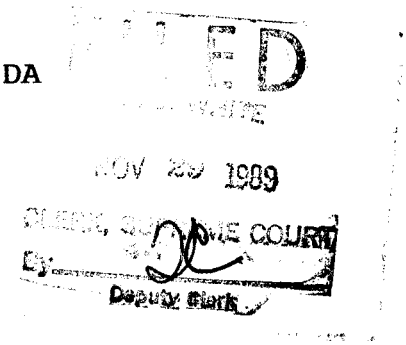
IN THE SUPREME COURT OF FLORIDA




MARK JAMES ASAY,

Appellant,

v. CASE NO. 73,432

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

**ANSWER BRIEF OF APPELLEE**

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 300179

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

COUNSEL FOR APPELLEE

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## OTHER AUTHORITIES

## STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's statement of the case, but would briefly set forth the following supplement as to the facts. Supplementation as to the facts regarding the procedural aspects of the specific points raised will be presented in the argument section:

As to the testimony concerning Appellant's use of intoxicants on the night of the murders, while there was testimony from Bubba O'Quinn and Robbie Asay to the effect that the three of them had been "buzzed" (R 495), both witnesses expressly testified that Appellant had not been drunk (R 493, 556). As to the circumstances surrounding the murder of Robert Booker, the State disagrees with the representation in the Initial Brief to the effect that Appellant "apparently [thought] Robbie was having difficulties with Booker" (Initial Brief at 3); inasmuch as Appellant never testified, there is no basis in the record to support this assertion. The record does indicate that Appellant initiated an altercation with the victim, cursing Booker and sticking his finger in his face (R 499). After the victim told Appellant, "Don't put your finger in my face", Appellant responded, "Fuck you, nigger", and shot him (R 499). O'Quinn stated that Booker has been backing away from Appellant at the time that he was shot (R 499). O'Quinn specifically testified that Booker had had no weapon at the time and that he had not attacked Appellant in any way (R 500); Appellant, however, had had a gun in the back pocket of his pants (R 499, 519, 530). According to O'Quinn, Appellant later said that he

shot Booker, "Because you got to show a nigger who is boss" (R 501) and because you "can't let them run over you" (R 531). Finally, as to the cause of death, Dr. Floro testified that the wound to the abdomen had been a "very fatal shot", in that it led to massive bleeding (R 424). The doctor also noted a small abrasion or scrape on Booker's right forearm (R 420).

As to the circumstances concerning the murder of Robert McDowell, which occurred twenty minutes later (R 512), the record indicates that the victim was shot as he stood at the door of Appellant's truck (R 509). According to O'Quinn, Appellant, who had momentarily left the scene, suddenly returned and grabbed McDowell by the arm, and, as the victim asked Appellant what he was doing, began shooting him (R 509); the witness stated that Appellant continued shooting McDowell repeatedly as the victim began to back away and try to escape (R 510). Officer Lewis, who had been on patrol nearby, testified that he heard five or six shots, with one initial shot, followed by a slight hesitation, and then four or five more (R 638). The pathologist identified six bullet wounds on the victim's body (R 431). Dr. Floro noted the presence of gun powder residue on the wounds on McDowell's hand and forearm (R 434). The doctor stated that any of the three wounds to the chest would have been fatal, and further testified that several of the wounds were consistent with the victim having been shot while lying on the ground (R 436-437). Finally, O'Quinn testified that when he had driven Appellant back home, Appellant has asked him to help change the appearance of the truck by removing the tool box; O'Quinn had refused (R 513).

As to Appellant's later statements, Appellant subsequently told Charles Moore that he [Asay] had wanted O'Quinn to get McDowell to the truck, "and they would take her off and screw her and kill her." (R 650-651). Likewise, Charles Moore stated that Appellant had told him that he had shot McDowell four times and then "just finished him off the last two times" (R 651). Likewise, Appellant told Moore's cousin that he had grabbed McDowell by the arm, stuck the gun in his chest and shot him four times, and that when the victim had hit the ground, Appellant had then "finished him off" (R 689). When Moore asked Appellant, "Doesn't it bother you that you shot somebody, killed a boy?", Appellant replied in the negative, stating that the victim had been a "faggot" (R 687); Appellant later stated that this "boy" had cheated him out of ten dollars in a drug deal and that he had told the boy that if he ever "got" him, "that he would get even" (R 688-689). Finally, as to Appellant's jailhouse statements to Thomas Gross, the witness testified that he had been incarcerated with Appellant in a cell holding eight inmates, of which five were black (R 749-750). When Gross had first asked Appellant what he was in jail for, Appellant, in the presence of the black inmates, had stated that he was there for a burglary (R 749). Later, when the black inmates were not present, Appellant advised Gross that he was in jail for the murders at issue, showing him newspaper clippings, and stating that he had "shot them niggers." (R 751, 759, 766). Appellant then displayed his tattoos, and,

according to Gross, indicated in his conversation "that he was prejudiced against blacks." (R 760). Appellant also stated that he was in jail because his brother had "pussied out, snitched him out." (R 760).

## SUMMARY OF ARGUMENT

Asay presents seven (7) claims on appeal in regard to his two convictions of first degree murder and two sentences of death. As to the convictions, Asay presents three claims, attacking the sufficiency of the evidence as to one, and, additionally, contending that the State impermissibly introduced racism into the case and that it was error for the judge to have denied Asay's **pro se** motion to dismiss counsel. As to the issue of sufficiency of the evidence, the State suggests that more than adequate evidence of premeditation exists to support both convictions; the contentions raised on appeal to the effect that Asay was "intoxicated" or acted "impulsively" at the time of the murders are entirely contradicted or unsupported by the record. As to the claim involving the denial of Appellant's **pro se** motion to dismiss counsel, no error has been demonstrated. Asay's motion, which was made in the midst of trial, was not motivated by any desire on the part of Asay to represent himself; rather, Asay was merely dissatisfied with the manner in which counsel has cross-examined a witness, and he was not entitled to the relief requested - an immediate mistrial and the appointment of two new attorneys.

Finally, the State would contend that Asay's primary conviction point, that the State allegedly impermissibly introduced racism into the process below, is rather disingenuous. The record indicates that Appellant himself supplied a racial motivation for the crimes, and that the State, without objection, introduced this evidence; when an eyewitness asked Appellant why

he had shot and killed the first victim, Appellant replied, "Because you got to show a nigger who is boss", later adding that you "can't let them run over you." Appellant made other admissions to his cellmate in regard to the second victim, which were also admitted without objection. The prosecutor's reference to these matters in closing argument was simply fair comment upon the evidence before the jury and fair reply to the preceding defense argument; in any event, no contemponaneous objection was interposed, and this claim is procedurally barred. Appellant's convictions should be affirmed in all respects.

Asay presents four claims of error in regard to his two sentences of death. His initial contention is that the court below erred in denying his **pro se** motion to continue the penalty phase. The State suggests that no abuse of discretion has been demonstrated; the penalty phase did not begin until twenty-nine (29) days **after** the trial had ended, and Appellant presented an insufficient basis for such request. Further, given the fact that Appellant was represented by counsel, he had no right to file a **pro se** motion of any kind, and it is clear that defense counsel had his own strategy as to mitigation; two witnesses were called on Appellant's behalf, including his mother, who testified as to his good character. Appellant's contentions notwithstanding, no exclusion of evidence occurred. Appellant also contends that error was committed by the prosecutor and judge in allegedly diminishing the jury's sense of responsibility in sentencing. This claim is procedurally barred, in that no contemporaneous objection was interposed; it is likewise without

merit, as the prosecutor and defense counsel, through argument, and the judge, through a special instruction, advised the jury that their recommendation was entitled to great weight.

Appellant's remaining claims relate to the findings in aggravation and the proportionality of the death sentences. The court below found two aggravating circumstances as to the murder of Robert Booker and three as to the murder of Robert McDowell; the court found one mitigating circumstance as to each murder, to which he assigned little weight and which he stated was far outweighed by the aggravating circumstances. On appeal, Asay only specifically attacks the "extra" aggravating circumstance found as to the McDowell murder, that such crime had been committed in a cold, calculated and premeditated manner; the court found, as to both murders, that they had been committed while Asay was under sentence of imprisonment and that they had been committed by one with a prior conviction for a crime of violence, by virtue of the contemporaneous convictions for first degree murder. Appellee suggests that Asay's attack upon the finding of heightened premeditation is meritless. Appellant's own statements indicate that he knew the victim, and that he felt that the victim had wronged him, and had vowed revenge; similarly, there was testimony to the effect that Appellant planned to get the victim into the truck so that he and another could rape and kill him, but, when the victim did not do so, Appellant simply proceeded to shoot McDowell six times, as he begged for his life. This aggravating circumstance was properly found, and, even if it were not, any error would be harmless beyond any reasonable doubt.

Finally, the State suggests that the sentences of death are proportionate and that the cases to which Asay cites for analogy, as to the alleged inappropriateness of death, are themselves distinguishable. By no stretch of the imagination were these "domestic" crimes, and, in contrast to a number of cases cited by Appellant, no substantial mitigation was presented to create any close question as to the appropriateness of the death penalty. The death sentences in this case are not disproportionate because Appellant cold-bloodedly executed two persons, apparently because, at least in part, he disapproved of their race and/or sexual orientation. This is the type of crime for which the highest penalty is reserved, and the instant sentences of death should be affirmed in all respects.

## ARGUMENT

### ISSUE I

FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE PROSECUTOR'S CLOSING ARGUMENT AT THE GUILT PHASE

Appellant argues for the first time on appeal that fundamental error occurred during the prosecutor's closing argument at the guilt phase of the trial. Appellant specifically contends that the prosecutor impermissibly injected the issue of racial prejudice, even though "there was no evidence linking any racial bias as motivation for the homicides" (Initial Brief at 18). The State would contend initially that this claim is not preserved for review, in that no contemporaneous objection was interposed in regard to **any** of the remarks at issue. The State would likewise contend, assuming that this claim is at all cognizable, that the prosecutor's argument was simply fair comment on the evidence previously admitted, similarly without objection, as well as fair reply to the prior defense argument. No fundamental error has been demonstrated, and the instant convictions for first degree murder should be affirmed in all respects.

As to the lack of preservation, this court has expressly held, specifically within the context of capital cases, that contemporaneous objection as well as motion for mistrial is necessary to preserve for review any claim involving alleged improper prosecutorial argument. **See Teffeteller v. State**, 495 So.2d 744 (Fla. 1986); **Hoffman v. State**, 474 So.2d 1178 (Fla. 1985); **Burr v. State**, 466 So.2d 1051 (Fla. 1985); **Rose v. State**,

461 So.2d 84 (Fla. 1984); **Davis v. State**, 461 So.2d 67 (Fla. 1984). The State would note that the two primary cases relied upon by Appellant, **Robinson v. State**, 520 So.2d 1 (Fla. 1988) and **McBride v. State**, 338 So.2d 567 (Fla. 1st DCA 1976), both involve the denial of a defense motion for mistrial, interposed in regard to the comments at issue. In that defense counsel **sub judice** failed to object to any of the comments now at issue (R 851-852, 853, 854, 869, 879-880, 884, 885, 886, 893), this claim is waived, unless fundamental error has been demonstrated. Although this court did find the existence of fundamental error in **Cooper v. State**, 136 Fla. 23, 186 So. 230 (1939), in which the prosecutor's argument had included comment upon the race of the victims and defendant, the State suggests that **Cooper** does not dictate reversal **sub judice**. As will be demonstrated below, no error of any kind occurred at trial.

While Appellee fully agrees with the holding of **Robinson**, to the effect that racial prejudice has no place in our system of justice, the State cannot agree with Appellant to the effect that there was no evidence which indicated that racial bias was a motive for the instant murders. Further, the State cannot accept the apparent corollary of Asay's claim - that the State is not entitled to comment upon a defendant's prejudice against another race when such prejudice is directly relevant to the prosecutions at issue. To the State, this contention seems similar to that rejected by this court in **Henderson v. State**, 463 So.2d 196 (Fla. 1985). In such case, the defendant had complained on appeal of the admission into evidence of certain allegedly gruesome

photographs of the victims. This court observed that persons accused of crimes can generally expect that any relevant evidence against them will be presented in court, and specifically stated that those whose work products are murdered human beings should expect to be confronted by evidence of their own accomplishments. The evidence relating to Appellant's racial motivation for committing these crimes was relevant, and its admission, in the absence of objection, was entirely proper. To paraphrase **Henderson**, the State respectfully suggests that those who commit murders due to racial hatred cannot expect to have their trials "sanitized" in this respect.

The record in this case clearly indicates that the arguments of the prosecutor were supported by the evidence. Robbie Asay testified that when Appellant had initially confronted Robert Booker, immediately prior to his murder, he had said, "You know, you ain't got to take no shit from these fucking niggers." (R 559). Bubba O'Quinn likewise testified that he had heard Appellant say, "Fuck you, nigger", immediately before shooting the victim (R 499). When O'Quinn asked Appellant why he had done it, Asay replied, "Because you got to show a nigger who is boss", and also said something to the effect that "you can't let them run over you." (R 501, 531). The murder of Robert McDowell took place some twenty minutes later, and while, Appellant made no contemporaneous references to McDowell as a "nigger", he later told a cellmate that he had "shot them niggers." (R 759, 766). At this same time, Appellant had displayed his tattoos, which included the inscriptions "White Pride", "SWP" (Supreme White

Power), as well as a swastika (R 758-759); the inmate to whom these were displayed, Thomas Gross, testified that Asay's entire conversation indicated that he was prejudiced against blacks (R 760).

In light of the above, it cannot be seriously contended that the State "introduced" racial prejudice into the proceedings below. It should also be noted that the State's closing argument followed the initial closing argument of defense counsel. In that argument, Asay's attorney, noting certain other statements by Appellant, had argued that the murder of McDowell had not been racially motivated; Appellant had said, at various times, that he had murdered McDowell because: (1) the victim had previously "ripped him off" in a drug deal; (2) the victim had allegedly taken ten dollars from Appellant for oral sex and not "delivered"; (3) the victim was a homosexual, and (4) Appellant had "put a lip-lock" on the victim and discovered his true sex (R 831-836). Accordingly, defense counsel argued,

> The State's trying to make a black/white issue out of this, and because of the black/white issue, I'm assuming that they are trying to get around some of the contradictions in the evidence. Black/white, black/white, everybody gets inflamed. My God, he went out and shot these people because they are black.
>
> There has been no testimony whatsoever about any planning to go anywhere to shoot anybody. Bubba didn't say, look, we left Brinkman's, and we were going to shoot some black guys, we were cruising around to shoot black guys. There is no conversation about a plan of that. You have a plan afterwards, a shooting, according to Bubba, but the only person in this thing that supposedly heard any of this stuff. (R 841)

* * * * * * * * * * * * * * *

> Sloppy? Sure, it's sloppy. It's sloppy, because the State would like you to believe because we're trying to make a black/white issue out of this, you're getting everything else in, and it doesn't matter if you get mad about the black/white issue, we'll forget about a lot of this stuff.

(R 849).

In light of the closing argument by defense counsel, it is understandable why the prosecutor chose to comment upon the evidence in support of a racial motivation for the crimes. The initial remarks quoted in the Initial Brief were obviously made in reply to the argument immediately preceding,

> . . . Mr. David is arguing that it's a black and white issue, that the State doesn't have -- well, they've got a weak case, so they are trying to make a black and white issue, they are trying to get everybody riled up, so you will go out there and say, oh, he's guilty, he's got tatoos [sic], Nazi tatoos [sic]. I guess we all know what that stands for. He just happened to think of supreme white power, and he just happened to think of white pride, but we pick on him because he hates blacks. I mean that's why we pick on him, he just happened to take certain words, exclusive language, "Fuck you, nigger", but we're going to pick on him, we're trying to make a black and white issue.
>
> Ladies and gentlemen, who has made it a black and white issue? Who said those words? Who's got those tatoos [sic]? . . .

(R 851-852).

The subsequent remarks quoted in the Initial Brief simply represent further arguments along the same vein - that the State was not introducing racism to "inflame" the jury, but, rather, that Appellant's self-declared racial bias was relevant to the

prosecution (R 853, 854, 869, 878-880, 884, 885-886, 893). This situation is completely distinguishable from **Robinson**, **McBride** or **Cooper**, wherein this court concluded that the State's references to racial matters had been gratuitous or irrelevant to any issue properly before the jury. Such was obviously not the case **sub judice**, in that Appellant's statements and opinions on race were, in essence, part of the case prosecuted. The State is certainly entitled to comment on the evidence as it existed before the jury, **see White v. State**, 377 So.2d 1149 (Fla. 1979), and, given the defense's "pre-emptive" accusation that the State was overemphasizing the racial aspect of the case in order to inflame the jury, the prosecutor was likewise entitled to reply and to place the evidence, and accusation, in context. **See, e.g., Darden v. State**, 329 So.2d 287 (Fla. 1976); **Ferguson v. State**, 417 So.2d 639 (Fla. 1982); **Whitfield v. State**, 479 So.2d 208 (Fla. 4th DCA 1985) (prosecutor's reference to victims' interest in justice not inflammatory, in that such argument "fair reply" to defendant's claim that prosecution vindictive); **Phillips v. State**, 476 So.2d 194 (Fla. 1985) (testimony of prosecution witness, fellow inmate, concerning racial slurs attributable to defendant, regarding the victim and victim's grieving relatives not improperly admitted, where such, **inter alia**, explained context of admission). This is, unfortunately, not the first racially motivated homicide in Florida, **cf. Barclay v. State**, 343 So.2d 1266 (Fla. 1977), and Appellant has entirely failed to demonstrate that the State, during closing argument, did not discuss relevant evidence.

The State would further suggest that it is particularly inappropriate to review this claim under the guise of fundamental error. While defense counsel did not object to the remarks cited by appellate counsel, he did object to another portion of the argument which he considered to relate to matters outside the evidence (R 860-862); no claim in this regard is presented on appeal. Defense counsel obviously knew full well the relevance of the matters now complained of on appeal and, hence, did not interpose what he could well conclude to be a fruitless objection; defense counsel also, correctly, must have known that he had invited a good number of these comments, given his strategic decision during closing argument to seek to blunt the impact of this evidence by initially raising the "black/white" issue himself. Defense counsel, of course, was quite aware that, during voir dire, the jury had been questioned by both the State and defense as to their views on racial prejudice and whether there would be any "problem" for this racially mixed jury in the fact that the victims were black and the defendant white (R 255-256,288-289). **Cf. Turner v. Murray**, 476 U.S. 1, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). Appellee sees no reason why the defense should be allowed to shift tactics on appeal, and to undo the contemporaneous strategic decisions of trial counsel. Fundamental error has not been demonstrated, and the instant convictions should be affirmed in all respects.

## ISSUE II

### THE TRIAL COURT'S DENIAL OF APPELLANT'S **PRO SE** MOTION TO DISMISS COUNSEL WAS NOT ERROR

In his brief, Appellant contends that Judge Haddock erred in denying Asay's **pro se** motion to dismiss defense counsel. By focusing rather selectively upon certain remarks by the judge, Asay creates the impression that the judge failed to afford him adequate consideration of his motion. Appellee respectfully suggests that, on the basis of the entire record, it is clear that the judge in fact afforded Appellant a more than adequate opportunity to state his claim on the record, and that it is clear that Appellant presented insufficient grounds to merit the relief sought. The basis for Appellant's motion would not seem to have been, for the most part, an overall allegation of ineffective assistance of counsel, but rather Asay's strategic difference with defense counsel as to the extent to which a witness should have been cross-examined; the State would suggest that this concern was later mooted, following consultation between attorney and client. The State would further maintain that the record clearly indicates that Asay never desired to represent himself and that, to the contrary, he affirmatively demanded an immediate mistrial, and the appointment of substitute counsel, neither of which he was entitled to. Under all the circumstances of this case, no error has been demonstrated.

This matter arose well after the trial had begun, when attorney David stated for the record that, following the cross-examination of witness O'Quinn, Appellant wished to make a

statement to the court; the jury was out of the courtroom at this time on a recess (R 537). Appellant then announced that he was "totally dissatisified" with the manner in which counsel has cross-examined O'Quinn, in that he had failed to confront him with the allegedly many inconsistencies and conflicts in his testimony (R 537); Appellant focused upon the matter of when O'Quinn had known that the victims were dead (R 538). Appellant then stated that he wanted to dismiss attorney David immediately and have the trial declared a mistrial (R 538). Appellant also complained that one of the jurors, Todd Sands, was a friend of his brother-in-law and that he [Appellant] had had a conflict with the latter (R 538). Appellant then stated,

> I cannot trust that Mr. Sands has an impartial conscience in this trial, and I just want a new attorney. I want two attorneys. I have two prosecutors prosecuting me, and I believe it's my right to have two attorneys.

(R 538).

Appellant announced that he wished his new attorneys to be instructed to come and see him and to "learn" the depositions in this case as well as he knew them, so that counsel could prove that O'Quinn was a bald-faced liar (R 539). Appellant concluded by stating, "I will not proceed with this trial. Mr. David is hereby fired now." (R 539).

It was at this juncture that Judge Haddock made his rather succinct observation to the effect that Asay not having hired attorney David, he lacked the ability to unilaterally fire him (R 539). Appellant, in reply, stated that, in his opinion, David was not working hard enough on his behalf, in that the attorney,

who was court-appointed, was not being paid as much as he would have been under other circumstances (R 539-542). Appellant pointed to a list of proposed questions which he had drawn up for counsel to ask O'Quinn, and during the course of this exchange, expounded upon the importance of several individual questions; specifically, Appellant stated, in regard to O'Quinn's testimony,

> And he was allowed to get on the stand and to depict that, that he was afraid of me, and he was intimidated by me, and that he asked me was everything cool, was I all right, did I want him to buy me a blowjob, and that is not what he originally said.

(R 543).

At this point, Judge Haddock reminded Appellant of his right to remain silent and of the fact that anything he said could be used against him (R 543). Appellant replied that he understood (R 543). The judge then announced that the motion to dismiss counsel would be denied, and advised Appellant that, if he had any further concerns as to the jurors, such could be taken care of (R 544). Appellant then stated,

> Your Honor, I would not intend to insult the Court, but if that jury comes back out here, and I'm made to sit at that chair right there, I will address the jury as I have just addressed you.

(R 544).

Judge Haddock then advised Appellant that if he disrupted the proceedings, he would be bound and gagged (R 544).

Appellant then stated that he would like to speak with attorney David, and, at such time, defense counsel made a statement for the record. Counsel noted that Appellant was very familiar with the depositions, and stated,

> I understand he would like to get every single "i" dotted, and every "t" crossed. I certainly understand that, but I have to make a determination when it becomes less than fruitful to proceed on. I determined it nit-picking. I'm not sure. However, I've also tried to explain to Mr. Asay that part of what you want to do is save things for closing arguments to close loose ends. If you can't -- if you close every loose end, obviously the State knows exactly where you would go, and where you would argue.
>
> I don't know what he was going to say, without giving away my trial strategy, however, the point -- I can't hit Mr. O'Quinn over the head with a bat. I mean, it may be effective in front of the jury, I just can't do that.
>
> I understand his concern. I tried to explain it to him before we went out, but apparently he was dissatisfied with what I told him. I virtually would be glad to discuss this with him in the back, if you will give us a few more minutes. . . .

(R 545).

Appellant then conferred with attorney David off the record, and, following a short recess, David stated that while Appellant still maintained his objections, he understood that he must go forward with the trial and that he agreed to do so; Appellant personally concurred this was a correct statement of his views (R 540). Judge Haddock then advised Appellant that he should feel free to present any further objections that he might have on the record, as long as the jury was not present at such time (R 546-547). During the course of this discussion, Appellant stated, "Your Honor, I can be mistaken, I'm not saying that Mr. David is an incompetent attorney." (R 547). The trial then proceeded (R 549).

Appellant contends on appeal that Judge Haddock violated the dictates of **Nelson v. State**, 274 So.2d 256 (Fla. 4th DCA 1973), in failing to advise Asay of his right to self-representation. In **Nelson**, the Fourth District, in considering a post-conviction appeal, set forth certain guidelines for courts concerning situations in which a pretrial motion to dismiss counsel has been made. The Fourth District held that the court should first make inquiry into the reasons for the motion and that, if incompetence of counsel was asserted, the court should make further inquiry to determine whether a reasonable basis for such claim existed. If cause was found, counsel could then be discharged; if reasonable grounds were not found, the court should then advise the defendant that if he discharges counsel, the State would not be required to furnish another. Should the defendant continue to demand discharge of counsel, the court could then discharge counsel and require the defendant to represent himself. Appellant also contends, in light of such decisions as **Hardwick v. State**, 521 So.2d 1071 (Fla. 1988), **Jones v. State**, 449 So.2d 253 (Fla. 1984), **McCall v. State**, 481 So.2d 1231 (Fla. 1st DCA 1985), **Chiles v. State**, 454 So.2d 726 (Fla. 5th DCA 1984), **Smith v. State**, 444 So.2d 542 (Fla. 1st DCA 1984), and **Williams v. State**, 427 So.2d 768 (Fla. 2nd DCA 1983), that his request to dismiss counsel must be construed as the equivalent to a request for self-representation. Appellee disagrees, and suggests that the above-cited cases are inapplicable.

The State would note initially that **Nelson** involved a situation in which the defendant made a pretrial motion to

dismiss counsel. Several courts have expressly found **Nelson** to be inapplicable when a defendant, such as Appellant **sub judice**, waits until after trial has begun in order to make such request. **See, e.g., Lyons v. State**, 437 So.2d 711 (Fla. 1st DCA 1983) (request for self-representation untimely when made after jury sworn); **Dukes v. State**, 503 So.2d 455 (Fla. 2nd DCA 1987) (motion to discharge counsel untimely when made after trial begun). Accordingly, not only **Nelson**, but also those cases which rely upon it, such as **Chiles, Smith** and **Williams**, are distinguishable on this basis. **See also Black v. State**, 545 So.2d 498 (Fla. 4th DCA 1989). Additionally, **Nelson** involves a situation in which the defendant wished to dismiss counsel due to an allegation of incompetence of counsel; as noted above, Asay specifically disclaimed any contention that he was arguing that David was ineffective (R 547), and, at most, the request to dismiss counsel in this case simply seemed to be due to a strategic difference of opinion between attorney and client. Finally, Appellee would note that Appellant expressly conceded that Judge Haddock did conduct an adequate inquiry into the basis for Appellant's motion (Initial Brief at 27). **Cf. Scull v. State**, 533 So.2d 1137 (Fla. 1988) (inadequate inquiry conducted).

The question then becomes what, if anything, the trial court was required to do after determining the insufficiency of Appellant's motion. The State respectfully suggests that there was no need for the court to have conducted further inquiry or advisement, in accordance with **Faretta v. California**, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), in that Appellant made

no request, equivocal or otherwise, to represent himself. **See, e.g., Hill v. State**, 549 So.2d 179 (Fla. 1989) (not error for court to fail to hold **Faretta** inquiry where defendant simply asks for new counsel based on his belief that assigned counsel too busy). **Hill** is obviously in accordance with prior precedent to the effect that in order to "trigger" the need for a **Faretta** inquiry, a defendant must unequivocally demand to represent himself. **See, e.g., Raulerson v. State**, 437 So.2d 1105 (Fla. 1983); **Frazier v. State**, 453 So.2d 95 (Fla. 5th DCA 1984); **Johnson v. State**, 427 So.2d 1103 (Fla. 3rd DCA 1983); **Cappetta v. State**, 204 So.2d 913 (Fla. 4th DCA 1967), **reversed**, 216 So.2d 749 (Fla. 1968). Under no stretch of the imagination, can it be said that Asay unequivocally demanded to represent himself. **Cf. Parker v. State**, 423 So.2d 553 (Fla. 1st DCA 1982).

Appellee would maintain that Appellant **sub judice** never "persisted" in "refusing" the services of appointed counsel to such an extent that his transitory opposition to attorney David must be viewed as the equivalent to a request for self-representation. **Cf. Jones, supra.** Appellant Asay never wanted to represent himself and never "vacillated" on this score. **Cf. Hardwick, supra.** Rather, Asay was absolute, adamant and unmistakable in his demands. He wanted an immediate mistrial and the appointment of new counsel who would study the depositions to his satisfaction before any retrial. In fact, in a sense of parity, Asay wanted **two** new attorneys, because, as he correctly noted, the State had employed two prosecutors against him. To construe Asay's remarks as any sort of request to represent

himself is to engage in unnecessary legal fiction, and to create and vindicate a constitutional right neither invoked nor violated.

In contrast to the cases relied upon by Appellant, this case, despite, perhaps, some of Asay's rhetoric, would not seem to involve a situation in which the relationship between attorney and client had broken down absolutely or in which the total competence of counsel was assailed by the defendant. **See Jones, supra.** Rather, this case would simply seem to represent an instance in which an attorney and client differed on strategy in regard to the manner in which one specific witness should have been cross-examined. Appellant, a layperson, felt that attorney David should have cross-examined O'Quinn to a greater extent. David, in his legal judgment, disagreed, and later presented his strategic reasons on the record - that he preferred to save the inconsistencies in the witness' testimony for closing argument, at which time the witness obviously could not explain them; such tactic, of course, would also have the additional benefit of not forcing the defense to "tip its hand" to the State any earlier than necessary. This type of strategic decision is a classic one left for an attorney, as opposed to a client, to make. After his initial outburst, Appellant was afforded an opportunity to confer with counsel and, while he did not abandon his prior objection, he would seem, during the course of the trial, to have accepted the representation of attorney David without further protest.

The State would note that attorney David subsequently conferred with Appellant during the cross examination of later

witnesses and, further, that Appellant's decision not to testify was made after consultation with his attorney (R 567, 796-797). Further, Appellant's concern as to juror Sands was later laid to rest when, in a highly unusual move, Judge Haddock designated Sands as an alternate juror (R 902-903). Appellee finds no merit in the suggestion in the Initial Brief, to the effect that Asay was allegedly so intimidated by the judge's reference to binding and gagging, that he was afraid to voice any subsequent dissatisfaction with counsel. Judge Haddock made it indisputably clear that if Appellant had any further remarks which he wished to place on the record, he was free to do so, as long as he did so outside the presence of the jury. This latter restriction was, no doubt, intended for Appellant's own benefit, in that during his colloquy with the judge, Judge Haddock felt it necessary to remind Asay of his right to remain silent and of the fact that anything that he said could be used against him; the judge, no doubt, felt that during the course of his explanation of the importance of the cross examination of witness O'Quinn, Asay, a layman, had begun to discuss matters which could incriminate him. Appellant has entirely failed to demonstrate an abuse of discretion in regard to the manner in which Judge Haddock resolved this situation.

Appellee would suggest that this case is comparable to **Peede v. State**, 474 So.2d 808 (Fla. 1985), and **Koon v. State**, 513 So.2d 1253 (Fla. 1987). In **Peede**, the defendant was represented by court-appointed counsel; prior to trial, counsel moved for a continuance and additionally moved to withdraw, given Peede's

opposition to the continuance. This court found no merit in Peede's contention that the denial of defense counsel's motion to withdraw had had the effect of "forcing" counsel upon him and denying his own right to self-representation. This court held that Peede had failed to demonstrate that he had made an unequivocal, voluntary and intelligent election to exercise his right of self-representation. This court further observed,

> The record demonstrates that Peede's request to represent himself did not arise from any wish to conduct his entire trial in a particular manner but rather arose from a dispute with his counsel as to whether they should seek a continuance in order to obtain psychiatric examinations of him and to interview a number of witnesses residing in other southern states. These things counsel felt were necessary to the defense.

**Peede**, 474 So.2d at 815-816.

Appellee would suggest that Asay's conflict with counsel **sub judice** was similar. Asay had no desire to represent himself, but merely disagreed with counsel as to the extent in which Bubba O'Quinn should have been cross-examined. Attorney David was obviously in the better position to make any "judgment call" in this regard. Additionally, in **Koon**, the defendant complained on appeal that the trial court had failed to conduct an adequate inquiry into his request to dismiss counsel and to have private counsel appointed to represent him. This court held that an indigent defendant has no right to a particular lawyer to represent him, and further noted that while, under **Faretta**, a defendant had a constitutional right to waive counsel,

> Koon expressly declared that he had no desire to represent himself. There is nothing in the record to indicate that Koon could have

> been better served by other counsel. The court made an adequate inquiry into the quality of representation that Koon was receiving, and we find no basis for Koon's argument that he should have been furnished new counsel.

**Koon**, 513 So.2d at 1255.

Again, Appellee would submit that Asay's claim is similar to that rejected by this court in **Koon**. Asay never indicated any desire to represent himself and, to the contrary, requested an immediate mistrial and the appointment of two new attorneys. As in **Koon**, Appellee would suggest that the judge conducted a sufficient inquiry into the basis for Asay's motion, and was able to determine that there had not been a complete breakdown in communications or in the overall attorney/client relationship itself. **Cf. Kott v. State**, 518 So.2d 957 (Fla. 1st DCA 1988).

In conclusion, while it is indisputable that Judge Haddock did not expressly advise Appellant as to his right to self-representation to the same extent as occurred in some of the cases cited by Appellant, **see e.g., Hardwick, supra, McCall, supra,** in which no error was found, the State would still respectfully suggest that such additional advisement was not required under the circumstances of this case. **See Hill, supra.** Further, while it is understandable that Appellant would rely upon such cases as **Williams v. State** or **Smith v. State**, the error in those cases lay in the fact that, after inadequate inquiry as to the defendant's abilities, the defendant's motion to dismiss counsel was granted, and he was forced to, unwillingly, represent himself at trial; such was obviously not the situation **sub judice**, and such cases cannot serve as a basis for reversal of

these convictions. On the basis of this record, it is clear that the judge correctly resolved the matter at hand - an incident in which a defendant, dissatisfied with the manner in which his counsel had cross-examined a witness, demanded an immediate mistrial and the appointment of two new attorneys, "relief" to which he was clearly not entitled. The instant convictions should be affirmed in all respects.

## ISSUE III

DENIAL OF ASAY'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT I, INVOLVING THE MURDER OF ROBERT BOOKER, WAS NOT ERROR

In his brief, Appellant contends that the trial court erred in denying his motion for judgment of acquittal as to Count I, that involving the murder of Robert Booker, in that, allegedly, insufficient evidence existed as to premeditation; of course, pursuant to Fla.R.App.P. 9.140(f), this court will review the sufficiency of the evidence not only as to this count, but also as to Count II, that involving the murder of Robert McDowell. The State would respectfully maintain that sufficient evidence exists to support affirmance of both convictions, and it was not error for Judge Haddock to have denied the motion for judgment of acquittal below.

Appellant cites four cases in support of his proposition that, as to the murder of Booker, at most second-degree murder occurred. **See Forehand v. State**, 126 Fla. 464, 171 So. 241 (1936); **State v. Bryan**, 287 So.2d 73 (Fla. 1973); **Presley v. State**, 499 So.2d 64 (Fla. 1st DCA 1986); **Spence v. State**, 515 So.2d 312 (Fla. 4th DCA 1987). Appellee would initially contend that the last three cases are inapplicable to the case at bar. In **Bryan, Presley** and **Spence**, the defendant had been convicted of second-degree murder and, on appeal, the reviewing court concluded that the evidence was sufficient to support that conviction. While it is apparently Asay's position that this case resembles those three cited above, such fact, even if true, certainly does not mean that insufficient evidence exists to

support the instant convictions of first-degree murder. **Forehand** represents the only case in which a conviction of first-degree murder was reversed due to insufficiency of evidence as to premeditation. **Forehand**, however, is distinguishable on a different basis. In **Forehand**, this court held that premeditation had been defined previously to mean intent before the act, although not necessarily existing for any extended time theretofore; this court expressly noted that the intent to kill could enter the mind of the killer "a moment before the act." **Forehand**, 170 So. at 242. This court reversed the conviction at issue because it held that the evidence did not exclude the possibility that "an adequate provocation" had acted so as to have momentarily displaced the defendant's capacity to form a premeditated design to take the victim's life.

In this case, Appellant's contentions notwithstanding, no "adequate provocation" existed to justify the instant murder or to reduce it in degree. As this court has held, evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide is committed and the nature and manner of wounds inflicted; premeditation must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of the victim is concerned. **See Sireci v. State**, 399 So.2d 964 (Fla. 1981); **Wilson v. State**, 493 So.2d 1019 (Fla. 1986). Whether or not the

evidence shows a premeditated design to commit a murder is a question of fact for the jury, which may be established by circumstantial evidence. **See Preston v. State**, 444 So.2d 939 (Fla. 1984).

The State suggests that, in light of these precedents, it is clear that sufficient evidence of premeditation existed. The testimony adduced at trial, primarily from "Bubba" O'Quinn and Appellant's brother, Robbie Asay, indicated that at the time that Appellant and O'Quinn arrived at the scene, the victim, Robert Booker, was talking to Robbie Asay (R 498). Appellant directed O'Quinn to pull the truck over to where Robbie Asay was, and Appellant got out of the vehicle with his gun in his back pocket (R 498). Upon encountering the victim and Robbie Asay, Appellant's first words were, "You don't got to take no shit from these fucking niggers." (R 560). According to O'Quinn, Appellant then "stuck" his hand in Booker's face and began cursing him (R 499). Robbie Asay told his brother, "Everything is cool", and Booker said, "Don't put your finger in my face." (R 498-499). Appellant then said, "Fuck you, nigger", and pulled out his gun and shot Booker in the left side of the abdomen (R 499). According to O'Quinn, Booker was backing up, away from Appellant, at the time that Asay shot him (R 499). O'Quinn also expressly stated that Booker had not been armed and had not "attacked" Appellant in any way (R 499-500). According to O'Quinn, the victim had then cried out, after being shot, and had grabbed his side and run off (R 501). Later, when O'Quinn had asked Appellant why he had "done it", Appellant replied, "Because

you got to show a nigger who is boss", adding that you "can't let them run over you." (R 501, 531). When O'Quinn asked Asay if he "reckoned" he had killed the victim, Appellant replied, "No, I just scared the shit out of him." (R 501). According to O'Quinn, Appellant's demeanor remained unchanged, and he did not seem affected by the incident (R 502). Subsequently, Appellant's cellmate, Thomas Gross, stated that Asay had told him that he had "shot them niggers." (R 759).

In his brief, Appellant contends that his conviction of first-degree murder must be vacated because: (1) at most, an "impulsive" shooting occurred, "during a heated verbal altercation"; (2) Asay was intoxicated "to some degree"; (3) Asay perceived "perhaps incorrectly, that his brother, Robbie, was having difficulties with Booker"; (4) Asay pulled the gun and fired "only after an emotional argument with Booker"; (5) Asay fired only one shot "and then immediately fled"; (6) when asked why he had done it, Asay said, "Because you got to show a nigger who is boss", and (7) Asay later stated that he had just "scared the shit out of [Booker]". (Initial Brief at 31-32). The State suggests that the above contentions are, for the most part, not supported by the record, and, given the contrary evidence in the record, there was no reason why a jury or a judge, in ruling upon a motion for judgment of acquittal, should have been "compelled" to find the existence of an "impulsive" shooting or a lack of premeditation. **Cf. Bello v. State**, 547 So.2d 914 (Fla. 1989) (sufficient evidence of premeditation where defendant's hypothesis of innocence not inconsistent with premeditation);

**Cochran v. State**, 547 So.2d 928 (Fla. 1989) (circumstantial evidence standard does not require that jury believe defense version of facts where State presents conflicting evidence; verdict will not be reversed on appeal where substantial competent evidence exists to support it). The evidence indicates that when Appellant got out of the truck, he was armed with his gun. Neither O'Quinn or Robbie Asay ever testified that Appellant was angry or upset at this time. In fact, when pressed on cross-examination, O'Quinn expressly testified that Appellant had **never** indicated to him that he had thought that the victim had been "messing" with Robbie Asay (R 521-522). As far as the existence of any "heated argument", such argument would seem to have been all of Appellant's making. It was he who stuck his finger in the victim's face and cursed him; although Robbie Asay seemed to suggest that there were "hands passed" and "words" (R 559-560), O'Quinn specifically testified that Booker had been backing away from Asay at the time that Appellant shot him (R 499). The fact that Appellant only shot Booker once is not of great moment, and such occurence can be explained by the fact that it was the victim, and not Appellant, who immediately ran away; Dr. Floro described the shot to the abdomen as "a very fatal shot". **See also Mackiewicz v. State**, 114 So.2d 684 (Fla. 1959) (fact that the defendant's gun still contained live ammunition when found, thus suggesting that additional shots could have been fired, not inconsistent with premeditation).

Additionally, as to Appellant's mental state, both O'Quinn and Robbie Asay testified that while Appellant might have been

"buzzed", he was not drunk at the time of the murders (R 493, 550); O'Quinn testified that, when Appellant returned to the truck, he seemed no different from when he had left (R 502). As to Appellant's later remark to O'Quinn that he had merely "scared the shit" out of Booker, and not killed him, the State sees no reason why it, or the jury, should have been bound by this self-serving remark. Certainly, Appellant Asay is not the only person on death row who has averred that he never intended to commit first-degree murder. In **Cochran**, this court, citing to **Songer v. State**, 322 So.2d 481 (Fla. 1975), recognized that a defendant's interpretation of circumstantial evidence need not be accepted, even when not specifically contradicted. **Cochran**, 547 So.2d at 930. The jury properly could have concluded that this later statement by Appellant was not conclusive as to his mental state at the time of the killing, and they could likewise have concluded that he was conscious of the nature of the deed which he committed and the probable result to flow from it insofar as the life of the victim was concerned. In other words, the jury could quite reasonably have concluded that one who shoots another person in the abdomen "expects" that that person will suffer a fatal wound.

While Appellant has only attacked the sufficiency of the evidence as to the murder of Robert Booker, the State suggests that it is not inappropriate, in resolving such matter, to look to Appellant's actions shortly afterward. Twenty minutes after committing this murder, Appellant shot and killed another person. He showed no hesitation in doing so, shooting Robert McDowell six

times, including several shots while the victim lay on the ground and several which were so close as to leave gun powder residue on the victim.[1] His immediate reaction, upon committing both murders, was to seek to change the appearance of his truck, such vehicle utilized in both killings (R 513, 680-683). The jury could certainly have found that Appellant had sufficient time and opportunity to premeditate the murder of Robert Booker, and, in addition to the other evidence, Appellant's racist remarks certainly could be interpreted as inclusive of a specific intent and/or desire to murder the individual victim in question. As this court has held, the State, as Appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. **See Cochran**, 547 So.2d at 930 (citing **Buenoano v. State**, 478 So.2d 387 (Fla. 1st DCA 1985), **review denied**, 504 So.2d 762 (Fla. 1987)). Appellant's best efforts notwithstanding, more than a second-degree murder was proven in this case, and, applying the above standards, denial of Appellant's motion for judgment of acquittal was not error, and the instant conviction should be affirmed.

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[1] The State would suggest that, **inter alia**, given the number of wounds, the fact that gun powder residue was present, and Appellant's later statements as to the motive for this killing, sufficient evidence exists to support the jury's verdict as to Count II, as well.

## ISSUE IV

DENIAL OF APPELLANT'S **PRO SE** MOTION TO CONTINUE THE PENALTY PHASE WAS NOT ERROR

In his first attack upon his death sentences, Asay contends that both sentences must be reversed because his **pro se** motion to continue the penalty phase was denied. In his brief, Appellant contends that such ruling was an abuse of discretion, because Asay wished to bring in character witnesses who would state that he was not a racist. Appellant also suggests that this ruling deprived him of his constitutional right to present relevant evidence in mitigation, in violation of such cases as **Hitchcock v. Dugger**, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), and **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct. 2954, 67 L.Ed.2d 973 (1978). Appellee particularly disagrees with this latter assertion, and would respectfully maintain, under all of the circumstances, that error has not been demonstrated. Appellant failed to present sufficient grounds to merit the relief sought and, indeed, being represented by counsel, had no right to file a **pro se** motion of any kind. The instant death sentences should be affirmed in all respects.

As a preliminary matter, the record in this case indicates that Appellant was indicted on August 20, 1987, and that his original counsel asked for, and received, a continuance of trial (R 11, 38, 40). Following the appointment of attorney David in February of 1988, he, in turn, asked for, and received, a continuance of trial (R 55, 57). The case did not proceed to trial until September 26, 1988, over a year after Appellant's

indictment. The trial ended on September 29, 1988, and, at such time, Judge Haddock announced that the penalty phase would not be held for another fifteen (15) days, or until October 13, 1988 (R 964). In fact, proceedings did not reconvene until October 28, 1988, or twenty-nine (29) days after the conclusion of the trial (R 967). At the start of the proceedings, a charge conference was held, and, at the conclusion of this conference, Appellant presented his **pro se** motion (R 999).

Appellant began by stating that he had been unable to advise attorney David that he expected witnesses other than family members to be called, such as friends of his who were black (R 1000). Apparently, these unnamed witnesses were other inmates, because Appellant stated that he did not know where they were and would require assistance in locating them (R 1000); Appellant maintained, however, that he had talked with them and they would be willing to come in and testify (R 1000). Asay also contended that several friends of his in Jacksonville had apparently "run into problems", one of them having a doctor's appointment (R 1000-1001). Asay then requested a seven-day continuance, so that these unnamed witnesses could make arrangements to come (R 1001). When the judge questioned the relevance of the testimony of the black character witnesses, Appellant pointed out that the State had previously argued that the murders had been racially motivated; Appellant also contended that these witnesses could attest to his good deeds (R 1001-1002). When the judge pointed out that the State would not be pursuing this line of argument at the penalty phase, Appellant simply contended that he had been

unable to work this out with his attorney (R 1002-1003). The following exchange then took place,

> THE COURT: You've got witnesses here, don't you, Mr. David?
>
> MR. DAVID [Defense Counsel]: His mother and Dr. Miller, I plan to call in.
>
> THE COURT: He's subpoenaed witnesses for the mitigation testimony that goes with the type of mitigation that he submitted intent to argue . . .

(R 1003).

Appellant then persisted that these character witnesses could testify as to how he had helped them with their problems and had supplied them with such amenities as clothing and cigarettes (R 1004). Judge Haddock then denied the motion, and defense counsel proceeded to call the two named witnesses (R 1005). Dr. Miller offered his opinion as to Asay's state of intoxication at the time of the murders, based upon a hypothetical question (R 1013-1022). Appellant's mother, Joan Baumgartener, testified as to his life and character (R 1023-1031). She testified as to Asay's love and concern for his family, and as to the many letters he had written her while he was incarcerated in Texas (R 1024); copies of these letters, as well as photographs of Appellant and drawings which he had done were introduced into evidence (R 1028). The witness stated that Appellant was the youngest of seven and had grown up in Avon Park, Georgia and Jacksonville (R 1024-1025). She testified as to the financial contributions he had made since returning home from prison (R 1026-1027). Mrs. Baumgartener specifically testified as to Appellant's conduct while incarcerated for this

offense (R 1029-1030). She stated that he had called her twice a day and that she had visited him frequently (R 1029). She also testified that he had requested her to bring him a great number of items of clothing, so that he could, in turn, give such to other inmates who needed it,

> I have bought that boy, in fifteen months, fourteen pairs of dungarees. He requested a pair of shoes for a gentlemen that was in his cell that was in his 50's or 60's, that didn't have any money to get a pair, a size 13, which were very hard to find.

(R 1029).

Mrs. Baumgartener then closed by stating that she felt that her son could be rehabilitated (R 1030).

Returning to the legal issues presented, as Asay correctly recognizes, this court has held that a trial court's ruling upon a motion for continuance will not be reversed unless palpable abuse of discretion has been shown. **See, e.g., Magill v. State**, 386 So.2d 1188 (Fla. 1980); **Lusk v. State**, 446 So.2d 1038 (Fla. 1984); **Thomas v. State**, 456 So.2d 454 (Fla. 1984). In fact, this court has gone so far as to hold,

> While death cases command our closest scrutiniy, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for continuance.

**See Cooper v. State**, 336 So.2d 1133, 1138 (Fla. 1976).

This court has previously considered, and rejected, claims of error in regard to the denial of a motion for continuance of a capital case penalty phase. **See Williams v. State**, 438 So.2d 781 (Fla. 1983); **Rose v. State**, 461 So.2d 84 (Fla. 1984). In

**Williams**, this court found no error in such ruling, stating that defense counsel had been on notice for several months since his appointment that the case would involve the death penalty. This court further noted that there had been a two hour recess to allow counsel to prepare, and concluded that the continuance request had been insufficient, in that counsel had failed to demonstrate due diligence in seeking to locate mitigating witnesses and had further failed to allege that the motion had been made in good faith.

Assuming that the above precedents even apply to the situation **sub judice**, a situation in which it was Appellant **pro se**, as opposed to his counsel, who requested a continuance, no abuse of discretion has been demonstrated. The defense was well aware that this case could involve the death penalty and it is clear that the trial and penalty phase in this cause did not occur until a year after Asay's indictment. Specifically, the penalty phase in this case did not occur until twenty-nine (29) days after the trial ended, surely a sufficient period of time to locate character witnesses. Additionally, the State would suggest that Asay's motion suffered from the same flaws as identified in **Williams**. It was completely unspecific as to the names of the potential witnesses, as well as the due diligence which had been expended in seeking to locate them; Asay failed to fully discuss the substance of their expected testimony, and he further failed to even allege that this testimony could not be secured through other witnesses, i.e., his mother. **See Smith v. State**, 59 So.2d 625 (Fla. 1952) (continuance motion insufficient

where, **inter alia**, not sworn to and lacking allegation that expected testimony material to cause and such as could not be proven by some other available witness). Although Asay "only" asked for a week, it should be remembered that he did not even know the location of several of these witnesses, and there certainly has been no showing that they would have been available at any specific point in time. The State respectfully suggests that, under all the circumstances of this case, a palpable abuse of discretion has not been demonstrated. **See Lusk, supra; Williams, supra; Rose, supra.**

The State further suggests, however, that Asay is not even entitled to have this court review the merits of the ruling below. Appellant had no right to file a **pro se** motion for continuance, or, for that matter, a **pro se** motion of any kind, given the fact that he was represented by counsel at the time. Accordingly, such "motion" must be considered a nullity. This court specifically held in **State v. Tait**, 387 So.2d 338 (Fla. 1980), that the Sixth Amendment does not guarantee that an accused can make his own defense personally **and** have the assistance of counsel, and further concluded that Florida's constitution likewise does not include any right of an accused to representation both by counsel and by himself. Pursuant to **Tait**, the district courts of this state have consistently regarded as nullities **pro se** motions such as that **sub judice**. **See Sheppard v. State**, 391 So.2d 346 (Fla. 5th DCA 1980); **Jones v. State**, 429 So.2d 396 (Fla. 1st DCA 1983); **Smith v. State**, 444 So.2d 542 (Fla. 1st DCA 1984); **Beverly v. State**, 516 So.2d 30 (Fla. 1st DCA

1987); **Whitfield v. State**, 517 So.2d 23 (Fla. 1st DCA 1987). In **Jones**, the situation before the court would seem somewhat comparable to that **sub judice**. In such case, the defendant had insisted that his attorney call several witnesses at trial; defense counsel explained on the record that he did not wish to do so for tactical reasons, and the trial court denied the defendant's **pro se** motion in this regard. On appeal, the district court affirmed, and concluded that, although the testimony of the proposed witnesses would have been relevant and admissible,

> It is not our province as a reviewing court to second-guess the trial strategy of the public defender in whose hands the defense of Jones' case was entrusted.

**Id.** at 398.

The court did note, however, that Jones retained the right to collaterally attack the competence of counsel.

As in Point II, **supra**, the real issue in this claim would seem to be a strategic difference between attorney and client. Before denying Appellant's **pro se** motion, Judge Haddock assured himself that defense counsel had, in fact, subpoenaed witnesses to testify in mitigation; counsel, of course, had, calling an expert witness and Appellant's own mother. To afford Appellant relief on this point would simply allow defendants **carte blanche** to interrupt and delay their trials at will, every time a disagreement arose between attorney and client. As the judge suggested to Asay, defense counsel had subpoenaed witnesses in accordance with **his** theory of mitigation. Defense counsel, quite properly, did not discuss his tactics on the record, and it is

entirely possible that he felt that the calling of black character witnesses on Asay's behalf might emphasize, as opposed to de-emphasize, the racial motivation for the killings; of course, these witnesses, assuming that they existed and were available, could do nothing to "undo" the racist remarks which Asay had made at the time of the murders. It should also be noted that Appellant's mother, who, presumably, knew him better than anyone else in the world, was able to testify as to his good character, including his generosity to other inmates. The State respectfully suggests that no legal claim of error has been presented, and that the instant sentences of death should be affirmed.

The State would, however, make one final observation. In his brief, Asay contends that the judge's ruling deprived him of the opportunity to present relevant evidence in mitigation, in violation of **Hitchcock** and **Lockett**. The State cannot agree with this assertion. **Hitchcock** and **Lockett** hold that all relevant evidence in mitigation must be **considered, if presented.** It is obvious that a great number of court rulings impact upon the presentation of defense evidence. Not all of them present claims for review under **Hitchcock** or **Lockett**. **Cf. Stewart v. State**, 420 So.2d 862 (Fla. 1982) (denial of continuance did not limit presentation or consideration of mitigating circumstances under **Lockett**). The State does not find that Judge Haddock precluded the presentation of any evidence, and finds that his remark expressing doubt as to the relevance of the proposed testimony to simply be an observation, and not a ruling; inasmuch as the

witnesses allegedly at issue were not present, it certainly was not within the judge's power to "exclude" them. This attempt to "bootstrap" error premised upon **Hitchcock**, should be rejected, and the instant sentences of death should be affirmed in all respects.

## ISSUE V

THE SENTENCER'S FINDING THAT THE MURDER OF ROBERT MCDOWELL WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WAS NOT ERROR

Appellant Asay is facing two (2) sentences of death. As to the murder of Robert Booker, the court found two (2) aggravating circumstances - that Asay had committed the murder while under sentence of imprisonment, §921.141(5)(a), and that Asay had previously been convicted of another crime of violence, §921.141(5)(b). As to the murder of Robert McDowell, the court found these same two aggravating circumstances, as well as a third, that the homicide had been committed in a cold, calculated and premeditated manner, §921.141(5)(i); as to both murders, the judge found the single mitigating circumstance of Asay's age of 23, §921.141(6)(g), but found that such factor did not weigh very heavily, in that Asay displayed maturity and had had extensive prior conduct with the criminal judicial system, and, further, that the aggravating circumstances "far outweighed" those in mitigation (R 160-162). In his only attack upon the specific sentencing findings, Asay contends on appeal that it was error for Judge Haddock to have found that the murder of Robert McDowell had been committed in a cold, calculated and premeditated manner. Asay contends in his brief that this finding was inappropriate because the murder was "impulsive" and because no plan to kill existed. The State disagrees, and suggests that no error has been demonstrated.

In finding the existence of that aggravating circumstance set forth in §921.141(5)(i), Judge Haddock made a number of observations, all of them attacked on appeal by Asay. In his sentencing order, the court noted that Appellant had committed this murder immediately after committing a prior one, after having ridden "around the downtown area of Jacksonville for a period of time, during which he could reflect on the fact that he had just taken the life of another human being." (R 161). The court likewise noted that, "without the slightest remorse or hesitancy", Asay had "selected a second person of the same race and social circumstances as the first victim", and then proceeded "coldly and calculatedly to execute him, shooting him repeatedly to ensure his death." (R 161). In his brief, Asay contends that this finding is error because: (1) the first murder was allegedly not premeditated and Appellant allegedly did not know that he had killed the victim; (2) it was error for the court to consider "remorse"; (3) it was error for the court to consider any racial motivation, and (4) it was error for the court to "attach significance" to the fact that multiple gunshot wounds were inflicted. The State would contend, in response, that the sentencing judge considered no improper factor, and that, under this court's prior precedents, this finding was justified.

In regard to Appellant's specific contentions, the existence of premeditation as to the murder of Robert Booker has already been considered in Claim III, **supra**. The fact remains that Appellant shot and killed Robert McDowell after shooting Robert Booker; even if Booker's flight deprived Appellant of the full

opportunity to appreciate the gravity of his acts, Appellant was still no doubt aware that he had shot Booker once, a "very fatal" shot, according to the pathologist. The judge's finding of heightened premeditation based upon the fact that Appellant had committed his second murder close in time to his first, i.e., twenty minutes apart, and that, by such act, he had proven himself more than capable of murder, is in accordance with this court's precedents. In **Jackson v. State**, 522 So.2d 802 (Fla. 1988), this court affirmed the finding of the cold, calculated and premeditated aggravating circumstance as to the defendant's **second** murder, noting that,

> The fact that Jackson had ample time during this series of events leading up to the murder of Milton to reflect on his actions and their attendant consequences is sufficient to indicate the heightened level of premeditation necessary under Section 921.141(5)(i) (citations omitted).

**Id.** at 810.

**See also Scott v. State**, 494 So.2d 1134 (Fla. 1986) (appellant had ample time to reflect on his actions and their attendant consequences); **Card v. State**, 453 So.2d 17 (Fla. 1984) (same); **Oats v. State**, 446 So.2d 90 (Fla. 1984) (heightened premeditation found in the fact that defendant had committed armed robbery and attempted murder at another convenience store on day prior to murder). Further, the judge's reference to "remorse" is not fatal. In considering Asay's state of mind, the judge was not "penalizing" Asay for refusing to admit his guilt at trial or after conviction. **See Pope v. State**, 441 So.2d 1073 (Fla. 1983) (improper to consider defendant's "lack of remorse" in denying

his guilt because such "punishes" defendant for exercising due process rights). Rather, Judge Haddock was simply noting that Appellant, having fatally shot one victim, was proceeding, undeterred, to kill another. This reference to "remorse" does not "taint" this aggravating circumstance, which is otherwise properly found. **See Rutherford v. State**, 545 So.2d 864 (Fla. 1989) (gratuitous reference to lack of remorse insufficient basis to strike aggravating factor, where otherwise supported by the evidence); **Huff v. State**, 495 So.2d 145 (Fla. 1986) (same); **Stano v. State**, 460 So.2d 890 (Fla. 1984) (same).

As to the remaining two observations by the judge, and objections by Asay, the State does not find the judge's reference to the fact that the second victim was "of the same race and social circumstance" as the first to be an express finding that the murders were racially motivated. Although, as contended in Claim I, **supra**, it is the State's position that adequate evidence existed to support this contention, the validity of this aggravating circumstance does not depend upon whether one accepts that premise. The judge's observation in this regard was simply that, an observation. He could likewise have noted the victim's age or sex. This subsidiary bit of background detail played no critical part in the judge's finding of this aggravating circumstance; had he wished to make an express finding of racial motivation, he certainly could have done so. As to the final factor, the fact that the victim was "executed" by repeated shots, the State does not agree with Asay's suggestion that such fact is immaterial. In his brief, Asay cites to three decisions

of this court, **Hamilton v. State**, 547 So.2d 630 (Fla. 1989), **Caruthers v. State**, 465 So.2d 496 (Fla. 1985), and **Blanco v. State**, 452 So.2d 520 (Fla. 1984), in support of his position that this court apparently does not care about such things. In **Hamilton**, this court struck this aggravating circumstance because it was based upon speculation, there being no direct evidence as to how the murder had taken place. In **Caruthers**, this court again struck this aggravating factor for lack of evidentiary support, in that it was apparently solely based upon the fact that the victim had known the defendant; Caruthers had stated that he had not intended to kill the victim, but that when she had "jumped", he had become frightened and had just "started firing", shooting three times. In **Blanco**, this court struck the aggravating circumstance because this court could not exclude the possibility that the defendant had been surprised by the victim, while burglarizing the latter's house, and that the victim's many gunshots wounds were the result of his attempt to grab the gun from Blanco. As will be discussed below, these cases are not applicable **sub judice**.

As noted, Asay's central premise is that this case was an "impulsive" shooting, without any heightened premeditation. Yet, the record indicates otherwise. According to O'Quinn, once Appellant had initially encountered the victim, he left the scene at O'Quinn's request to allow McDowell and O'Quinn to have oral sex. Again, according to O'Quinn, Appellant, however, then returned and began shooting McDowell as he stood outside the truck (R 509). Appellant grabbed the victim by the arm, and, as

McDowell asked what he was doing, Asay opened fire (R 509). According to O'Quinn, Appellant continued shooting as the victim backed away, screamed and tried to escape (R 510). A witness passing by heard five to six gunshots, with one initial shot, followed by slight hesitation, and then four or five more (R 638). When O'Quinn asked Appellant why he had done this, Asay said that "the bitch had beat him out of ten dollars", apparently referring to a prior transaction between Asay and McDowell (R 512).

Appellant later provided more detail. He told Charlie Moore that, while he had been out with O'Quinn "looking for whores", they had come across one that Appellant knew and that he had previously given money to for a bag of marijuana (R 650); Appellant stated that this "whore" had cheated him and that he had told "the boy" that "if he ever got him that he would get even" (R 689). Appellant stated that the plan had been for O'Quinn to get "the whore" into the truck, "and they would take her off and screw her and kill her." (R 650-651). Appellant stated that O'Quinn had not been able to get McDowell into the truck and, apparently after Asay and McDowell had "liplocked", he had then proceeded to shoot McDowell as he cried, "Please don't hurt me." (R 651). Appellant had stated that he had shot the victim four times and then "just finished him off the last two shots" (R 651). Appellant later detailed that he had stuck the gun into the victim's chest, shot him four times and then "finished him off" as he lay on the ground (R 689); as noted earlier, the pathologist testified that McDowell's wounds were

consistent with having been shot while lying on the ground, and the doctor further noted the presence of gunpowder residue on the victim's hand and forearm (R 434-437). When the recipient of these confidences, Charlie Moore, asked Appellant whether it bothered him to have shot somebody, Appellant replied in the negative, that it did not bother him, because the victim had been a "faggot" (R 687).

Thus, this case is entirely distinguishable from **Hamilton**, where the actual circumstances of the homicide were not known, or **Caruthers** or **Blanco**, where the evidence did not exclude the possibility that the victim had somehow triggered the shooting. Here, the victim did nothing to precipitate his own murder, except, perhaps in Asay's view, merely exist. Far from being an "impulsive" shooting, this was a planned murder, and sufficient planning, calculation and prearrangement exists to support this aggravating circumstance under **Rogers v. State**, 511 So.2d 526 (Fla. 1987). Although the State does not contend that Asay expressly drove through Jacksonville on the night of the murder, looking for McDowell, the evidence indicates that once Appellant encountered McDowell at that time, he fully decided to murder him, apparently to avenge an earlier wrong. Appellant recognized McDowell, and stated that he had previously cheated him and that at such earlier time he had warned the victim that if they ever met again, he would "get him". Accordingly, Appellant planned for O'Quinn to get the victim into the car so that they could then rape him and murder him; any suggestion that the murder was motivated by Appellant's discovery of McDowell's "true sex" is

basically irrelevant, because it is clear from the record that Appellant's intent to murder McDowell was formed prior to any "liplock" (R 650-651). Certainly, as correctly noted by the judge, Appellant's subsequent actions were consistent with the desire to "execute" McDowell, and this court has specifically held that this aggravating circumstance was designed to apply to execution style murders. **Cf. O'Callaghan v. State**, 429 So.2d 691 (Fla. 1983) (circumstance properly found in case of "execution killing"). No error has been demonstrated in regard to the finding of this aggravating circumstance.

Even if error were found, the State would suggest that such would be harmless beyond any reasonable doubt. Reversal of Asay's sentence as to this murder would only be permitted if this court could say that the error in the weighing of the aggravating and mitigating circumstances, if not corrected, reasonably could result in a lesser sentence; if there is no likelihood of a different sentence, the error must be deemed harmless. **See Rogers, supra.** In this case, the striking of this aggravating circumstance would result in two valid, unchallenged, aggravating circumstances as opposed to one mitigating circumstance, that of Asay's age. Judge Haddock expressly stated in his sentencing order that he could not assign great weight to this mitigating circumstance, in light of Appellant's maturity and extensive criminal history, and he further stated that the aggravating circumstances "far outweighed" the mitigating (R 161). It is not speculation to assert that the judge would still have imposed death in regard to this murder, even without this aggravating circumstance.

It must be noted that the striking of this aggravating factor would mean that the factors in support of this death sentence would be identical to those found in support of the death sentence imposed for the murder of Robert Booker. If Judge Haddock concluded that death was appropriate as to the murder of Robert Booker, based upon the finding of two aggravating circumstances and one mitigating, it would be freakish to contend that he would regard death as an inappropriate sentence for this murder, based upon identical findings. The State would note that this court reached an identical conclusion in **Kennedy v. State**, 455 So.2d 351 (Fla. 1984), in which two death sentences were involved and, in which, on appeal, this court struck the "extra" aggravating circumstances as to one. In any event, under the test in **Rogers**, harmless error has been demonstrated. **See Rivera v. State**, 545 So.2d 864 (Fla. 1989); **Jackson v. State**, 530 So.2d 269 (Fla. 1988); **Hamblen v. State**, 527 So.2d 800 (Fla. 1988); **Mitchell v. State**, 527 So.2d 179 (Fla. 1988); **Grossman v. State**, 525 So.2d 833 (Fla. 1988); **Hardwick v. State**, 521 So.2d 1071 (Fla. 1988). The instant sentence of death should be affirmed in all respects.

## ISSUE VI

### ASAY'S SENTENCES OF DEATH ARE NOT DISPROPORTIONATE

In his next claim, Asay contends that his two sentences of death are disproportionate and must be vacated. Appellant insists that these crimes do not justify death, because, **inter alia**, they were "nothing more than impulsive shootings committed while Mark was under the influence of alchohol." (Initial Brief at 42). Appellant also suggests that the validly found aggravating circumstances "carry little weight." Appellant finally analogizes these murders to "heated domestic disputes" committed "during stressful circumstances", and contends that, in light of certain of this court's precedents, the sentences must be vacated. To say that the State disagrees with the above is an understatement of the highest magnitude.

The State respectfully contends that Asay's allegations concerning his alleged intoxicated state and the allegedly "impulsive" nature of these homicides are matters which are more appropriately raised before the circuit court, as opposed to the reviewing court. Indeed, the judge and jury both rejected these contentions for lack of evidentiary support, and no different result is dictated on appeal. As to Appellant's intoxication, as noted, while there was testimony to the effect that Asay was "buzzed" at the time (R 495), both O'Quinn and Robbie Asay specifically testified that Appellant was not drunk (R 493, 556). Appellant himself offered no contrary evidence, and the defense expert who testified at the penalty phase was only able to

testify on a hypothetical basis (R 1016-1018). As Dr. Miller candidly conceded, he did not examine Asay at any time relevant to the offenses, and, at most, he was able to opine that it was possible that the blood alcohol level which Asay allegedly possessed could have impaired an individual's ability to make decisions or tell right from wrong (R 1018, 1019). No claim of "intoxication" can be made on the basis of this record. As to the "impulsive" nature of the instant homicides, this again represents a matter of hope, rather than proof, by Asay. There was absolutely no evidence that Appellant was "overcome with emotion or stress" at the time of **either** murder. As to the first murder, O'Quinn testified that Appellant seemed no different after this crime than he had beforehand (R 502); Asay certainly never evinced any regret for any "impulsive" act. Similarly, while Robbie Asay testified that Appellant had seemed "shook up" at the time that he eventually returned home, O'Quinn, who actually witnessed the murder of McDowell, never testified that Appellant seemed upset or angry in any way. The facts of this murder, of course, are hardly consistent with a murder "on impulse"; the victim was shot six times, sometimes at close range, as he tried to back away and beg for mercy. Appellant has presented no convincing argument against the death penalty.

The State would also respectfully contend that Appellant's arguments concerning the "weight" of the aggravating circumstances are addressed to the wrong court. While this court will, of course, consider the proportionality of the death sentences in this case, it will not engage in any "reweighing" or

reevaluation of the evidence as to the aggravating and mitigating circumstances. **See Hudson v. State**, 538 So.2d 829 (Fla. 1989). Additionally, Appellant's contentions as to the aggravating circumstances found are unconvincing, as is his reliance upon certain precedents of this court. Despite Appellant's contrary allegation, this court did not hold in **Songer v. State**, 544 So.2d 1010 (Fla. 1989), that "being on parole at the time of the homicide is insufficient to uphold a death sentence." (Initial Brief at 42). Rather, this court held in **Songer** that the death penalty in that case was disproportionate, given the existence of only one aggravating circumstance and virtually ten (10) mitigating circumstances, including significant ones in regard to Songer's mental state and capacity. Songer obviously has no application **sub judice**, given the presence of other aggravating circumstances and the dearth of mitigation.

Likewise, Appellant's contentions notwithstanding, **Wilson v. State**, 493 So.2d 1019 (Fla. 1986), does not stand for the proposition that it was error for the sentencer to have found the existence of a prior conviction for a violent felony, in regard to Asay's simultaneous conviction of two counts of first degree murder as to the two victims in this case. This court has expressly approved such finding in the past, under identical circumstances. **See, e.g., Cook v. State**, 542 So.2d 964 (Fla. 1989); **LeCroy v. State**, 533 So.2d 750 (Fla. 1988); **Correll v. State**, 523 So.2d 562 (Fla. 1988). **Wilson** dictates no different result. In such case, this court held that the death sentence was disproportionate where, **inter alia**, the murder had occurred

during a heated domestic dispute and the other conviction at issue was for second degree, as opposed to first degree, murder. As will be argued more fully **infra**, the State contends that this case has nothing in common with any "domestic" crime. The State would additionally point out at this time that this court has previously found proportionate a death sentence based upon these two aggravating circumstances, relating to prior conviction and a defendant's parole status, **see Williams v. State**, 437 So.2d 133 (Fla. 1988); additionally, because the death sentence as to Robert McDowell contains another aggravating circumstance, that of cold, calculated and premeditated commission, the State would observe that this court has likewise held that a death sentence predicated upon these three aggravating circumstances is proportionate. **See, e.g., Williamson v. State**, 511 So.2d 289 (Fla. 1987).

The main thrust, however, of Asay's proportionality argument is his contention that this case somehow bears similarity to those "domestic" cases which this court has deemed inappropriate for the death penalty. The cases which Appellant cites for analogy are not convincing. Thus, it is difficult to see what this case has in common with **Smalley v. State**, 546 So.2d 720 (Fla. 1989), in which an infant was murdered by drowning, or **Ross v. State**, 474 So.2d 1170 (Fla. 1985), in which a man beat his wife to death during a drunken argument. Likewise, it is difficult to see what this case has in common with the felony-murder cases cited by Asay, in which the defendant, during an attempt to commit robbery or burglary, simply lashes out and

kills the victim. **See Proffitt v. State**, 510 So.2d 896 (Fla. 1987); **Caruthers, supra; Rembert v. State**, 445 So.2d 337 (Fla. 1984); **Richardson v. State**, 437 So.2d 1091 (Fla. 1983). Usually, this court's finding of disproportionality was based upon the existence of some substantial evidence in mitigation, as well as the absence of any prior criminal record on the part of the defendant; additionally, this court at times concluded that several of the aggravating circumstances found were invalid. **See also Fitzpatrick v. State**, 527 So.2d 809 (Fla. 1988) (death sentence disproportionate, **inter alia**, in light of substantial mitigating evidence as to defendant's mental infirmity). Asay's case has nothing in common with the above.

This is particularly true because, as noted above, the evidence presented in mitigation in this case is hardly compelling, and the State would respectfully contend that Judge Haddock essentially gave Asay the benefit of the doubt in even finding a mitigating circumstance relating to his age of twenty-three. This court has previously held that it was not error for a court not to have found such age, or even a lower age, as a mitigating factor. **See Simmons v. State**, 419 So.2d 316 (Fla. 1982) (23); **Mills v. State**, 476 So.2d 172 (Fla. 1985) (22); **Garcia v. State**, 492 So.2d 360 (Fla. 1986) (20). Appellant should also get no "mileage" out of the fact that his "only" prior conviction was for a contemporaneous crime. Such prior conviction was for the crime of first degree murder, the most serious possible, and the State would further note that, convictions aside, Judge Haddock found that the mitigating

circumstance of age was entitled to little weight "in light of Defendant's extensive prior exposure to the criminal justice system." (R 161). Asay specifically waived the application of Section 921.141(6)(a), that mitigating circumstance relating to a defendant's lack of significant criminal history, apparently with good reason (R 127). Thus, this case does not represent one in which the sentencer had a difficult choice in weighing the aggravating and mitigating circumstances, and neither does it appear that this double murder on the part of Asay represented his first brush with the criminal justice system. Additionally, as noted, one explanation for the results in other cases, was this court's determination that certain aggravating circumstances had been improperly found. As argued previously, such has not been the case **sub judice**. Accordingly, Asay has failed to demonstrate, by analogy, that his case is not one in which death is appropriate.

Having said the above, and, hopefully, convinced this court as to what this case is **not**, the question then becomes just what this case is. Appellee would suggest that, to a large extent, Asay's case is **sui generis**, which is, perhaps, fortunate for society. In contrast to so many of the capital cases before this court, there was no underlying felony involved in this case. Further, despite Asay's protracted efforts in this direction, this case did not represent a "domestic" killing, in which persons who knew each other resort to homicide due to sudden rage or years of incitement. Rather, this case would seem to be the handiwork of a new breed of killer, one who decides to execute

victims, not for love or money, but rather based upon their race or social class. While the victims in this case came into contact with Appellant more or less by chance, Appellant's actions after the initial encounter were anything but "impulsive".

Upon seeing his brother talking with Booker, Appellant jumped out of his truck, armed with a gun, verbally assaulted the victim and then proceeded to shoot him; he later confided to O'Quinn that one simply had to "show a nigger who was boss" because one "can't let them run over you". Likewise, when Appellant encountered McDowell by chance some twenty minute later, he, apparently, recognized the victim as one who had cheated him in the past and against whom he had sworn vengeance. When McDowell did not get into the truck, thus facilitating the planned rape and murder, Appellant grabbed the victim and proceeded to shoot him six times. From Appellant's later statements, it is clear that he viewed the killing of this "boy" as no cause for regret, given, **inter alia**, McDowell's race and sexual orientation. It is appropriate that society execute Mark Asay because it is hardly in the interests of society as a whole that one such as he exercise his version of eugenics by means of a .25 caliber revolver. Obviously, the most applicable case in this area in **Barclay v. State**, 343 So.2d 1266 (Fla. 1977) (black defendants seek to start revoluntionary race war by indiscriminately selecting, kidnapping and murdering white victim). While Asay was not as vocal as defendants **Barclay** or **Dougan** in explaining the full extent of his racial philosophy, it

should still be undisputable that a similar type of xenophobia played a part in these killings. Death is the appropriate sentence.

Finally, the State would respond to an argument presented by defense counsel in his closing argument at the penalty phase. At such time, defense counsel argued to the jury that one of the reasons that they should not recommend death was, essentially, that the victims did not merit it,

> . . . These two guys over here never again will walk the face of this earth, and everything. In their profession, sooner or later it was probably going to happen anyway.

(R 1060).

* * * * * * * * * * *

> I recommend to you strongly, look at the aggravation and mitigation, the time of night it happened, the circumstances, and these particular cases the people we are dealing with, that this is not a death case . . .

(R 1062).

The jury quite properly rejected this argument. **See Bolender v. State**, 422 So.2d 833 (Fla. 1982) (fact that victims were armed cocaine dealers not reasonable basis for life recommendation); **Thomas v. State**, 456 So.2d 454 (Fla. 1984) (fact that victim may have been homosexual who used the services of defendant as a prostitute not valid basis for mitigation). This court has previously held that a jury's recommendation of death, reflecting the conscience of the community, is entitled to great weight. **See, e.g., Grossman v. State**, 525 So.2d 833 (Fla. 1988); **Smith v. State**, 515 So.2d 182 (Fla. 1987); **LeDuc v. State**, 365 So.2d 149 (Fla. 1978). The jury in this case rendered two advisory

verdicts of death, after hearing all of the available evidence in aggravation and mitigation. The judge in this case imposed two sentences of death, after careful consideration of the applicable aggravating and mitigating circumstances. Given not only this court's prior precedents, but also the nature and purpose of the death penalty, death is the appropriate sentence in this case. The instant sentences of death should be affirmed in all respects.

## ISSUE VII

FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO ALLEGED MISADVISEMENT OF THE JURY AS TO ITS ROLE IN SENTENCING

In his final claim, Appellant contends for the first time on appeal that his sentences of death must be vacated because the prosecutor, through remarks, and the judge, through delivery of the standard penalty phase jury instructions, allegedly misadvised the jury as to the importance of its role in sentencing, in violation of **Caldwell v. Mississippi**, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Appellant bases his claim upon the fact that during the penalty phase, the prosecutor told the jury, without objection, that they should not feel guilty or that they would be the ones putting the defendant in the electric chair, in that the judge decided the penalties (R 1036). Counsel also told the jury that it would not be only their decision as to the penalty, in that they "just recommend" (R 1037). The prosecutor reminded the jury, at the conclusion of his argument, that the judge would be the one imposing sentence (R 1051-1052). Appellant also apparently now finds objectionable the portion of the State's argument in which the prosecutor said,

> You are making a recommendation **that carries great weight**, but you are making a recommendation to the judge, he can override -- if you recommend life, he can override your recommendation, or vice versa. If you recommend death, he can still decide life. He's the one that determines that, that's what he gets paid for.

(R 1036-1037). (Emphasis supplied).

Appellant also cites to the "standard" jury instructions in this case, which, according to him, "emphasized" any misstatement in that they advised the jury that the final decision as to punishment lay with the judge (R 1064).

Appellee respectfully suggests that this claim is frivolous. This court has previously held that claims of this nature, regarding alleged **Caldwell** violations, cannot be raised for the first time on appeal, in that contemporaneous objection is required at trial. **See Carter v. State**, 14 F.L.W. 525 (Fla. October 19, 1989); **Hill v. State**, 549 So.2d 179 (Fla. 1989); **Mitchell v. State**, 527 So.2d 179 (Fla. 1988); **Grossman v. State**, 525 So.2d 833 (Fla. 1988); **Jackson v. State**, 522 So.2d 802 (Fla. 1988). Inasmuch as there was no objection to any of these matters, this claim is obviously procedurally barred. Assuming this matter is at all cognizable in Florida, **see Combs v. State**, 525 So.2d 853 (Fla. 1988), it would be difficult to find a case in which a claim based upon **Caldwell** would be **more** inappropriate. As noted above, the prosecutor, whatever his other alleged failings, advised the jury that their recommendation was entitled to great weight (R 1036). Defense counsel in his closing argument did likewise, telling the jury that "the law requires that the judge give great weight to your recommendation." (R 1052). Most significantly, however, despite Asay's attack upon the standard jury instructions, **the standard jury instructions were not given in this case**. Rather, the defense requested a special jury instruction, to the effect that the law required the judge to give great weight to the jury's recommendation. (R

1031). Judge Haddock agreed to give this instruction (R 970), and did so, modifying the standard jury instruction to read:

> . . . As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge, **however, the law requires me to give great weight to your recommendation.**

(R 1064). (Emphasis supplied).

Assuming that precedent of the Eleventh Circuit Court of Appeals is applicable, the State would suggest that this case should be resolved in accordance with **Bertolotti v. Dugger**, 883 F.2d 1503 (11th Cir. 1989) (no violation of **Caldwell v. Mississippi** where Florida jury specifically advised that advisory verdict entitled to great weight). No relief is warranted as to this procedurally barred claim. The instant sentences of death should be affirmed in all respects.

## CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant convictions of first degree murder and sentences of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

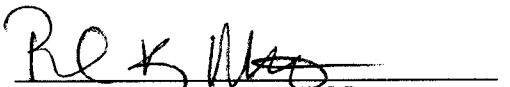
RICHARD B. MARTELL #300179
Assistant Attorney General

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 furnished by U.S. Mail to Mr. W.C. McLain, Esq., Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 29th day of November, 1989.



RICHARD B. MARTELL
Assistant Attorney General