IN THE SUPREME COURT OF FLORIDA

ROOSEVELT BOWDEN,

Appellant,

v. Case No. 74,438

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

I

The state urges this Honorable Court to find that appellant did not carry his initial burden in showing a violation of Neil that would require the court to make an inquiry. Further, even if the defendant had carried his burden, the state's explanation was race-neutral and no violation of State v. Neil has been shown.

II.

Appellant did not request self representation when given an opportunity by the court to do so and the defendant's allegations of dissatisfaction did not rise to the level of a challenge of ineffective assistance of counsel sufficient to trigger the necessity for an inquiry. Further, even if an inquiry was necessary, the court's inquiry of counsel sufficiently showed that counsel was providing effective assistance and attempting to fully and fairly represent the defendant. The record also shows that the only problem in the instant case was the defendant's own lack of cooperation with his court appointed counsel and his previous counsel Frank Lauderback.

III.

Appellant argues that the trial court's refusal to allow him to say something to the courtroom deprived him of a fair trial in that it constituted a denial of his right to testify. It is the state's contention that appellant was allowed to testify fully and fairly before the jury and that any limitation on his right

to "say something to the jury" was within the trial court's discretion.

IV.

While the challenged statement by Littlefield was not so harmful as to require an instruction, the jury was, nevertheless, told not to speculate on the answer. The curative instruction in the instant case was sufficient to dissipate any prejudicial effect of the objectionable comment. Further, the statement was harmless in the context of this case.

V.

Appellant argues that the trial court should not have given an instruction on robbery during the penalty phase because the evidence did not establish this factor beyond a reasonable doubt as evidenced by the trial court's refusal to find this aggravating factor. This argument ignores the distinction between giving an instruction and finding the existence of an aggravating factor. To give an instruction requires only that there be sufficient evidence before the jury; to find an aggravating factor, however, there must be proof beyond a reasonable doubt. Thus, while the trial court may have not have found that this factor was established beyond a reasonable doubt, there was sufficient evidence before the jury to warrant giving the instruction.

VI

As the trial court's order specifically states that the challenged information was not the basis of his determination

that the aggravating factor of 'previously convicted of a prior violent felony' had been established beyond a reasonable doubt and Bowden has not shown that any improper information was before the trial court, this Honorable Court should affirm the court's finding and the imposition of the death penalty in the instant case.

VII

Appellant argues that the especially heinous, atrocious or cruel aggravating circumstance, as applied, does not genuinely limit the class of persons eligible for the death penalty. He argues that this aggravator has not been applied in a rational and consistent manner by this Court and that juries are provided with inadequate guidance in order to enable them to separate the murders which qualify as especially heinous, atrocious or cruel from those which do not. As appellant acknowledges, this Honorable Court has repeatedly rejected arguments similar to those set forth herein. Your appellee contends that nothing in Bowden's argument requires this Honorable Court to reconsider the claim.

ARGUMENT

ISSUE I

WHETHER THE DEFENDANT WAS DEPRIVED OF HIS RIGHTS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS WHEN THE STATE PEREMPTORILY EXCUSED A BLACK PROSPECTIVE JUROR.

In State v. Neil, 457 So.2d 481, 486 (Fla. 1984), *clarified sub nom*, State v. Castillio, 486 So.2d 565 (Fla. 1986), and State v. Slappy, 522 So.2d 18, 22 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), this Honorable Court established the procedure to be followed when a party seeks to challenge the opposing parties peremptory excusals:

> "A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race." 486 So.2d 481, 486 (Fla. 1984).

Thus, one of the threshold questions is whether the defense has established a prima facia showing of discrimination. In Smith v. State, 562 So.2d 787 (Fla. 1st DCA, 1990), the First District Court found that defense counsel's request to have the record show an excusal of black jurors was insufficient to constitute a timely objection under Neil and Slappy. The Court stated:

> " . . . No argument was made showing a likelihood that the potential jurors have been challenged solely because of their race. Slappy. holds that the spirit and intent of Neil was not to obscure the issue and procedural rules governing the shifting burdens of proof, but to provide broad leeway

> in allowing parties to make a prima facia showing that a 'likelihood' of discrimination exists. As the state agreed voluntarily to proceed with the Neil inquiry, we will pass upon the merits of the alleged discrimination. However, defense counsel should be aware that the Neil and Slappy procedure should be complied with in order to properly preserve the issue of appeal."

In the instant case, as in Smith, appellant wholly failed to allege or demonstrate at trial that there was a strong likelihood that the potential juror was challenged solely because of race.

Appellant relies, in part, upon this Court's decision in State v. Slappy, 522 So.2d 18 (Fla. 1988), providing that the racially discriminatory excusal of even one prospective juror taints the jury selection process. Id. at 21. The above reference in Slappy assumes that the objecting party first satisfied the initial burden of demonstrating on the record a strong likelihood that the state struck the subject juror solely because of race. If such a demonstration is made, then Slappy indicates that the discriminatory excusal of even a single prospective juror taints the selection process. As appellant failed to satisfy the third Neil requirement, the trial court did not err in finding that the defendant did not demonstrate any Neil violation. Accordingly, the prosecutor's reasons for excluding the juror were not subject to review. Adams v. State, 559 So.2d 1293 (Fla. 3d DCA 1990).

In Adams, supra the Third District Court found no error on the part of the trial court in failing to conduct a Neil inquiry into the state's reasons for peremptorily excusing the first

black juror on the panel where the defense failed to show a strong likelihood that the juror was rejected on racial grounds. In Adams, the Court stated:

> "A trial judge is in the best position to determine whether there is a need for an explanation of challenges on the basis that they are racially motivated. Thomas v. State, 502 So.2d 994, 996 (Fla. 4th DCA), *review denied,* 509 So.2d 1119 (Fla. 1987), see Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In the present case, by the time Mrs. Arlington was challenged, the trial judge had already heard the answers she had given during questioning. He had heard the tone of her voice. The judge was satisfied that the question challenges were not exercised solely because of the juror's race. Adams failed to demonstrate that there was a strong likelihood that black prospective jurors were challenged solely on the basis of their race. See Woods v. State, 490 So.2d 24 (Fla.), *cert. denied,* 479 U.S. 954, 107 S.Ct. 446, 93 L.Ed.2d 394 (1986). The record does not reveal the requisite likelihood of discrimination to require an inquiry by the trial court. In fact, we find, just as the court did in Parker v. State, 476 So.2d 134 (Fla. 1985), that the record reflects nothing more than a normal jury selection process. For these reasons, the trial court did not err in failing to inquire into the state's motives for excusing Ms. Arlington

Similarly, in Williams v. State, 567 So.2d. 1062 (Fla. 2nd DCA, 1990), the Second District Court of Appeal rejected William's argument that the state's challenge to one black jury veniremen was racially motivated and that the trial court failed to conduct the requisite inquiry under State v. Neil. The court found that the burden initially lies with the defendant to demonstrate a likelihood of discriminatory motivation and that trial counsel's

perfunctory objection in the case was insufficient. And, in Verdelleti v. State, 560 So.2d 1328 (Fla. 2nd DCA 1990), the Second District again found that the defendant did not carry his burden of showing that a prospective juror was challenged solely because of race.

Further, even if appellant's reliance solely on the fact that the one excused juror was black was sufficient to satisfy his initial burden under Neil, your appellee contends that the reasons volunteered by the prosecutor for excusing the juror were race neutral. The reasons advanced by the state included the jurors age, the fact that a relative or family member was accused of a crime and that it was his intention to take the younger women off the jury. (R 885)

The record shows that the prosecutor, after excusing Ms. Brazell, excused seven women and no men. (R 884, 902 - 904, 912, 925) Prior to excusing Ms. Brazell the prosecutor excused two men. (R 859) The prosecutor also noted for the record that at one point the panel consisted of ten women. (R 904)

This Honorable Court in Reed v. State, 560 So.2d 203 (Fla. 1990), stated: "In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process. " Id. at 206. It is not unreasonable for the prosecutor to attempt to get a jury that is balanced with men and women.

Further, the prosecutor also noted that he had excused the juror because she had indicated that a family member was accused of a crime. (R 885) This is a valid and racially neutral reason. See, Gonzalez v. State, 15 FLW D2507 (Fla. 4DCA, October 10, 1990). Appellant challenges this statement as unsupported by the record. Appellant contends Ms. Brazell made no such response during voir dire questioning. In Floyd v. State, 15 F.L.W. S465 (Fla. September 13, 1990), this Honorable Court stated:

> "It is the state's obligation to advance a facially race-neutral reason that is supported in the record. If the explanation is challenged by opposing counsel, the trial court must review the record to establish record support for the reason in advance. However, when the state asserts a fact that is existing in the record, the trial court cannot be faulted for assuming it is so when defense counsel is silent and the assertion remains unchallenged. Once the state has proffered a facially race-neutral reason, a defendant must place the court on notice that he or she contests the factual existence of the reason. . . . Because defense counsel failed to object to the prosecutor's explanation, the Neil issue was not properly preserved for review." Id. at 466.

In the instant case, it is apparent that the prosecutor discerned this information from the questionnaire provided by the jurors. It was incumbent upon defense counsel to challenge this statement if it was unsupported by the record. As no such challenge was made, appellant has waived his right to challenge the validity of the statement.

Accordingly, the state urges this Honorable Court to find that appellant did not carry his initial burden in showing a

violation of Neil that would require the court to make an inquiry. Further, even if the defendant had carried his burden, the state's explanation was race-neutral and no violation of State v. Neil has been shown.

ISSUE II.

WHETHER THE INQUIRIES INTO APPELLANT'S DISSATISFACTION WITH HIS COURT-APPOINTED COUNSEL WERE ADEQUATE OR NECESSARY.

Appellant asserts that twice during the course of his representation by court appointed counsel, that the trial court incorrectly denied his motion to discharge counsel. First, appellant asserts that on September 26, 1988, that he filed a pro se motion for speedy trial that requested self-representation. Subsequently, after the penalty phase of trial, but before he was sentenced, appellant asked for "another counsel to be appointed" to represent him. Appellant contends, based on this set of facts, that the court below erred in failing to conduct an adequate inquiry into his dissatisfaction with his court appointed counsel and improperly denied his right to represent himself.

First, the record shows that the only time that the defendant suggested he might want to represent himself was in his pro se motion for speedy trial. At the subsequent hearing on the motion to withdraw, the defendant was offered the opportunity to represent himself and declined same. (R 692 - 696) Accordingly, it was not necessary for the trial court to conduct an inquiry to determine whether appellant was capable of representing himself because appellant was not interested in representing himself. In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the United States Supreme Court noted that a request for self representation must be stated unequivocally. 422 U.S.

at 835 - 836 (emphasis added). Appellant's request was not only equivocal, it was also subsequently repudiated. Therefore, Bowden was not entitled to a Faretta inquiry.

Appellant further argues, however, that the trial also failed to conduct the requisite inquiry under Nelson v. State, 274 So.2d (Fla. 4th DCA 1973), and approved in Hardwick v. State, 521 So.2d 1071 (Fla.), *cert. denied,* 488 U.S. 871, 109 S.Ct. 182, 102 L.Ed.2d 154 (1988). Nelson mandates that, once the competency of counsel is sufficiently challenged, a trial judge should make an inquiry of the defendant and his attorney to determine whether or not there is reason to believe that the attorney is not rendering effective assistance to the defendant. However, the appellant herein did not challenge the competency of his attorneys, he merely alleged his dissatisfaction with the way they were handling the case. Appellant's allegation that he was dissatisfied with the way his lawyers were handling the case does not trigger a Nelson inquiry because it does not amount to an assertion of counsel's incompetence requiring exploration or verification as a predicate for substitution. Smelley v. State, 486 So.2d 669 (Fla. 1st DCA 1986). See, also, Johnston v. State, 497 So.2d 863 (Fla. 1986).

The state asserts, however, that the court's inquiry was sufficient to satisfy Nelson. The court's inquiry revealed that Bowden's dissatisfaction was based on the fact that defense counsel wanted to talk to him about the penalty phase of his trial and about his family. (R 692, 693) The record shows,

however, that counsel for the defendant deposed close to thirty witnesses in preparation for the defendant's trial, including two F.B.I. experts who were obtained to testify for the defendant during the guilt phase. (R 105 - 107, 285, 694) The court's inquiry further revealed that the court appointed attorneys only problem in the preparation of the case was Mr. Bowden's refusal to cooperate with them. Defense counsel Martin represented to the court that Mr. Bowden refused to discuss the facts of the case with them as to what his testimony would be if he took the stand and that he was accusing them of being in league with the state against them.[1] (R 691)

Further, the trial court was very familiar with the competency of the court appointed attorneys and stated for the record:

> "Mr. Bowden, you've got two lawyers that are as good as any two lawyers anywhere.
>
> I don't know whether you know that or not, but I know that because they appear before me all the time.
>
> I don't know who you think you are going to get, but you can bet they will not be as good as these two guys that are here working on this job.

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[1] The record also shows that the defendant's prior counsel, Frank Lauderback also withdrew from the case because the defendant refused to cooperate with him. (R 693)

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The record also shows that the defendant's prior counsel, Frank Lauderback also withdrew from the case because the defendant refused to cooperate with him. (R 693)

> I'm not going to let them withdraw. I'll give you ten days to get yourself a lawyer. If you don't get one by then, you sure better start cooperating with these two lawyers that you have got.
>
> Do exactly what they say. If you don't like the way they prepare for trial, that is not your business.
>
> You wouldn't tell a doctor how to operate on your brain would you? Let these fellows do their job. They know what they are doing.
>
> Your motion at this time is denied without prejudice to make it again in ten days hence.
>
> If he excuses other counsel and still refuses to talk to you, you'll have to come back in, and we will try to deal with it in another fashion."

(R 695 - 696)

Further, it should be noted that with regard to appellant's motion to appoint new counsel, that the court denied the motion without prejudice. The court specifically told the defendant that if he was not able to hire other counsel and he was still dissatisfied that he could renew this motion. (R 696) The fact that the defendant chose not to do so until after the penalty phase of the trial is evidence in and of itself that the defendant was satisfied with counsel. It was not necessary for the court to appoint other counsel. Although 00an indigent defendant has an absolute right to counsel, he does not have a right to have a particular lawyer represent him. Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 161, 75 L.Ed.2d 610 (1983); Koon v. State, 513 So.2d 1253 (Fla. 1987), *cert. denied*, 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1988). As in Koon, there is nothing

in the instant record to indicate the appellant could have been better served by other counsel. The appellant has not alleged that the denial of his motion to discharge was prejudicial, or deprived him of effective assistance of counsel. On these facts, the trial court did not err in denying his motion to discharge his court appointed counsel.

As for the motion that was made after the penalty phase of the trial, a Nelson inquiry is not required when a motion to discharge counsel is not made until after the jury has been empaneled. Dukes v. State, 503 So.2d 455 (Fla. 2nd DCA 1987). It is significant that every case cited by the appellant as to this issue concerned a motion to discharge made prior to trial, and that appellant does not address the untimeliness of his motion. Appellant merely alleges that the court improperly dismissed the motion with the reference that court appointed counsel Martin's representation of appellant was "pretty much at an end" and that Martin would not be handling his appeal. Appellant's position is not supported by the facts of this case nor the law. It is ironic to note that in the original motion for discharge that the defendant's only dissatisfaction with counsel was that they were attempting to prepare too much for the penalty phase. And yet, in this appeal before this Honorable Court, appellant asserts that even though the penalty phase had already been conducted when he made his final motion for discharge, that since the sentencing was yet to remain that he was some how prejudiced by the court's denial of the motion. The

defendant did not request self representation at the close of the penalty phase; he merely requested a court appointed counsel. Again, this motion was untimely made and no inquiry was necessary.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW BOWDEN TO "SAY SOMETHING TO THE COURTROOM" AFTER THE STATE COMPLETED ITS CROSS EXAMINATION OF BOWDEN.

Appellant argues that the trial court's refusal to allow him to say something to the courtroom deprived him of a fair trial in that it constituted a denial of his right to testify. It is the state's contention that appellant was allowed to testify fully and fairly before the jury and that any limitation on his right to "say something to the jury" was within the trial court's discretion.

"It is well recognized that although criminal defendants have a constitutional right to testify on their own behalf, the right must sometimes 'bow to accommodate other legitimate interests in the criminal trial process.'" Rock v. Arkansas, 483 U.S. 444, 455, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973). Accord, United States v. Jones, 880 F.2d 55 (8th Cir. 1989); Roussell v. Jeane, 842 F.2d 1512 (5th Cir. 1988); Ortega v. O'Leary, 843 F.2d 258, 261 (7th Cir.), *cert. denied,* 488 U.S. 841, 109 S.Ct. 110, 102 L.Ed.2d 85 (1988). This is true because the need for order and fairness in criminal trials is sufficient to justify firm, though not always inflexible, rules limiting the right to testify; and, of course, numerous rules of undoubted constitutionality do circumscribe the right. See Rock, 483 U.S. at 55, 56 n.11, 107 S.Ct. at 2711 note

11; Ortega, 843 F.2d at 261. In the exercise of the right to present witnesses the accused, as is required of the state, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Chambers v. Mississippi, 410 U.S. at 302, 93 S.Ct. at 1049.

Most obviously, the right to present evidence is limited to relevant and material testimony. Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) As the court stated in United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982):

> "In Washington, this Court found a violation of this clause of the Sixth Amendment when the defendant was arbitrarily deprived of 'testimony [that] would have been relevant and material and . . . vital to the defense.' 388 U.S. at 16, 87 S.Ct. at 1922." Valenzuela-Bernal, 102 S.Ct. at 3446.

There has been absolutely no showing that any relevant and material evidence has been excluded. And in fact when the defendant was allowed to make his statement to the jury during the penalty phase, his testimony shows that no relevant material evidence was excluded. The defendant told the jury:

> "THE DEFENDANT: Members of the jury, I feel like you have been highly deceived in this whole proceeding here, because I have been -- committed a crime of murdering my daughter. I believe the prejudice here in this particular field has brought great weight in this situation here that I am up against.
>
> Now, Charles David Littlefield, I did not kill Charlie Littlefield. All the evidence that you have seen was circumstantial and I

> said -- but the cat is out of the bag now. They put my manslaughter out in front of me and I feel at this time it's appropriate for me to tell you what you were led to believe is not the truth. I did not kill Charles Littlefield.
>
> I did not kill this man and the evidence, whatever has not been said -- I have proof the same evidence that condemns is the same evidence that could clear me, if given the right weight. If that same evidence was presented to you in the right way and you will see my innocence. My past is haunting me again and that's what's happening here right now, this very day, telling this jury right now this is one -- I am -- why I am in front of this courtroom now, because of prejudice of what I done in the past.
>
> I am asking you to take that into consideration, what I just said, because that's the truth and nothing else but the truth. I did not kill Charles David Littlefield, regardless of what the prosecutor presented here in this courtroom. And I am pleading for my life, because I want to live. I want to live. I did not kill this man and I said it time and time again and I will go to my death saying that I didn't kill him. I want each and every one of you to know that.
>
> I thank you, your Honor, for letting me speak." (text at R 1474, 1475)

On the present record, this testimony was not even remotely connected to the critical issues in the instant case. The testimony was not so material, relevant and vital so as to evoke the Sixth Amendment protection. Roussell v. Jeane, supra at 1517.

Further, as this Court held in Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), although there is a constitutional right to testify under federal due process, that right does not fall

within the category of fundamental rights such as the right to counsel, the right to trial by jury, the privilege against self incrimination, and the right to be present at all crucial stages of a criminal prosecution. The right to testify, as distinguished from those rights considered to be so fundamental as to be personal to the defendant, does not go to the very heart of the adjudicatory process. Id. Quoting State v. Albright, 96 Wisc. 2nd 122, 291 N.W.2nd 487, cert. denied, 449 U.S. 957, 101 S.Ct. 367, 66 L.Ed.2d 223 (1980), this Court further stated:

> "We view this right to be more like an accused's right to represent himself. Although such a right has been expressly recognized by the United States Supreme Court in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), this right has not been considered so fundamental as to require the same procedural safeguards employed to ensure that a waiver of the right to counsel is knowingly and intelligently made."

Torres-Arboledo at 411.

Thus, it was within the trial court's discretion to deny appellant the opportunity to address the jury without the benefit of counsel.

ISSUE IV.

WHETHER THE TRIAL COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL OR GIVE A CURATIVE INSTRUCTION TO THE JURY REGARDING THE OBJECTED TO TESTIMONY OF STATE WITNESS RITA LITTLEFIELD.

State witness Rita Littlefield, the wife of the victim herein, testified that when appellant came to the apartment he shared with the Littlefield's at about 8:30 P.M. on April 11, 1988, that he had a man and a woman and a child with him. (R 1005) She testified that appellant wanted them to stay the night so he could sleep with "that guy's old lady." (R 1005 - 1006) Defense counsel objected and moved for a mistrial and a curative instruction. (R 1006) The prosecutor was told to "move on" and the motion for mistrial and curative instruction was denied. (R 1006 - 1007) Appellant argues that the statement was prejudicial and that it cast appellant in a bad light before the jury by portraying him as a person of low moral character. He contends that at the very least, the jury should have been instructed to disregard Rita Littlefield's improper testimony and that the court's failure to grant his request to so charge the jury deprived him of a fair trial.

A mistrial should be declared only when the error is so prejudicial and fundamental that it denied the accused a fair trial and even if the comment is objectionable, the proper procedure is to request a curative instruction from the trial judge that the jury disregard the remark. Buenoano v. State, 527 So.2d 194 (Fla. 1988).

Although the trial judge did deny the perfunctory request for a curative instruction, the trial judge did instruct the jury to disregard the statement.

> "JURYMAN KARANGELEN: In the last answer, I would like to hear it. I didn't hear it.
> . . .
>
> THE COURT: The question that was asked Mr. Karangelen, that was objected to and I sustained that objection. We can't speculate on that." (R 1007)

Thus, while the statement was not so harmful as to require an instruction, the jury was, nevertheless, told not to speculate on the answer. The curative instruction in the instant case was sufficient to dissipate any prejudicial effect of the comment.

Further, the statement was harmless in the context of this case. The gist of the comment was that Bowden wanted to sleep with another man's wife. Any harm caused by this statement was miniminiws by the unobjectioned to testimony of Willie Lampkin that the defendant had told him that he (Bowden) was having an affair with the man's wife. (R 1158 - 1159) In Johnston v. State, 497 So.2d 863 (Fla. 1986), this Honorable Court held that a comment regarding finding a bag of marijuana in the defendant's clothes was harmless in light of forthcoming testimony about appellant's heavy drug usage on the evening in question. Id. at 868. Accordingly, the comment in the instant case was harmless beyond a reasonable doubt and the motion for a mistrial was properly denied.

ISSUE V

WHETHER THE COURT BELOW ERRED IN INSTRUCTING APPELLANT'S JURY AT PENALTY PHASE THAT THE COULD CONSIDER IN AGGRAVATION THAT THE HOMICIDE WAS COMMITTED DURING A ROBBERY.

Appellant argues that the trial court should not have given an instruction on robbery because the evidence did not establish this factor beyond a reasonable doubt as evidenced by the trial court's refusal to find this aggravating factor. This argument ignores the distinction between giving an instruction and finding the existence of an aggravating factor. To give an instruction requires only that there be sufficient evidence before the jury; to find an aggravating factor, however, there must be proof beyond a reasonable doubt.

Recently, in Stuart v. State, 558 So.2d 416 (Fla. 1990), this Honorable Court found that it was error for a trial court to refuse a requested instruction where the evidence showed impairment but not substantial impairment as a mitigating factor. Quoting Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986), this Court stated:

> "The legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determination of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advise would be preconditioned by the judge's view of what they were allowed to know."

Accordingly, if the trial court refused to give the instruction where there was evidence to support it, he would have been usurping the jury's role in the decision making process as it is unquestionable that there was sufficient evidence before the jury to support the giving of the instruction that the homicide was committed during a robbery. The evidence conclusively showed that Bowden took from Littlefield $14 in cash and two disposable lighters. (R 973, 1192) Appellant's argument that the evidence of robbery was undermined because appellant obviously knew that Littlefield was not a man of means and thus robbing him would yield little value is undermined in itself by appellant's own limited means. And, in fact, the evidence before the jury was that the entire conflict started because of appellant's shortage of funds to pay for room and board. (1000, 1002, 1008)

Thus, while the trial court may have not have found that this factor was established beyond a reasonable doubt, there was sufficient evidence before the jury to warrant giving the instruction.

ISSUE VI

WHETHER THE TRIAL COURT INCORRECTLY CONSIDERED EVIDENCE THAT ESTABLISHED THE AGGRAVATING FACTOR OF A CONVICTION FOR A PRIOR VIOLENT FELONY.

Appellant's contention that the trial court incorrectly considered unsupported convictions and, accordingly, that the death sentence was improperly imposed is entirely without merit. The trial court specifically stated that although these charges are all serious charges involving violence against persons, the defendant's brutal slaying of his own infant daughter was sufficient of itself to support a finding that the defendant had previously been convicted of another felony involving the use of violence to a person. (R 486 - 487). This aggravating factor was established by the state beyond any reasonable doubt and the defendant himself testified regarding the brutal slaying of his own baby daughter in 1978.

In Alford v. State, 355 So.2d 108 (Fla. 1977), this Honorable Court upheld the sentence of death where the trial judge was aware of inadmissible evidence, finding that a sentence of death may stand when such factors do not enter into the exercise of his discretion. See, also, Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (Not a violation of due process to rely on information that the defendant has had an opportunity to deny or explain).

As the trial court's order specifically states that the challenged information was not the basis of his determination

that the aggravating factor of 'previously convicted of a prior violent felony' had been established beyond a reasonable doubt and Bowden has not shown that any improper information was before the trial court, this Honorable Court should affirm the court's finding and the imposition of the death penalty in the instant case. (R 1600-01)

ISSUE VII

WHETHER THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCES IS APPLIED ARBITRARILY AND CAPRICIOUSLY AND FAILS TO GENUINELY LIMIT THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Appellant argues that the especially heinous, atrocious or cruel aggravating circumstance, as applied, does not genuinely limit the class of persons eligible for the death penalty. He argues that this aggravator has not been applied in a rational and consistent manner by this Court and that juries are provided with inadequate guidance in order to enable them to separate the murders which qualify as especially heinous, atrocious or cruel from those which do not. As appellant acknowledges, this Honorable Court has repeatedly rejected arguments similar to those set forth herein. See, Smalley v. State, 546 So.2d 720 (Fla. 1989) and Occhicone v. State, 15 F.L.W. S531 (Fla. October 11, 1990). Your appellee contends that nothing in Bowden's argument requires this Honorable Court to reconsider the claim.

Further, as applied to the instant case, the heinous, atrocious or cruel factor was properly applied. The evidence before the jury clearly supported a finding of this aggravating factor. The defendant Roosevelt Bowden is over six foot tall and weighed over 200 pounds at the time of the murder. (R 1087) The victim Charlie Littlefield on the other hand was 5'6", weighing 104 pounds. Bowden murdered Littlefield by repeatedly bludgeoning him with an iron bar (a rebar), then dragging him to another spot striking him repeatedly again, resulting in over 32

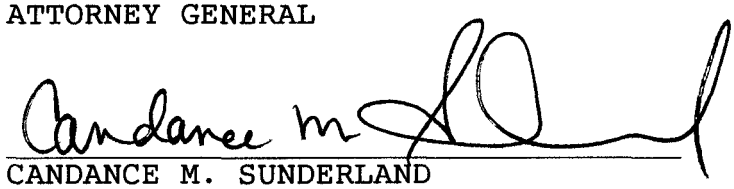
separate injuries to the head alone and multiple defense wounds to the victim's arms and hands. (R 1206 - 1208) The evidence also shows that Bowden attempted to strangle the victim as evidenced by the damage to the victim's neck muscles and hyoid bone. Dr. Joan Wood, the Medical Examiner, testified that the hyoid bone was compressed with two hands and that the victim was alive when this happened. She also testified that defensive wounds indicated that the victim put up his arms to ward off blows in face to face combat. (R 1455 - 1456) The evidence also shows that the victim was so brutally beaten that his teeth were knocked out and found under a Palmetto tree. (R 971) The medical examiner also testified that this assault would have lasted at least a few minutes. (R 1450) Based on the foregoing, the aggravating factor of heinous, atrocious or cruel was clearly supported by the evidence.

CONCLUSION

Based on the foregoing facts, arguments and authorities, appellee would ask that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 17 day of January, 1991.

OF COUNSEL FOR APPELLEE.