THE PROSECUTOR DID NOT APPEAL TO RACIAL BIAS IN URGING THIS JURY TO RECOMMEND SENTENCING MR. DOUGAN TO DEATH.

The prosecutor's strategy in Mr. Dougan's case was designed to present evidence which accurately reflected the circumstances of the crime and proved the existence of statutory aggravating factors. It is ironic that Mr. Dougan can organize a racially motivated crime and then complain to this Court that race was a factor in the imposition of his death sentence. If the opponents of abortion kidnapped and murdered an eighteen year-old girl who had recently underwent an abortion and pinned a note to her body claiming that this is only the first such victim until the law recognizes the right of the unborn to live, this state would have just as much authority to seek the death sentence as they did in this case. This murder is no more excusable than that of Martin Luther King or John F. Kennedy or an anonymous store clerk. The facts in Robinson v. State, 520 So.2d 1 (Fla. 1988) have no bearing on this case at all. See Barclay v. Florida, 463 U.S. 939, 949 (1983).

ISSUE III

THE TRIAL COURT DID NOT LIMIT THE JURY'S CONSIDERATION OF MITIGATING FACTORS AND THE JURY WAS ADEQUATELY INSTRUCTED REGARDING THEIR ABILITY TO RECOMMEND LIFE.

(A)

Mr. Dougan's sentencing proceeding was conducted after Lockett v. Ohio, 438 U.S. 586 (1978), Skipper v. South Carolina, 476 U.S. 1 (1978) and Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). Mr. Dougan was represented by experienced defense counsel. Mr. Dougan's complaint seems to be that the jury was instructed and the jury verdict form required them to act in a rational manner. The jury was asked to weigh the aggravating and mitigating factors and impose a sentence of death if the aggravating outweighed the mitigating factors and did not justify the imposition of a life sentence. Dougan's argument certainly turns the principles of Tedder v. State, 322 So.2d 608 (Fla. 1975), on its head. In Tedder, this Court held that the trial court may override a jury recommendation of life where it is not rationally based on the evidence presented in mitigation and aggravation. Thus, Dougan concedes an override would be the proper disposition in this case because the jury in essence would have been hoodwinked into recommending life. Torres-Arboledo v. State, 524 So.2d 403, 413 (Fla. 1988).

Dougan relies on Franklin v. Lynaugh, 101 L.Ed.2d 155 (1988) and Mills v. Maryland, 100 L.Ed.2d 384 (1988), in

support of his argument. However, in Franklin the Texas death penalty statute requires a unanimous verdict of the jury as does the Maryland death penalty statute in Mills. The record demonstrates that Dougan persuaded three of twelve jurors that life was the recommended sentence. Thus, the danger inherent in Mills that one juror might misconstrue the law and vote for death when he really meant to vote for life is unavailing in Florida. In any event, defense counsel agreed with the reinstruction given.

(B)

The jury was adequately instructed as to the definition of mitigating circumstances. Dougan admits that the jury was given the Florida standard jury instruction on mitigating circumstances. The jury also heard testimony from an unlimited amount of witnesses regarding Dougan's good character and prison record and still voted to recommend death. The jury was basically saying that Mother Theresa would get the death penalty for organizing a plan to go out and kidnap an innocent man, torture him and then shoot him twice in the head. The rationale for the imposition of the death sentence in this case was adequately set forth in Justice Adkins' dissenting opinion in the Dougan case. Dougan v. State, 470 So.2d 697 (Fla. 1985).

(C)

Dougan was not entitled to the statutory mitigating circumstance, no significant history of prior criminal activity where there had been another murder which had been nolle prosequi by the State. Dougan's argument is, once again, he should be allowed to present to the jury with a shell game regarding his criminal history. The fact that Dougan committed another murder sheds great light upon his character and would not be an improper matter for the jury to consider when weighing the aggravating and mitigating factors. The real issue here is whether or not this jury improperly considered matters in determining whether Dougan belongs to that limited class of killers for whom the death penalty is the appropriate punishment. The non-fact that the jury did not hear cannot be said to have resulted in an improper death sentence. This Court's opinion in Dougan, supra, was not a license to commit a fraud upon the jury.

ISSUE IV

THE INSTRUCTIONS ON THE AGGRAVATING CIRCUMSTANCES ADEQUATELY CHANNELED THE DISCRETION OF THE JURY IN DETERMINING THE PROPER PUNISHMENT.

(A)

In Maynard v. Cartwright, 100 L.Ed.2d 372 (1988), the United States Supreme Court set aside an Oklahoma death sentence because the appellate court in that state had allowed an over-expansive use of the term "cruel, heinous and atrocious" as an aggravating factor in capital cases. The Supreme Court was reaffirming the law previously announced in Godfrey v. Georgia, 446 U.S. 420 (1980). This Court's definition of heinous, atrocious and cruel, set forth in State v. Dixon, 283 So.2d 1 (Fla. 1973), sufficiently defines this aggravating factor. See also Barclay v. Florida, 463 U.S. at 947.

In this particular case the trial court originally gave the Florida standard jury instructions without objection by either party which do not give the full definition set forward in Dixon. Upon request by the jury the court further instructed the jury using the language from Dixon. (T 1770-71). The United States Supreme Court also cited in Maynard the Florida Supreme Court's instruction of this aggravating factor. Even if there were some error in this case defense counsel did not request a different instruction or object to the instruction given. In fact, defense

counsel invited the instructions given and Dougan should not be heard to complain on appeal.

(B)

Cold, calculated and premeditated without any pretense of moral or legal justification.

The State will agree to be bound by this Court's standard as set forth in Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). The killing of an innocent hitchhiker in no way is morally or legally justified under any circumstance. This is not a murder plan to kidnap and kill an avowed segregationist or white power group. Dougan's role as the cold, calculated planner of this murder is set forth in the testimony of co-defendant William Hearn. (T 900-954).

(C)

Murder in the course of kidnapping.

Dougan claims that there was no forcible constraint until the car arrived on the dirt road and Mr. Dougan said, "This is it, sucker." (T 922). However, the Medical Examiner's testimony described bruises from the pressure of the hand grip applied to Orlando which established "forcible constraint". (T 853). Under Mr. Dougan's argument, a defendant who entices a little girl into his car with a piece of candy, takes her out to an abandoned road, stabs her repeatedly with a knife and then shoots her in the head

never kidnapped her. There is no error in the kidnapping instruction here or in the court's finding of this aggravating factor. Barclay v. Florida, 463 U.S. at 947.

ISSUE V

JUDGE OLLIFF DID NOT ERR IN HIS CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES ESTABLISHED IN THE RECORD.

The State takes exception to Dougan's claim that the murder of Stephen Orlando was morally and legally justified under any circumstance.

A. The judge's failure to consider the mitigating circumstances presented.

The record below establishes that Dougan was not precluded from presenting any evidence in mitigation. The jury verdict demonstrates that the jury considered the mitigating circumstances and found they did not outweigh the aggravating circumstances. In Porter v. State, 429 So.2d 293 (Fla. 1983), this Court held:

> There is no requirement that a court must find anything in mitigation. The only requirement is that the consideration of mitigating circumstances must not be limited to those listed in §921.141(6), Florida Statutes (1981). What Porter really complains about here is the weight of the trial court accorded the evidence Porter presented in mitigation. However, mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence. Quince v. State, 414 So.2d 185, 187 (Fla. 1982). [footnote omitted]

Id. at 296.

It is within the provice of the trial judge to decide whether a particular mitigating circumstance has been proven and the weight to be given that factor. Toole v. State, 479 So.2d 131 (Fla. 1985), Smith v. State, 407 So.2d 894, 901 (Fla. 1981). Reversal is not warranted simply because Dougan would draw a different conclusion. Stano v. State, 467 So.2d 890, 894 (Fla. 1984). This is especially so given the fact that the jury heard the same evidence and recommended death.

B. The judge's consideration of aggravating circumstances is supported by the evidence.

Dougan argues that the three aggravating circumstances found by the trial court were not supported by the evidence. In other words, there was no evidence that (1) the murder was especially wicked, evil, atrocious or cruel, (2) the murder was not committed in a cold, calculated and premeditated murder without any pretense of moral or legal justification and (3) the murder was not committed while Mr. Dougan was engaged in the commission of the crime of kidnapping.

(1) Especially heinous, atrocious or cruel

Mr. Dougan argues also that he cannot be held accountable for the multiple stabbings of the victim for only Mr. Barclay committed these acts. (T 923). This Court has already held that Mr. Dougan was the mastermind behind

this operation and all acts of the agents are attributable to the principal and Dougan is the killer. The record reveals that young Mr. Orlando suffered sufficiently to satisfy the atrocious and cruel standard of Godfrey v. Georgia, supra. This Court has previously upheld this finding as supported by the record. Barclay v. State, 470 So.2d 691 (Fla. 1985). See Jennings v. State, 453 So.2d 1109, 1115 (Fla. 1984), and Parker v. State, 476 So.2d 134, 139 (Fla. 1985).

(2) Cold, calculated and premeditated

The trial court's order adequately sets forth facts upon which this aggravating circumstance can be based. This aggravating circumstance has been established under the test of Rogers v. State, supra.

(3) Murder in the course of kidnapping

The whole purpose of taking Mr. Orlando for his brief ride was his subsequent execution. Therefore, he was transported for the purpose of murdering him which remains a felony in this state. The evidence supports this aggravating circumstance. This Court has previously approved this aggravating factor in Barclay v. State, 470 So.2d 691, 694 (Fla. 1985) and these are law of the case.

ISSUE VI

DEATH IS THE ONLY POSSIBLE SENTENCE FOR MR. DOUGAN.

This Court has long recognized that the existence of three valid statutory aggravating factors and no mitigating circumstances combined with a death recommendation for the ring leader trigger-man is a valid death sentence. Unlike co-defendant Barclay, there is no rational basis for a life sentence for a 27 year-old intelligent charismatic leader who chooses to kill innocent victims. See Rogers, supra, at 534.

Interestingly enough, Dougan now argues that this Court was wrong to reduce Barclay's sentence to life but having done so it must compound the error and reduce Dougan's sentence to life. There has never been any argument that Dougan should not get the death penalty. There has never been a jury which failed to recommend the death penalty for Dougan and the trial court has always imposed the death penalty for Dougan. This is a death penalty case. The undersigned assistant attorney general is very familiar with this Court's recent observation in Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), and fails to see any resemblance between the two cases. In Fitzpatrick a twenty year-old man of limited mental capacity formulated a bizarre and unrealistic plan to rob a bank. The plan failed and a death resulted. There was never any evidence that Fitzpatrick contemplated killing until his plan had gone awry. Here,

Dougan and his co-horts stalked the city looking for victims, found a couple, and has been tried and sentenced for one. The State does believe that this is the sort of unmitigated case contemplated by this Court in Dixon which is reserved for the death penalty.

ISSUE VII

MR. DOUGAN WAS NOT DENIED A FAIR TRIAL DUE TO THE TRIAL COURT'S FAILURE TO CHANGE VENUE.

The issue of pre-trial publicity was ventilated before the jury during voir dire. Those jurors who had knowledge such as the news reporter, Kelly, were excluded for cause. (T 597) Therefore, there is no standard under existing law upon which Dougan can claim his trial was infected with pre-trial publicity. The trial court did not abuse his discretion in denying a motion for change of venue. Davis v. State, 461 So.2d 67, 69 (Fla. 1984).

ISSUE VIII

THE USE OF THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE DOES NOT VIOLATE MR. DOUGAN'S RIGHTS UNDER THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

Mr. Dougan admits this Court has previously rejected this claim in Combs v. State, 403 So.2d 418 (Fla. 1981), cert. den., 456 U.S. 984 (1982), and has adhered to that decision since then. In support of his position he asks this Court to rely on a decision of a federal district court which has not been affirmed by the Eleventh Circuit. This Court is bound by its own precedent and that of the federal supreme court. Card v. Dugger, 512 So.2d 829 (Fla. 1987).

ISSUE IX

THE JURY PANEL'S AWARENESS OF MR. DOUGAN'S PRIOR TRIAL DID NOT DIMINISH THE SENSE OF RESPONSIBILITY FOR THEIR SENTENCING RECOMMENDATION.

If Mr. Dougan was concerned about the effect of his 1975 proceedings would have on the jury in this case the proper thing to do would have been to have asked for a special instruction from the court that they are not to regard this prior proceeding in any way. Mr. Dougan's position would effectively preclude the State from ever conducting a resentencing proceeding before a new jury panel. This situation is no different than a defendant who pleads guilty and receives a penalty proceeding in front of a jury. The fact the jury was told that "The judge is required to give great weight to the jury's recommendation" at the request of defense counsel to preclude the possibility of an amendment claim regarding the jury's sense of responsibility for the recommendation. (T 189-190, 217). See Caldwell v. Mississippi, 472 U.S. 320 (1985).

ISSUE X

WHETHER PROBABLE CAUSE TO ARREST MR. DOUGAN WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

The sole issue in this appeal is the validity of the death sentence imposed after the 1987 penalty proceeding. This issue has been previously disposed of in a prior appeal. Dougan v. State, 470 So.2d at 699

ISSUE XI

THE JURY'S SENSE OF RESPONSIBILITY FOR ITS ADVISORY SENTENCE WAS NOT DIMINISHED BY THE COURT'S INSTRUCTION THAT GREAT DEFERENCE WOULD BE GIVEN TO ITS ADVISORY VERDICT.

The trial court did instruct the jury that he was required to give great weight to their recommendation. (T 217). In any event, this Court has rejected this claim in every case. See Card v. Dugger, 512 So.2d 829, 831 (Fla. 1987).

ISSUE XII

THE PROSECUTOR DID NOT IMPROPERLY DELEGATE THE DECISION TO SEEK THE DEATH PENALTY TO THE VICTIM'S FAMILY.

This argument is without merit. The decision to seek the death penalty is and was the prosecutor's alone. This Court has no authority to review that decision. State v. Bloom, 497 So.2d 1 (Fla. 1986).

CONCLUSION

Appellee respectfully asks this Court to affirm the sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Gary L. Printy

GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 363014

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Mr. James E. Ferguson, II, Ferguson, Stein, Watt, Wallas & Adkins, P.A., 700 East Stonewall Street, Suite 730, East Independence Plaza, Charlotte, North Carolina 28202, this 14th day of November, 1988.

Gary L. Printy

GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL