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THE CASE OF ALVIN FORD

The case of Alvin Ford abounds in the elements of tragedy--personal, social, and legal. It is the story of a promising young man who believed he could succeed in the American way of life--and was doing so in business, when he experienced frustrations and disappointments, then failure and despair. He plunged quickly and deeply into fast living, drugs, and violence--for which he had been sheltered for so long by a close-knit family experience. Then suddenly, he was caught up in an event of terror, danger, and panic beyond his control, his world burst with the gunfire of the moment.

Then, as he had before the event, he trusted his companions--now even more than his lawyer, whose sympathies he thought would run to the policeman who died in the shooting, with whom his lawyer would identify his own son--with the love Alvin Ford himself had known as the son of devoted parents. And so he kept to himself alone for many years the account of what happened before and during the event--and only now can it help, when the trial, conviction, and sentence are so many years in the past.

The social, economic, and cultural faults of American life that contributed to Alvin Ford's hopes, and also to brief but terribly troubled months before the shooting, cannot be changed to spare him--or the victim--now. Only clemency

can correct, in part, the consequences of that chain of events that links the personal, social, and legal elements of tragedy.

Alvin Ford in life can serve usefully, as his youth promised he would and as indeed he has already in his many years in prison. He can remind us in life, so much better than in the fleeting moment of his death, that we might have served him and others, including the victim of the shooting, a policeman, so very much better than we have.

OVERVIEW

Alvin Ford was raised in a close knit, warm and loving family. His mother and his sisters and brothers (his father is dead) are as devoted to him now, and he to them, as in his youth. His experience in this family, in the small town setting of Palmetto, produced in him a deep attachment to the traditional values of the American way of life and many admirable character traits, including ambition, independence, integrity, a sense of fairness and justice, and especially a deep concern for others. When he left home and a boyhood of family, friends, neighbors and teacher to go out into the world, he had been sheltered, ironically, from much of what that world held for him. He knew nothing of what was in store for him when the classic American tragedy of dreams, dissappointments, despair and destruction had run its course. Frustration and depression, then failure and decline, brought him down to the bottom of life. He sank quickly and deeply, into a sub-culture of bad companions, dangerous habits and suicidal despair.

Alvin Ford was thus set up by life for a tragic event and its tragic aftermath, the full details of which remained with him alone for many years afterward. Alvin Ford did not disclose his account of what happened to anyone, not even to his lawyer as his case went to trial. His lawyer, he thought

was the father of a policeman. (The attorney was, in fact, the son of a policeman and a former FBI agent himself.) The victim of the shooting for which Alvin was on trial was a police officer, causing him to fear that his lawyer's sympathies would be with the victim and that his own story would be turned to his disadvantage. This was a tragic misapprehension of the responsibility of a lawyer and the relationship of lawyer and client, which assumes openness and trust. This misapprehension grew out of Alvin's own experience in which he knew how devoted his family, especially his mother, was to him, and he projected these sympathies for a son onto his lawyer. Instead of listening to his lawyer, he listened to his companions, his co-defendants.

So Alvin Ford fell silent and remained silent. He did not tell those he trusted most, his family, to spare them the knowledge of what had happened. He preferred not to disturb their belief that he was innocent. Only many years later did Alvin tell his story, when a lawyer won his trust, and from it has flowed the details of what happened before, during and after the tragic event of July 21, 1974. Now, for the first time, it is possible in this clemency proceedure to correct an injustice yielded so tragically by the combination of personal, social and legal elements.

This memorandum, benefitting from what Alvin has finally revealed, will indicate several ways in which those personal,

social and legal factors influenced the course of his case toward sentencing. It will point out experiences and events from his past as well as procedures and rulings in his trial by which the case was moved toward sentencing. Few of those steps, where the legal process combines with the story of the offense and the character of the offender, can be identified as determinative when considered individually. But when taken in their entirety, in light of what Alvin has finally told of himself, and these events, these same steps can be seen to have produced a sentence that is highly inappropriate.

This memorandum presents information that contributes to a better understanding of Alvin's character and experience than was known at the time of sentencing. It examines the sentencing process in this case which took place when Florida was experimenting with its new sentencing system. In addition it scrutinizes the sentence itself for its fitness in the broader context of capital punishment in Florida. It concludes with a prayer for the grace that will grant the commutation of Alvin Ford's sentence from death to life.

THE PERSONAL ASPECT

Alvin Ford grew up in a loving family, a close, deeply caring and steadily supportive family that was troubled only by an alcoholic father, with whom Alvin Ford had a close relationship nonetheless. Alvin helped his father build the house Alvin lived in until he was eighteen years old. (Ford's Statement-10.) Alvin's mother eventually divorced his father but Alvin continued to have a good relationship with him, receiving at least one visit from his father in prison. (Ford's Statement-15.) Alvin's relationship with his mother, two sisters and two brothers was much closer, resulting in regular visits by Alvin with them after he had moved from Palmetto to Gainesville, and by his family with him, after he was imprisoned. Alvin was so strongly drawn to his home and mother that after fleeing the scene of the shooting, he drove to Palmetto to be there with her. (T-1337.)

Alvin's family was, and remains, a deeply caring family. This quality became so much a part of Alvin that it has expressed itself in many ways, even during his prison years. In his correspondence with high school students and friends he has counseled them to stay with their studies and expressed concern for their problems. In a letter to one youngster Alvin wrote, "I am sorry that you have a D average. I will have to write to your teacher and

see if I can show him that at least you are trying. At grade time let me know if you think my writing him has helped." In a later letter he commented that it was good your grades improved." (See Letters to Students, Appendix J.) He wrote to a friend trying to make ends meet that "The working two jobs I don't like too much." He always asks questions indicating his concern for others and pursues a problem until it is resolved.

One incident which reflects Alvin's caring nature illustrates as well the tragic course his case has followed at certain points that related curcially to his sentence. Dr. Taubel, the psychiatrist who interviewed Alvin during the trial for testimony in the sentencing phase, said at one point in his testimony that Alvin did not care. "Yes," he stated, "he did not care. He didn't care." (T-1317.) Dr. Taubel's testimony continued from that point:

> I said, "how do you feel right now, Saturday afternoon? Last Saturday afternoon, the trial was going on. How do you feel right now compared to the way you felt when you were depressed?"
>
> "I feel fine."
>
> "You are okay now?"
>
> "Yes, I feel fine. Man, I really feel good."
>
> Okay. I guess maybe I didn't look too good because I shook his hand and I said, "Alvin, you have been very cooperative." I said, "I want to tell you what I am going to say to the jury if I'm asked to say to the jury. I think you ought to know. You spent three and

> a half hours with me. You ought to know what I'm thinking."
>
> So I told him just what I am describing for you today and when I was finished, I shook hands and said goodbye, and he said, he said, "I'm fine Doc. Don't worry about me. I'm just fine," and we parted that way. Oh, he said, "You're a nice man, Doc. Don't worry about me."
>
> That's the way Alvin Ford has been. That's the way he's lived. (T-1337, 1338.)

Dr. Taubel was right. That is how Alvin Ford has been, how he has lived. But to take Alvin's expressions there to indicate a lack of caring is to miss the real character of Alvin Ford, who cared about the man with whom he had spent three and a half hours, the man who "didn't look too good" after such a lengthy interview.

Alvin has guided his two brothers, encouraging Roderick to enter the military "because I don't want to see him come the same way I did." (Ford's Statement-18.) Roderick is now in the United States Air Force. His brother William was much younger than Alvin, but as time has gone on, Alvin has managed to guide William also, even in prison. "I let some of these guys talk to him that's here, you know, that's been here, that got 40, 50, 200 years, telling him about what this place is about." (Ford's Statement-20.)

The role Alvin assumed with his younger brothers is the role of a father-substitute for the alcoholic father who was ineffective in his own life and who is now dead. Alvin began taking his father's place very early in life.

He matured from his father's helper on handyman, masonry, cement laying and other construction jobs, to his father's full-fledged substitute on the occasions when his father was unable to make it to work. "Sometimes he would drink and I knew he would have jobs to do. And I would skip school and go out and do the jobs for him." (Ford's Statement-14.) Later Alvin sent money home whenever his mother needed help and he could afford to give it. His sisters remember that he was always concerned that they had clothes. Alvin's supportive character is reflected in his efforts on behalf of fellow inmates, and even visitors to the prison. Time and again he has drafted grievances on behalf of fellow prisoners and corresponded with lawyers to describe practices he finds unsuitable. (See Van Diver Memorandum, Appendix E.)

Much of this activity on Alvin's part arises out of an acute sense of justice and fairness. An early illustration of this is connected with the only episode marring his school years, which were free of disciplinary troubles other than this one. He and a friend and teammate, Keith Smith, skipped school and drove to Bradenton to get pictures that had appeared of them in the newspaper. Upon their return Alvin was expelled, he thought because he had been the one with the car. "I guess he (the principal) figured I was responsible for the other guy." (Ford's Statement-24.)

The other student, Keith Smith, was not expelled. "He was a running back for our school," Alvin remembered. "He was the top running back and I figured the reason he didn't expel him was because they wanted him to play that Friday in the game. And the school was known for -- what you call it, win record?" (Ford's Statement-24, 25.)

Another episode indicates Alvin's belief that a wrong can be appealed and made right. This occured at a younger age when he had entered a science project in the county level competition, where it received no recognition.

A. The project next to mine didn't look as difficult as the one I had, but it had got third place. So I kind of got mad about it.

Q. And what did you do?

A. Well, I put up some protesting, and they told me that, well, it would go to the state level.

Q. And what happened at the state level?

A. Got honorable mention.

Alvin has always played by the rules, as he did in that incident. When the schools were desegregated and Alvin was transferred to Manatee High School, he wanted to remain at Palmetto High School. He went to the school board and was permitted to be transferred back home to Palmetto, even though it cost him a year's athletic eligibility. (Ford's Statement-23.) His advocacy of fellow inmates and of himself has been conducted through

bureaucratic channels, according to the rules, throughout his years in prison.

Another episode anticipates later themes of critical importance in Alvin's life. His only brush with the law as a juvenile was a neighborhood burglary, committed in the companionship of friends. When out riding around one evening, some automobile parts were taken for a car he and his friends were rebuilding.

> I think I was home when the police came by and picked me and took me down to the city jail in Palmetto, and I stayed there a couple days. Well, my mother and father came down and they were asking me about who was with me, you know. And I wouldn't tell them. And they told the Chief of Police to just let me set in jail.
>
> So, I wouldn't talk. And finally she -- she came back a couple of days later and told me that the two boys that was with me, they -- she looked out the front of the house and they were out putting the car parts in her front yard around the shrubbery and different things in her yard. So when she told me that, I felt, you know, that that might not be right. So I went ahead and told who was with me and told about the whole thing. (Ford's Statement-39.)

Despite three years of probation, this was an offense so youthful and harmless in its nature that it was ignored by the Department of Corrections when Alvin was hired as a guard at Union Correctional Institute in Raiford.

Alvin's record is marred in those years only by these minor incidents. He was very much the good boy remembered years later. (See Statements of July 31, 1981, Appendix H.) He was a good boy from a good family with good friends,

such as Keith Smith, who later went on to play professional baseball with the St. Louis Cardinals, Henry Lawrence, a football player with the Oakland Raiders, and Al Washington who is now a district manager for General Motors. (See E. A. McCray's Statement, July 31, 1981, p. 4.)

Alvin's companions have been important to him, even during detention before trial when there was correspondence among them by notes, one of which, from Alvin Ray Lewis, came to the attention of Alvin's lawyer and was discussed during the trial (T-699-702). Alvin seems to have relied heavily on that note, which apparently urged Alvin to "stay cool" and get another lawyer, which Lewis said his own family could afford. Alvin, tragically, did "stay cool."

He was inexperienced with the law, having had only the one juvenile incident from which to learn. He had been, he recalls, represented by the public defender's office, but had talked only with a probation officer, not a lawyer. (Ford's Statement-39, 40.) Later he was arrested on a warrant for a robbery, he was told, and taken to Manatee County where he spent twenty days in jail. There he was represented by a lawyer, but "when I got down there, nobody really said anything to me other than Krautz (the lawyer) came down and talked to me. And I was released." (Ford's Statement-40.)

Alvin grew up in the same neighborhood, traveling infrequently except for occasional family visits. The only

travel, other than for athletic events, were trips taken to Bradenton to play basketball. (Ford's Statement-12.)

Then, as he put it, "When I was of age, I moved to Gainesville." (Ford's Statement-12.) He was not, however, a mature eighteen year old in every respect. Although he had fulfilled many of the responsibilities of the man of the house, he had been in other ways shielded by family, friends and his community from experiences that would have served him well. He was set up for a tragedy, which happened when he found himself accused of murder and on trial for his life.

His court-appointed lawyer, Robert T. Adams, son of a police officer and a former FBI agent himself, was mistakenly understood by Alvin to be the father of a policeman. The victim of the shooting in which Alvin stood accused was a policeman. Alvin knew the feeling of a parent for a son. He had experienced the love and devotion of his own parents all of his life. He knew something of those feelings from his own role and responsibility for his younger brothers and sisters. ". . .I associated how would he feel if that was his son that got shot. And I said -- well, you know, I just can't talk to him, you know." (Ford's Statement-41.) The result: "Well, I told him some things but I didn't tell him everything." (Ford's Statement-41.) This may be compounded by experiences of the event itself, as Dr. Amin indicates in his report: "He experienced uncontrollable rage and subsequent

amnesia for explicit details of the shooting, which is consistent with a hysterical, dissociative reaction." (See Dr. Amin's Report, Appendix B.)

This tragic misapprehension of his lawyer's sympathies and responsibilities has had profound importance in the case of Alvin Ford. His trial and sentencing would not have been so limited in information had Alvin not fallen silent when he should have spoken.

While he would not talk to his lawyer because he did not fully trust him, he would not talk to his family either, because he loved them too much to bear to have them believe that he was anything but absolutely innocent. They continue to believe that.

Many years later a lawyer won Alvin's trust and learned of what he would not speak when it had been so crucially important. It is no less important today, even though its disclosure has come so late.

THE SOCIAL ASPECT

Alvin Ford's story corresponds closely to the classic American tragedy of dreams, disappointments, despair and destruction. It begins with ambitions to attain the brass ring of success and ends in the embrace of that culture of drugs and violence that receives our losers, who then must face the vengefulness of our reaction.

Alvin Ford began his life in poverty, his parents employed at menial labor though always working. Alvin Ford himself always worked, from childhood on, sometimes with his father, sometimes with his mother, later with employers.

> Well, usually I would work with my father. And while I was -- while I was still in high school, I was working part-time at night. And I worked at a Red Lobster restaurant while I was in high school. And when I got out of school, I worked there awhile and I worked with -- at Conley Buick. That's in Bradenton. And -- with another buyguy that did the same type of work my father did, that lives in Rubonia. (Ford's Statement-25.)

Always, he observed those for whom he worked, acquiring their values. Alvin continues to believe in these standard, traditional American values, as his prison letters to students indicate. He believes that education and hard work will pay off, that if one only keeps trying the system will work in return. He became very ambitious and began to dream the dreams of success.

And success came, with progress from dishwasher to cook in his first restaurant job. He went from the "opening

team" of the Red Lobster chain, traveling to new restaurants to open them up (T-1329), to the big break that took him to the Italian Fisherman in Gainesville, where he was soon responsible as assistant manager for supervision of some thirty to thirty-five persons. "Waitresses, bartenders, cashiers, cooks, dishwashers, food service, stuff like that." (Ford's Statement-27.)

With Alvin's quick climb up the ladder of American business, well above the bottom rungs by now, came difficulties.

> I had a lot of pressure on me as far as trying to do everything necessary that an assistant manager should do, as far as I didn't go to school -- didn't go to college in hotel, motel, well, restaurant management. I didn't go to school in doing, you know, that line, that line of work, so I didn't know exactly if I was performing my duties right, and it bothered me a lot.
>
> And I guess I tried my best to do the best I could. It really bothered. I came to a point where I had a nervous breakdown, I think. I'm not sure. I saw a psychologist. (Ford's statement-27.)

Perhaps his problems owed something to dyslexia, as Dr. Taubel suggested, which made it especially difficult, indeed all but impossible for Alvin to handle the mathematics of his supervisory position, such as reconciling the cash register and other book-keeping tasks. (T-1330, 1331, 1332.) Perhaps it was the lack of specialized education in the field of restaurant management. Or it may have been a matter of rising too quickly, before the skills of lower levels had

been mastered and assimilated. In any event, Alvin began to sense that he was not excelling. "It was just my personal feeling that I wasn't doing the best that possibly could be done, you know. Just a feeling. And that feeling was always in the back of my mind, and it really bothered me." (Ford's Statement-28.) He experienced what he believed was a nervous breakdown, so severe that he sought -- and got -- professional psychological counseling. (Ford's Statement-28.) But his depression reached the suicidal point, as he attempted to purchase a life insurance policy payable to his mother.

> Well, I was really depressed to a point where -- I was really depressed to a point I bought a life insurance policy, I think it was $25,000. I had contemplated committing suicide, but -- and I had made the beneficiaries my mother and my oldest sister, for -- I was having so many problems at the time, I just felt like life wasn't worth it -- I don't know. (Ford's Statement-29.)

Alvin experienced his first failure when he finally left the Italian Fisherman, unable to handle the responsibilities to which his career had carried him. He worked for two weeks clerking in a paint store, unhappy with the responsibilities that were so much lower than what he had been used to.

Then he got a job at Union Correctional Institute, not as good a job as he had had, but a second chance, another hope. He resumed his efforts to translate his dreams into reality by putting the traditional values to work for him. He began to think of a career in corrections. (T-1330.) He

enrolled for courses and bought his books for Santa Fe Community College (T-1330.) "I had went to Santa Fe Community College and I had enrolled there in a course in criminology, majoring. I was planning on going there, going to school at night and working over at UCI during the day, but -- that didn't work out." (Ford's Statement-21.)

When Alvin lost the job at UCI he slipped into the familiar syndrome of joblessness, still trying to get work but growing increasingly discouraged. (Ford's Statement-33.) It was a time of recession and high unemployment, especially in Florida in the industries in which Alvin had found employment before. Finally discouragement became depression and he truly "didn't care," as Dr. Taubel observed. (T-1337.) It was for his future and his life that Alvin had stopped caring, not for his family or friends.

Alvin Ford was losing in life and he was received by the sub-culture that welcomes America's losers. His decline came fast and carried him far. He fell in with bad companions and the company of cocaine, becoming a regular user. (T-1335.) Due to his sheltered youth Alvin had never been exposed to drugs before, a common experience for too many of our nation's school children. He quickly became a heavy user of cocaine. (Ford's Statement-34.) He lived a life of highs, the life that Dr. Taubel described.

> This man's behavior pattern suddenly reversed itself and instead of being an essentially responsible person who worked hard, long hours, was rewarded with good pay and responsible

> jobs, he suddenly became a real fat cat in Gainesville. He is swinging. Man, but is he swinging. He is going horseback riding in the morning. Now, that is a bit unusual. He's got a lot of girl friends. Doesn't have any men friends, except one man at the University of Florida that he is close to, but women, horseback riding, cars, out all night, spending a lot of money.
>
> He is acting, I said to myself -- he didn't say this to me -- he is acting as if he were eating, drinking, and being merry for tomorrow you may die. He is acting as irresponsibly as all get out. (T-1334.)

It is not difficult to imagine how overwhelming the street life, to which he had never been exposed, had to be for Alvin. Along the way he inadvertently ingested the drug PCP, or angel dust, which was mistakenly substituted for the usual cocaine at a party. (Ford's Statement-35.) Afterwards he experienced the first violent episode of his life, in which he fired a gun in his girl friend's presence, (Ford's Statement-36, 37) terrifying them both with the uncharacteristic nature of the act. Dr. Amin puts it this way: ". . .the stress he ultimately faced in 1974 was intolerable to him: no work, no income, mounting personal bills, escalating demands from his family, increasing difficulty in concealing his failures from his hometown friends, and a cocaine and PCP alteration of his mental capacity." (See Dr. Amin's Report, Appendix B.) Once again he tried to buy a life insurance policy. (T-1335.) Dr. Amin's observations on the life insurance purchase are as follows:

> Symbolically, he wanted to be remembered for having left something "helpful" in spite of

> the circumstances surrounding what he felt was surely an impending death from his newly acquired lifestyle. Mr. Ford appeared to be suffering from a syndrome similar to battle fatigue, commonly called "shell shock." Sufficient stress can produce this aberrant behavior in otherwise normal people. There is an extreme vulnerability to psychotic acting out during which time there is a temporary absence of the usual human sensitivities. (See Dr. Amin's Report, Appendix B.)

Soon he was engaged in the robbery that took such a tragic turn.

If Alvin for a time managed to escape the poverty that grinds so many down at the bottom of American society, he did not escape the effects of racial discrimination. Even Dr. Taubel's testimony manifests a subtle, if unintentional, racism.

> He is the oldest son in a family of six, a black family of perhaps better than average ability and more drive for success and achievement than I would estimate the average black family to have had. (T-1328.)

> He was making $190.00 a week and two percent net profits commission. Pretty good pay, I thought, and he thought, too, for an eighteen year old black man in Gainesville. (T-1330.)

> He comes from a family that is overstriving beyond their means to achieve and accomplish. He took the father's role as a young man, became the responsible male in the family. One has to realize that in the black culture a responsible male is not the same thing, it is not as common as in the white culture, by any means. (T-1338.)

Such comments could only have diminished Alvin Ford in the estimation of the all-white jury. Nor could the jury respond but negatively to the references throughout the

trial to a "black male" by counsel on both sides. It would be truly tragic if the racism alleged in the Department of Corrections itself contributed to the loss of Alvin's job at Union Correctional Institute. "He had to ride fifty miles from Gainesville to Raiford, each way, and he couldn't make it to the job sometimes (because of mechanical problems with his car) and his supervisor there, a white man, said that, 'You are putting me on. You are joking. You just don't want to come to work.'" (T-1333.)

If Alvin's family spared him exposure to much of the adversity of life, he was confronted with it in the form of the ugly mood at the trial. Officer Ilyankoff was the first Ft. Lauderdale policeman killed in the line of duty. Were the valve stems of his lawyer's car kicked out because Alvin was black or because he had killed a cop? (Letter of Robert T. Adams, Appendix C.) The vengeful gesture reflected the sentiments expressed verbally in the comments in the local newspaper by the reporter who covered the trial.

> And so some piece of human garbage stood over him and shot him to death as cooly as you or I would brush a fly from our sleeve.
>
> And if some murderous thug comes at you with a gun or knife and you shoot him, you're a brutal cop. You've violated his rights. . .
>
> . . .What about the cop's civil rights. Doesn't he rate life, liberty and the pursuit of happiness the same as some sadistic savage whose entire role in life is to cause misery for others?
>
> It seems, in recent years, that the only time we

> hear about civil rights is when some bloody-handed jerk is brought before the bar of justice. (George McEvoy, Ft. Lauderdale News, July 23, 1974, Local Section, p. 1, Appendix G.)

The media was present, even in the jury room, in the form of several magazines featuring crime-oriented stories, one of them an article entitled "The Law: Living on Death Row." (Ford v. State, 374 So. 2d 496, Fla. 1979, p. 499.) More generally the mood of the country was vengeful, with the Vietnam War winding down, a President resigning in disgrace, an oil embargo forcing drivers into long lines, unemployment rising, and frustration and anger on all sides.

These social aspects constitute an important part of the context of the case of Alvin Ford. Like the personal dimension of the case, these elements flow into the legal process itself and contribute crucially to an understanding of the events and circumstances that yielded the sentence in this case.

THE LEGAL PROCESS

The law runs a course by which a case moves by many steps. At each of these the quality or quantity of evidence is influenced; more or less information, better or worse information is received for consideration by jury and judge as to guilt, then as to sentence.

Prior to these steps in the fact-finding process others took place which influenced the nature of the fact-finder, the jury. At some of these steps decisions are made which involve the interpretation and application of rules of law and in some instances the scope of discretion to apply a rule or not. All of these steps have influenced in varying degrees the fairness of the jury, especially in its representativeness and objectivity, in the first instance, and the fullness of the fact-finding process, in the next. Some of these decisions were noted by objection or by motion by defense counsel; others were not. Some were presented to the trial judge as the basis for a motion for a new trial; others were not. Some were appealed to the Supreme Court of Florida; others were not. And some were taken to the United States Supreme Court on petition for writ of certiorari; others were not. Some few of the issues joined in the reviewing process were resolved favorably to the defendant; most were

not.

The resolution of any one issue unfavorably to Alvin Ford would not have been determinative of the outcome on the issue of guilt, although the issue of the impeachment of the only eye-witness by her prior inconsistent statement, would surely have been crucial to the question of guilt, for it involved the very identification of the person who fired the third shot. The cumulative effect of all those other decisions, however, which were resolved unfavorably to Alvin Ford, may have been determinative on the question of guilt. The cumulative effect of those decisions resolved unfavorably to him surely has been determinative on the question of his sentence.

The obligation of an appellate court is to scrutinize each such ruling that is called into question in the regular course of the legal proceeding and to determine if the decision made at that step in the process accords the rules of law. The job of the appellate court, even the highest court of the state or nation, is discharged when it has held that the trial judge ruled--or did not rule--according to the law. The appellate court is not concerned about the whole of a case, the cumulative effect of the many steps in the legal process. The executive, however, is able to keep the totality of a case in view. The executive can and must ask the question, was it right for the case to come out as it did,

given the course it followed and the cumulative effect of the many rulings made during its course of movement? Was justice done by the quality of the process in its entirety, including its appellate review?

All of this is to say nothing of the intangible qualities of a case, about which little can be said until time has passed and the case is in perspective, a perspective the appellate courts do not have--or take--in their legalistic review. The overall review of the whole of a case is not a function of an appellate court, which necessarily views cases legalistically; but is a function of the executive, which views cases with an eye to the fundamental justice of the outcome. The executive views cases not so much with the mind's eye to the rationale of a given decision but with the heart's eye to its fitness. The executive must have at the ready an exquisite sense of doubt, to discern with acute sensitivity whether a verdict and sentence are reflective of justice. The American Law Institute must have had in mind such a sensitivity of doubtfulness in its provision for exclusion of the death sentence when such uneasiness exists:

> (1) Death sentence excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree (not death) if it is satisfied that:...
> (g) although the evidence suffices to sustain the verdict, it soes not foreclose all doubt respecting the defendant's guilt. (Section 201.6 (1))

If the American Law Institute would have that made available to the trial judge, then it must be even more applicable in principle to the executive in clemency because the spirit of that provision accords so well with the function of clemency. The executive, unlike the jury, may entertain doubts that are more subtle less than those which justify a verdict of acquittal for failure to meet the burden of proof in criminal cases.

In the case of Alvin Ford, when the case is taken as a whole, when the cumulative effect of all of its steps of shaping the fact-finding (the jury), the finding, the facts, are taken into account, a lingering doubt remains. It weighs heavily in the scales of sentencing.

At this point several of those steps will be reviewed, to note some limitations, some weaknesses in the process by which Alvin Ford's case moved along its course. First, the jury's representativeness of the community will be shown to be limited in terms of its racial composition and sentiment on the death penalty. Second, the jury objectivity will be shown to have been subject to influence by publicity and outside communications. Third, that in the fact-finding process itself, the quality of three important pieces of evidence will be examined.

As observed before, most of these, which have been in appellate review, have been resolved unfavorably to Alvin

Ford. No one of them--with the exception of the impeachment of the eye-witness testimony--can be said with confidence to have been determinative. But it is the quality of the process taken altogether that is the point of this review.

The racial composition of the jury cannot be ignored in this case. Step by step in the jury selection, defense counsel notes that there were no blacks. (T-64, 248) The jury ended up all-white. In addition, it heard reference throughout voir dire and trial, dozens of times, to the terms "black male" and "colored boy" and other racial expressions, including "black chick".

No less important was the inadequacy of the jury selection in respect to the defendant's rights in Witherspoon not to have prospective jurors opposed to capital punishment automatically dismissed for cause. The weakness of the process in this respect is revealed in the method followed. The Court read an instruction to the panel on the Witherspoon requirements (T-122), then asked for a show of hands and excused the twelve who raised their hands in response, defense counsel noting that he would question them because the Court's instructions "are meant to be clear but sometimes they are confusing as all get out." (T-124) The Court withdrew its excusal of the twelve (T-125), so counsel could inquire, which he did by addressing the panel as a whole (T-126), but on

the issue of the new Florida statute, rather than the Witherspoon requirements, stating at one point, "I am confused too;" (T-129) then getting into the Witherspoon requirements, and finally asking, "Is there anyone of you who still feels that you could not give this defendant a fair trial because of some inner feeling, or perhaps concern about that possibility of the death penalty being imposed by the Court?" (T-129) A veniremen said, "I don't want to be responsible." (T-130) Adams asked, "You still don't want to sit on this jury because of the law that might be applicable; is that it?" (T-130) Adams opposed the challenge, but the Court excused them all. Then the same veniremen said, "I'm sorry, Your Honor, I was a little confused by the wording on that. Does that mean that we are not willing to be on the jury on account of the death penalty or the second clause?" (T-131-132) Another, referring to the judge's explanation, said, "In my mind it wasn't that way. It being what the case is; if I didn't think that absorbing all that, that I could come up with a fair verdict." (T-132) Yet another said, "That is the same think (sic) differently." (T-132) Then the Court, "In an abundance of caution again," took their names and excused them. It is clear from these exchanges that the prospective jurors did not understand the judge's instruction, that the polling of the panel for a show of hands was inadequate in revealing their capacity

to function in accord with Witherspoon, and that they were not interrogated any further, either individually or collectively, in any way as to reveal that. Hence, the defendant was denied the right to have such jurors as there might have been among them who could function accordingly. There were 12 so excused from the first panel of 29.

The Court was not insensitive to prejudicial influences on the jury, because it dismissed the first panel of jurors, who had been able to see the shackles on Ford under the table where he was sitting, an indication as well of heavy security. (T-105-110)

Far more important was prejudiced outside influence through the media. Defense counsel first brought up sequestration of the jury on the first day of the trial, but the Court resisted it, "even though there are emotional attitudes, political implications. This isn't Watergate." (T-28) The motion was made later but denied. The publicity, however, as revealed in the clippings from the local newspaper (See Appendix G.), indicate heavy prejudicial publicity of the sort that would infect the entire atmosphere of a community, as the judge noted, hence of the criminal trial itself. There is serious doubt, despite the formal questions and answers in voir dire, to say nothing of the high number of challenges for cause on this score, that the jury was not biased by pretrial publicity and by publicity during trial.

At one point Adams brought to the Court's attention some local radio and television commentary he had heard pertaining to the case, including one which "came on with another jibe in the nature of an editorial which was, in my opinion, critical of court personnel for allowing this thing (shackling of Ford) to have happened." Urging that it might likewise affect prospective jurors, Adams renewed his motion to sequester the jury. The trial judge said this:

> In any event, there is no question in my mind that there was a considerable recitation of the shackles situation, and I know I am not a bit concerned about the critical aspect of it. I admitted to it very candidly and it may certainly may have very well been my fault for not having cured it.
>
> Nonetheless, it occurred. I surely don't want to declare a mistrial and set this thing over for your consideration but I tell you that possibility exists in my view. (T-235-236)

The effectiveness of sequestration, even change of venue (if it had been proposed), is doubtful because it was not possible even to keep crime-oriented, indeed capital punishment-oriented reading material out of the jury room itself, as pointed out earlier.

Finally, without sequestration one juror did have contact with outside persons but told the Court, when called out of the jury room to do so, that nothing had been discussed other than the mere mention of his membership on the jury.

The Florida Supreme Court said:

> ...the transgression allegedly committed by the juror is not the evil at which sequestration is directed. Sequestration is designed to keep the jurors insulated from improper influences during the course of the trial; the phone call suggests that Huber had made up his mind before trial and was attempting to express his views to others, not vice versa." (Ford v. State, 374 So. 2nd 496,5000)

The Court observed that Huber was not dismissed and replaced with an alternate, as if that cured the problem. The important result in retrospect is that Huber's experience, "called on the carpet" of the Court, could not have made him anything but antagonistic to the defense and the defendant, hence less likely to decide objectively on guilt or on sentencing.

Of the major pieces of evidence, one was a statement of the defendant, given to the police. There was a motion to suppress that statement and a hearing on December 6, 1974. The Court announced on the opening day of trial:

> the Court found that the requirements of the so-called Miranda rule had been met and these statements attributed to the defendant were freely and voluntarily made.

But the circumstances surrounding the taking of the statement do bear notice. The officer taking the statement, in a six-seater plane, sat directly across form Ford and another sat alongside him. The police detective acknowledged in his testimony

that Ford had requested an attorney:

> A.: I was aware they had given him permission to contact an attorney up in Jacksonville; yes sir.
>
> Q.: You were also aware he was unable to talk to his private lawyer?
>
> A.: I was aware of that; yes, sir. (T-1139)

The officer acknowledged that he went ahead and talked with Ford, that he knew Ford had tried to contact his lawyer but could not reach him, that Ford would not give a written statement, that he did not give a written waiver of his right to an attorney, and that the officer made no notes of the conversation (T-1140-1141) --all of this in a six-seater plane, at 5:30 a. m., surrounded by police officers, no one else present, approximately twenty hours after the shooting, after hours of driving about Florida. (T-1131)

The testimony of co-defendants was important in the case against Ford. The unreliability of such testimony needs little comment. Some are in order, however, with reference to one of them. George DeCosta was extremely unreliable, causing even the State Attorney "to have George Angelo DeCosta considered a hostile witness and I would like to impeach him." (T-591)

Later the prosecutor stated to the Court: "On November 26th, he gave me a lengthy statement and I am surprised and appalled by his lack of truthfulness as to what he is saying

in this courtroom." (T-594) In addition DeCosta pleaded guilty and three days later made his statement to the prosecutor. (T-624) Finally, this exchange occurred between defense counsel and DeCosta:

Q.: Well, kind of sum it up for the jurors and the Court, George. How come you finally made these statements that you made, these five statements culminating in the one that Mr. Satz here, the prosecuting attorney, took; why did you do that?

A.: The five?

Q.: Why did you make those statements that I asked you about earlier, the last of which was the one to Mr. Satz?

A.: How you mean after the one I made to Mr. Satz?

Q.: How come you talked to the police and gave them statements throughout this proceeding those four or five times that we talked about earlier; why did you do that?

A.: I don't really know.

* * * * * * *

Q.: I will ask you one more time. Do you know why you made those statements to the officers and Mr. Satz?

A.: I know why I made it to Mr. Satz.

Q.: Well, that was because you made an arrangement for a quilty plea with your lawyer and the prosecutor; isn't that it?

A.: Yes, Sir.

Q.: To second degree murder?

A.: Yes, sir.

Q.: Now, why did you make those statements to the police officers, one of whom had shot you while stripped and handcuffed?

A.: Because they threatened me.

Q.: Because you were threatened?

A.: Yes, sir. (T-647-648)

Of major importance is the question of the impeachment of Mrs. Buchanan. This step in the process will be taken up in detail later in the discussion of sentencing.

One response to this review of a legal process exhibiting limitations along several of its dimensions is of course that the criminal trial is a human institution. The trial judge put it in the usual way at one point, in connection with the possibility that prospective jurors had been influenced by publicity:

> It is pretty well settled law that even in first degree cases that the defendant is not guaranteed a perfect trial. Human beings being what they are, I don't know of any way to give him a perfect trial. All he is entitled to is a fair trial, as I understand the law. (T-236)

But that is precisely the point: the criminal trial is not perfect; it is far from perfect. This is all the more reason for caution when it comes to carrying its product--a conviction and sentence--to the level of irrevocable

consequence, the death penalty. This is precisely why the American Law Institute has proposed one final check on the movement of a case toward the death sentence, a check that would empower even a judge to withhold the death sentence when he has that lingering sense of doubt about guilt itself. The doubt that justifies withholding the death sentence <u>after</u> guilt is established should be so much more subtle, and it is to that stage of the process that this memorandum now turns.

THE SENTENCING PROCESS

Clemency, by its nature as "an act of grace proceeding from the power entrusted with the execution of the laws" (Rules of Executive Clemency of Florida, September 14, 1977), is not confined by laws nor is its exercise dependent on laws. It is unlike the judicial power, which is rooted in, bound by, and thoroughly preoccupied with laws. Yet some attention must be given here, in a "legalistic" way, to certain matters of law: the statutory schedule of factors, or circumstances, by which the sentencing decision is guided in capital cases.

The law of Florida in Section 921.141 clearly evinces a legislative intent that Florida's policy that certain capital felonies may be punished by death must be implemented with the utmost care and caution, lest a life be taken wrongfully.

In subsection (1) of Section 921.141, which provides for a separate sentencing proceeding, it is stated that "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6)." This suggests that the evidence on which the sentence is to be based is not limited to matters relating only to the specified circumstances. But the statute goes on to state in Subsection (5) that "Aggravating circumstances shall be limited to the following, ..." --

that is, to those aggravating circumstances specified in the statute. The scope of evidence of the nature of the crime and character of the defendant is not so limited, not only because Subsection (6) states that "Mitigating circumstances shall be the following," -- that is, the mitigating circumstances specified in the statute, but also because the Supreme Court of the United States has so held in Lockett, 438 U.S. 586 (1978), which the Florida Supreme Court has followed in Songer, 365 So. 2d 696 (Fla. 1978).

The law in Subsection (2) provides for an advisory sentence by the jury based upon "whether sufficient aggravating circumstances exist as enumerated in Subsection (5)." The jury must also decide "whether sufficient mitigating circumstances exist," including but not limited to those enumerated in the statute. It is important to note that the requirement is for sufficient circumstances, not merely the existence or presence of such circumstances. The intention of the legislature is clearly to require of the jury a discrimination between any circumstances which might be of an aggravating or mitigating sort and which happen by their nature to fit the statutory category on the one hand, and circumstances which are sufficient. The nature of the circumstance is necessary but not sufficient. The obligation on the jury is thus to weigh the evidence of such circumstances. This includes not only the aggravating and mitigating circum-

stances against each other but the evidence within each enumerated category of circumstance. This is the analytic exercise that is imposed upon the jury. The evidence of the jury's analysis is an advisory sentence stating that it has so found, that the mitigating circumstances do not outweigh the aggravating circumstances, and that the sentence should be death and not life imprisonment.

This is a recommendation the court need not follow. If the court does not follow the recommendation it must itself weigh the aggravating and mitigating circumstances and then enter a sentence based, in the case of the death sentence, on a specific written finding of fact based upon the circumstances in Subsections (5) and (6) and upon the records of the trial and the sentencing proceedings.

It is clear that the legislature intended a weighing process involving sufficiencies and not merely an indentification or enumeration coupled with a counting of so many on the one side, so many on the other. It is not clear that the legislature intended a full discussion of the findings of sufficiencies and insufficiencies in the weighing process. It is, however, in the spirit of the proceedure that such a discussion would occur, especially because the ideas that were "in the air" at the time of Furman and the early legislative responses to it suggest that the legislature had in mind a judicial decision-making analysis somewhat like the one which was described in Judge Marvin Frankel's widely

discussed 1972 lectures, which were later published in his book Criminal Sentences, in which he described the process by which judicial sentencing decisions would be made according to "codified weights and measures."

> The sentencing judge commonly faces a decision within a huge range -- for example, anything from probation to twenty-five years in prison for armed robbery of a federally insured bank. In deciding where to fix any particular sentence, he will presumably consider a host of factors in the case: the relative seriousness of the particular offense -- the degree of danger threatened, cruelty, premeditation; the prior record of the defendant; situational factors -- health, family disturbance, drug use; the defendant's work history, skills, potential, etc. In the existing mode of handling the sentence, the judge is under no pressure -- and is without guidelines -- toward systematic, exhaustive, detailed appraisal of such things one by one. He probably does not list them even for himself. He certainly does not record or announce the analysis. Probably, in most cases, he broods in a diffuse way toward a hunch that becomes a sentence. It may be a lenient or a harsh sentence. But even that cannot be stated with vivid meaning. Only other hunches, equally unstructured, supply the standards of comparison. And there is, of course, no explicit course of reasoning anyone -- an appellate tribunal, for instance -- could rationally approve or disapprove.
>
> The partial remedy I propose is a kind of detailed profile or checklist of factors that would include, whenever possible, some form of numerical or other objective grading. Still being crude and cursory, I suggest that "gravity of offense" could be graded along a scale from, perhaps 1 to 5. Other factors could be handled in the same way. The over-all result might be a score -- or, possibly, an individual profile of sentencing elements -- that would make it feasible to follow the sentencer's estimates, outweigh them, and compare the sentence in the given case with others. (Criminal Sentences, pp. 113-114)

The analysis of aggravating and mitigating circumstances in Alvin Ford's case was far from this kind. The court instead merely identified items and declared certain stated things as "FACT," following each statement with a "CONCLUSION." This was perhaps the best that could be done in the early experimental days of Florida's new capital sentencing system, but surely it was not in the spirit of the legislature's intentions as indicated by its requirement of a weighing of the circumstances.

Without reasoned analysis by the sentencing authority, it is not only difficult but often all but impossible to analyze adequately the decision which is the subject of review. This is why the Florida Supreme Court called for reasoned judgment, not discretion, in the sentencing process in Raulerson, 358 So. 2d 826 (1978). The sentencing in Ford's case falls far short of this.

In the clemency review, there is no requirement that this decision-making procedure be reviewed, let alone replicated. But it is so important that these dimensions of Alvin Ford's case be understood clearly that it is necessary to examine the aggravating and mitigating circumstances one by one, because the trial judge found each and every one of the aggravating circumstances and not a single one of the mitigating circumstances.

The Aggravating Circumstances

The Supreme Court of Florida, in Ford v. State, 374 So. 2d 496 (Fla. 1979), dismissed three of the findings: (5) (a)-- capital felony committed by a person under sentence of imprisonment; (5)(b) -- previous conviction of another capital felony or of a felony involving the use or threat of violence to the person; and one or another of (5) (d) -- capital felony committed in the course of certain offenses including robbery, and (5) (f) -- capital felony committed for pecuniary gain. The court's opinion is not clear as to which one of the last two should stand, because "consideration of the appellant's conduct as two independent aggravating factors is faulted by our ruling in Provence v. State, 377 So. 2d 783 (Fla. 1979)" -- and this holding does not say which of the two factors remains after their merger. But an aggravating circumstance consisting of an underlying felony by which a less-than-capital homicide is converted first into a capital felony, then into a presumptive death sentence, cannot have been intended by the legislature. It would permit the underlying felony to be employed once again, in a pyramiding fashion, to convert a less-than-capital homicide automatically into a death sentence, and the legislature could not have intended such an anomaly. If Provence forbids doubling among the aggravating circumstances horizontally as it were, then a fortiori, that

reasoning forbids vertical doubling. The legislature, knowing that the history of felony-murder is strewn with tens of thousands of miscarriages of justice, could not have intended the possibility of a compounding of this by introducing an aggravating circumstance that automatically bootstraps a non-capital homicide not only into a capital felony but into a death sentence. So, fundamental fairness requires that the underlying felony circumstance be put aside and reserved for a case where its use is proper.

Of the remaining factors, the court said that "the evidence convinces us that the other five aggravating circumstances may properly be said to exist in this case." (p. 503) Those five include the one discussed immediately above, which will be put aside at this point. Three others were not addressed by the court beyond that statement. The issues with respect to all of these were joined in the petition and response in the certiorari proceeding but were not resolved by the denial of the petition. They are still very much at issue.

Subsection (5) (c) -- knowingly created great risk of death to many persons, was examined in the Kampff case, 371 So. 2d 1007 (Fla. 1979), in which five shots were fired in a bakery where two people were present and others were in the general area. In Ford's case, apart from the victim himself, the only other person in the area was a woman in a

room within the restaurant building itself and behind a door. In Kampff the court said "great risk" means a high probability of death; moreover, death to many persons, which means more than a small number (pp. 1009-1010). The intent of the legislature was to provide for the situation of a bombing, not a shooting within a confined area in which only one person is present. In addition, this factor requires that the "great risk of death to many persons" be created knowingly, and as the memorandum will indicate later, there is grave doubt on Alvin Ford's state of mind.

Subsection (5) (e) -- capital felony committed for purpose of avoiding or preventing lawful arrest or effect escape from custody, and Subsection (5) (g) -- capital felony committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, must be merged because they refer to the same action of the police officer. The Florida Supreme Court in Clark v. State found the doubling of these factors to be improper. The specific intent suggested by the word "purpose" in (5) (e) which is implicit in (5) (g), must be viewed in connection with the testimony of the witness, to be presented below, as to whether Alvin Ford could reasonably be said to have had any intention to shoot the policeman as an officer of the law or in the exercise of his functions.

Finally, Subsection (5) (h) -- capital felony especially

heinous, atrocious, or cruel, was the one aggravating factor the court upheld with reference to specific facts. It said:

> The testimony of Mrs. Buchanan was that Officer Ilyankoff, after being wounded twice, was shot a third time when he posed no danger to Ford's escape and was in fact trying to cooperate with the armed appellant. We therefore make the specific finding that the killing was "especially heinous, atrocious, or cruel" under section 921.121 (5) (h), Florida Statutes (1975).

It must be said that the cases decided by the Florida Supreme Court itself do not support this conclusion, even when the central facts are taken as strongly as they are stated there. Thus, it is the melancholy task of the executive in clemency to correct for the errors even of the Supreme Court itself, for the court has held as follows on the circumstances of "heinous, atrocious, and cruel" circumstance. In Fleming, 374 So. 2d 954 (1979), the court held that the murder of a police officer is not in and of itself heinous, atrocious, or cruel. In Lewis, 377 So. 2d 640 (1979), the court held that shooting a victim who is already wounded, shot once in this instance, and then shot in the back while fleeing, is not heinous, atrocious, or cruel. In Sullivan, 303 So. 2d 632 (1974), the court found an "execution-type slaying" in which the victim's hands were tied behind the back, there was a beating, and finally a shooting. However, in Riley, 366 So. 2d 19 (1978), the court held that shooting a victim while bound and gagged is not heinous, atrocious, or cruel. In Menendez 368 So. 2d 1276 the court held that

shooting a storekeeper twice while his arms were held surrenderingly was not heinous, atrocious, or cruel. Finally, in Kampff, 371 So. 2d 1007 (1979), the court held that a pistol shot at the head of the victim was not heinous, atrocious, or cruel. These cases contrast sharply with Alvin Ford's, even as it is generally described by the court as above. The contrast is even sharper when the contents of the eye-witness testimony are set out in detail.

Barbara Buchanan was at work that Sunday morning, about 8:15 a.m., when she heard a scream (T-749). She came out of the kitchen and exited by a side door (T-750), ran to the rear of the building, and was stopped by a young man with a rifle who told her to "get back inside and be cool." (T-751.) She saw her co-worker being chased by another young man (T-751), caught and brought back to the restaurant (T-767: cross examination). Buchanan herself was taken to the rear door by the young man with a rifle. She saw another co-worker in the kitchen being held by the arm by another young man (T-752).

Mrs. Buchanan was then put into a room outside the kitchen with a slatted or louvered door, which was closed (T-753). She saw the policeman arrive and approach the kitchen door carrying a clipboard and keys (T-757). The door was wedged open with an apron (T-757), which had been thrown there before the officer's arrival (T-769: cross

examination), thrown from the inside (T-770: cross-examination), while she was inside the utility room (T-770: cross-examination). She saw him open the door with his right hand, whereupon she heard two shots and saw him fall back outside the door (T-757). She then heard him call on his radio that he had been shot (T-758). Then she saw him "while he struggled himself up almost against the wall." (T-758.) She saw Alvin Ford come out, go to the police car, and come back. (T-758.) He asked for the keys, saying, "Man, where are your keys?" The police officer replied "I don't know." Alvin Ford again asked, "Man, give me your mother fucking keys." Buchanan then saw Ford pick up the keys and "Then he shot the policeman." (T-759.) It was "in the head." (T-759.) "He was standing right to him." (T-759.) Ford then took the officer's gun from his holster (T-760) and went to the police car. "He ran and jumped in the car" (T-762) and left (T-760).

In contrast to the Florida Supreme Court's description of the event, Mrs. Buchanan's testimony states that the officer had been able to radio that he had been shot and then raise himself up -- not clearly a policeman posing no danger; moreover, her statement indicates no attempt to cooperate -- merely that Alvin Ford picked up the keys. The court has made inferences from the testimony that are not warranted by the facts as established in that testimony.

Mrs. Buchanan's testimony must be discounted to some degree by the feelings of terror she must have experienced, only a louvered-door away from such a scene. That she could have peered through the slats at all, in such a moment, is a remarkable feat, let alone observe -- and later describe -- the event in any degree of dependability.

The confidence level of Mrs. Buchanan's testimony is lowered even further by her acknowledgment of having had four conversations with the police in connection with her visits to the line-up (T-784: cross-examination) and that she had talked more than once with the prosecutor (T-785: cross-examination). She admitted that her stories differed.

> Question by Mr. Adams: "With regard to these three or four times you talked to the officers and at least a couple of times with Mr. Satz, did your stories differ, at least to some extent, considering all of those statements?"
>
> A. "Yes."
>
> Q. "They did; correct?"
>
> A. "Yes."

Beyond this, Mrs. Buchanan's testimony produced a remarkable Catch-22 of the law that could not but work to Ford's disadvantage. After cross-examination of Mrs. Buchanan was completed and she was dismissed as a witness, Ford's lawyer learned from other lawyers over lunch that she had made an inconsistent statement at a bail hearing (T-1016, 1017), which the State Attorney later did not deny (T-1146).

He sought to have her recalled to lay the foundation for impeachment by prior inconsistent statement, but his request was denied upon the State Attorney's successful objection that he had had "full opportunity to cross examine." State procedural rules precluded her from being called as a defense witness and impeached (T-1017) and the State Attorney objected successfully to having her declared a hostile defense witness, there being no surprise to the defense (T-1018). Later, defense counsel attempted to call a police officer for testimony that Mrs. Buchanan had admitted to him that she could not identify the person who fired the shots nor see him above the waist. The State Attorney objected successfully on the ground that a proper predicate had not been laid for impeachment, in that Mrs. Buchanan, while admitting to prior inconsistent statements, had not had her attention drawn to this particular one to admit, deny, or explain it. The earlier ruling preventing her recall as a witness, of course, made it impossible to lay the predicate for impeachment. The ruling to deny recall of a witness is within the discretion of the court, but it was exercised in a way that worked a most unfavorable result for Alvin Ford, in light of the effect such impeachment would have had on her testimony as the only eye-witness to the event, indeed as the only witness to the very identity of the person who fired the third shot. In a capital case that discretion

should have been exercised on the side of evidence. The fact-finding process, certainly in capital cases, must be as full and as fair as possible.

There was no testimony other than that, yet many questions are left unanswered. How, precisely, was Ford Positioned? Was he standing, bending, crouching, squatting? How precisely was he holding the gun? Was he aiming it, swinging it, pointing it? Was he holding it in a two-handed grip, one-handed, arm bent or straight? Was he still, motionless? Was he moving slowly or quickly, smoothly or jerkily? Was he calm, agitated? Was his voice calm, quivering, soft, loud? Was he shouting or screaming? Was he inches away, or three, four, five feet away? Or more? Was the police officer more upright than prone, was he still, was he moving, did he move any part of his body, a hand or an arm? Did Ford turn to run? Did he take a step, did he whirl about, did he pause? Was the shot fired as he turned to leave? Or before? To characterize the third shot as that of an execution flies in the face of everything that is known of Alvin Ford. Even if he had qualities that might have made possible such a motive, it must be remembered that the third shot was fired only moments after the first two. Alvin Ford was surely, as would anyone be under such circumstances, in a state of terror-stricken panic, desperate to get out of there. Dr. Amin thinks it was fired with Alvin

"in a residual hysterical panicky state which still viewed the fallen officer's attempt to retrieve his gun as threatening." (See Dr. Amin's Report, Appendix B)

Alvin Ford's own account changes the picture of the shooting by providing structure for the event and specific steps within it--which are crucial in the illumination of the circumstances of aggravation and mitigation discussed below. However, it was unavailable at the time of the trial.

Other steps could have been taken that would have changed the situation. First, closing arguments by the defense at the end of the sentencing hearing were limited to observations on the nature of the death penalty. It was not a point by point analysis of the application of the aggravating and mitigating circumstances to the facts of the case. Such a detailed summary could not have been anything but helpful to the jury in the deliberations and to Alvin Ford in his sentence. It might have persuaded a majority of the jury to recommend a sentence of life imprisonment. As it is, the jury apparently was divided because one of them, one Dorothy Watkins, on the polling of the jury on the question of whether the advisory sentence was "the majority vote" said, it was the second time: "The second time it was." (T-1359) What influence an advisory sentence of life imprisonment would have had on the trial judge cannot be known, but it could not have influenced him in the direction of a death sentence, and may have influenced him on specific findings.

The second ommission was of the submission to the jury of the statement of the aggravation and mitigating circumstances. The judge, defense and prosecutor (their colloquy is set out below) manifested considerable uncertainty as to what to do and elected to follow defense counsel's preference, which was not to allow the jury to have a statement but to permit the judge to read it to them. If the jury had the statement with them, it is problematic as to what they would have done. But with specific requirements before them, they would in all probability have found it more difficult to reach a majority decision on an advisory sentence of death.

The third ommission was of a jury instruction that aggravating and mitigating circumstances must themselves be proved beyond a reasonable doubt. State v. Dixon, 283 So. 2nd (Fls. 1973) held that aggravating circumstances must be proved beyond a reasonable doubt; accordingly, there should have been an instruction to that effect. Barbara Buchanan's testimony, when viewed under an instuction that it demonstrate beyond a reasonable doubt the elements of the aggravating and mitigating circumstances, would surely have failed to measure up, however adequate her testimony might have been on the seperate issue of guilt in the earlier phase of the bifurcated trial.

Had the judge and jury been provided with more information about the offense and the character of the defendant

that information could have been developed (a) on the basis of Alvin Ford's own disclosure, and (b) by means of a modern sentencing hearing. It must be much more likely that the jury, so informed, would have advised the judge to sentence the defendant to life imprisonment. What influenced this would have with the judge is problematic, especially given his finding and all of its aggravating factors. But the primitive qualities of the hearing in those days, to say nothing of the limited body of information available to him, suggests that his sentence might well have been different.

The Mitigating Circumstances

What might have developed at sentencing is speculative, but in all likelihood it would have worked in favor of life imprisonment for two additional reasons.

First, Alvin Ford's disclosures which were made years later, had they come out at the time of the trial or at least in the sentencing phase, would have led to the development of more extensive information in mitigation. The mitigations would have fit the several statutory categories and also gone beyond that into the general area of character, including the extensive mitigating circumstances now permitted by Lockett.

Second, the sentencing hearing itself would be a different one now than it was then. When the hearing was held in January 1975 there was little experience with the bifurcated trial. Lawyers generally, including prosecutors, defense counsel and judges, scarcely knew what they were doing. The colloquy among court and counsel in Alvin Ford's case at the time of the sentencing hearing reveals the extent of the uncertainty and uneasiness.

> THE COURT: Madam Reporter, continuing the case of the State of Florida vs. Alvin Bernard Ford, let the record reflect the presence of Mr. Ford, his attorney Mr. Adams; Mr. Satz

THE COURT: for the State. The jury is without the courtroom.

Gentlemen, I have received a communication from the jury. I will read it for the record: "Judge Lee, we would like the list of charges regarding the definitions of aggravating circumstances and mitigating circumstnaces. Signed, L. Pati, Foreman."

What is your pleas(ure) gentlemen? What is the State's attitude?

MR. SATZ: Your Honor, since this is a relatively new proceeding, I would like the defendent to, through his counsel, state his feelings on it and if I could possibly go along with it, I will.

MR. ADAMS: Well, I have no qualms with that Judge. I am absolutely against giving it to them, again. However, apparently, there is some question. They took the trouble to write it out. If the Court is going to give it why I request that it be verbally and that we proceed as we have and not send in the written instructions.

THE COURT: What is the State's view?

MR. SATZ: Your Honor, I will go along with that, if the Court wants to read them to the jury once again.

THE COURT: Is that proceeding acceptable to you? I am asking what your view is.

MR. ADAMS: No, number one, I am kind of taking a retreating position. Number one, I would request that the Court just merely answer the question to the effect that you have heard the law as applied to this case and ask that you recall it as best you can.

THE COURT: Frankly, I am inclined to concede to the defendent's request in this proceeding.

MR. SATZ: I am going to yield to the Court on this.

THE COURT: I appreciate that. Thank you for your view.

MR. ADAMS: Judge, there is one other matter.

THE COURT: If you wish to be heard on it, I will be happy to listen.

MR. SATZ: Once again, I will yield to the Court. The only thing I can liken it to, sir, is the regular jury instructions during the course of a trial other than a capital one or a capital one prior to the second part of the trial, where the jury would want some instructions read back. The Court usually reads the instructions requested.

THE COURT: Yes, I may retreat from my position. You are right. That, ordinarily, we do.

MR. SATZ: If you read, Your Honor, the totality of your charges once agian, which would include mitigating and aggravating, I could see no harm in that.

THE COURT: Mr. Adams.

MR. ADAMS: I am opposed to it, as I announced, Judge.

THE COURT: I appreciate that. The jury is obviously in some quandry. They have taken the trouble to write a request and the Court feels it is an appropriate one under the circumstances. The Court retreats from its prior position. However, I will accede to Mr. Adams and not send the charges in but I do propose to read the mitigating and aggravating circumstances again.

MR. SATZ: Once again, I will reiterate my agrument that I made prior to that and leave it up to Mr. Adams.

MR. SATZ: He doesn't want the instructions going back and I will again yield to that.

THE COURT: All right, sir. Thank you. (T-1350-1353)

Had such a hearing been held presently and handled with the sophistication that has come with time and experience, the results would have been a sounder base of information. The circumstances in Alvin Ford's favor would have been developed fully, even those about which there was information at the time, to say nothing of those things that came to be known years later.

For instance, despite pharmacological information on the effects of cocaine, Dr. Taubel in his testimony referred to cocaine vaguely and as though it were merely an immoral aspect of Alvin's lifestyle. The effects of cocaine and of PCP on behavior could have been identified to illuminate the mitigating circumstance of Subsection (6) (g)-capital felon committed while the defendant was under the influence of extreme mental or emotional disturbance. Psychiatric testomy could have been oriented toward specific circumstances of mitigation, as in Dr. Amin's report: "At the time of the crime, Mr. Ford suffered an overwhelming anxiety reaction which triggered a violent dissociative hysteria. He acted out his fear and rage, protesting the destruction of himself and his goals in life." (Dr. Amin's Report, Appendix B.)

THE DEATH PENALTY

The policy that a murderer's life may be taken in punishment for his crime is carefully formulated in the death penalty statute and administered according to hundreds of rules of law. Each step of the process however bound by rules it may be in a formal sense, involves a decision that is a judgment combining both justice and mercy, a judgment that is generally intuitive in the degree to which a rule is relaxed in the interest of mercy. Some steps, however, are less bound by rules than others, hence more reflective of community sentiment on the combination of justice and mercy.

There are three points at which these judgments are relatively unconstrained by rules, hence where discretion is broad, hence where the judgment is relatively more reflective of the sentiment of the community. These are the decision (or many decisions) of the prosecutor with respect to the charges; then the jury in conviction and the jury and judge in sentencing; and finally, the Governor and Cabinet in clemency. The process by which a case moves from each such step to the next is relatively more rule-bound, hence less reflective of community sentiment.

One of the early judgments that reflects the community's openness to life for Alvin Ford was the apparent willingness of the prosecutor to entertain discussions of a plea of guilty. The colloquy on this point at the opening of the trial went as follows:

THE COURT: Mr. Adams.

MR. ADAMS: Judge, I think the record should reflect, initially, that there have been conferences with Mr. Satz and other personnel of the State Attorney's office with regard to the possibility of a plea. I want the record to show that I did not leave that stone unturned.

THE COURT: I see. All right, sir. Surely I appreciate it.

MR. ADAMS: Nothing was able to be gained from it.

THE COURT: Nothing was able to be resolved but you acknowledge in fact you were contacted by the State Attorney with the possibility, with a view of negotiating a plea.

MR. ADAMS: Not only to negotiating a plea but we have had many conferences with reference to the case itself and discussions about the case and the evidence.

MR. SATZ: Let the record further reflect that this conference is outside the presence of the jury, and no juror or prospective jurors are present. (T-8-9.)

This is very important because a plea of guilty to first degree murder, let alone to a lesser charge, is not exchanged for a death sentence. The judgment of the prosecutor must have been that this was a case that did not necessarily call for the death sentence.

The next judgment-point indicating the community's sense of the appropriateness of the death sentence is the advisory sentence of the jury. Apparently the jury divided in its initial vote, as observed earlier in the discussion of the sentencing process. It is very important to note that this cross-section of Ft. Lauderdale itself, a jury whose selection

was not free of faults, a jury whose members were exposed for months to prejudicial publicity, a jury which was not protected by sequestration from the mood of the community during the trial itself, nevertheless divided in its first vote on life or death.

The remaining judgment-point in this case is the clemency decision, in which the executive views a case from a higher vantage point than the community in which the offense occured, hence with a view of the sentence in a particular case as it relates to other cases in the whole picture. The executive can see this much better than any trial judge, who sees a capital case once in a while; much better even than the Supreme Court of Florida, which sees such cases one by one in a sequence determined by a combination of chronology and the accidents of appellate litigation -- and always with a focus on rules not results, on what is legal not what is right. Thus, the executive has a much better sense of which capital cases truly stand out as warranting a death sentence, if there are to be death sentences at all, and which cases do not, whatever judgment might have been made at the level of the local community. This is why the grace that is clemency is vested in the state-level executive, not its counterparts at county or municipal levels, nor in the legislative or judicial branches.

What should the judgment be in the case of Alvin Ford?

It has been suggested that this case was swept into the death sentence by the mechanical application of the statutory schedule of aggravating and mitigating factors, a more careful, discriminating analysis of which would have led to a quite different sentence. It has been suggested further that the sentencing process in this case, in the early days of sentencing under Florida's then-new system, was done much less soundly than it would be done today. It has been suggested that there is much more information that could have been developed to be presented through a modern-style hearing for careful application of the sentencing factors. All of this suggests that the death sentence is inappropriate in the case of Alvin Ford.

Some help on this judgment is available from two of the nation's leading retentionists on capital punishment, Walter Berns and Frank Carrington, both of whom staunchly advocate the death penalty. The latter, in his book, Neither Cruel Nor Unusual, has identified an inventory of cases for which, in his opinion, the death penalty is appropriate. He has done so with reference to the categories of aggravating circumstances, much like those in Florida's sentencing system under which Alvin Ford was sentenced. But One searches Carrington's catalog (See Carrington, Chapter 2, Appendix E.) in vain for a case that comes close to Alvin Ford's. The conclusion is inescapable that Carrington

would reserve the death penalty for especially heinous offenses, not Ford's.

Walter Berns in his book For Capital Punishment writes as follows:

> To reinforce the moral sentiments of a people, the criminal law must be made awful or awesome, and . . .the only way within our means to do that today is to impose the death sentence; but an execution cannot be awesome if it is associated with petty affairs or becomes a customary, familiar event. Thus, while the death penalty should not be seen as cruel, by the same token it should be seen as unusual, not in the techniques employed when carrying it out, but in the frequency with which it is carried out. It is this principle that should be embodied in statutes and impressed upon judge and jury; a properly drawn statute will allow the death penalty only for the most awful crimes: treason, some murders, and some particularly vile rapes. It is not beyond the skill of legislatures to draft such a statute -- for example, it could provide that the death sentence be imposed only for "outrageously or wantonly vile" offenses -- one that defers to the jury's judgment in particular cases but, at the same time, impresses upon the jury the awesome character of the judgment it is asked to make. This is not incompatible with retributive sentencing; on the contrary, retribution, unlike deterrence, precisely because it derives from moral sensibilities, recognizes the justice of mercy, the injustice of punishing the irresponsible, and limits to the severity of punishment. . . .It is also compatible with the purpose of capital punishment; only a relatively few executions are required to enhance the dignity of the criminal law, and that number is considerably smaller than the number of murders and rapists. (P. 183.)

In his letter (See Appendix D. Berns has applied his principle of sparingly administering the death penalty: ". . . if you are right when you say that the crime he (Alvin Ford) committed

was less heinous than that of John Spenkelink, . . .then I have no hesitation in saying that he does not deserve the death penalty. . . .had I been on the Spenkelink jury, I would not have voted for the death penalty; but I would not hesitate so to vote in some other cases, which I discuss in the book." And those cases, like those in Carrington's book, are far from resembling that of Alvin Ford.

That distinction, between the cases for which the death sentence is appropriate and a case like Alvin Ford's, that is swept into its scope by rules automatically applied without discrimination, is a distinction the executive can appreciate better than local communities, because the executive has a broader perspective on the death penalty and can see the forest, not a tree or two. Moreover, the executive in clemency can act upon that distinction and bring the sentence, where it is inappropriate, into harmony with what sentences should be.

A final point must be made in general about the death penalty, that looks forward to a factor that will one day rise above the neglect it has received in the law generally and in capital punishment. That factor is time, the passage of time. Not only is the time on death row spent cruelly and unusually -- only 160 some inmates experience it out of many thousands in prison, but no man spends seven years on death row and remains the same man -- or boy -- he was at

sentencing. Alvin Ford has kept himself remarkably intact in his seven years under sentence of death. He has moved, as all men move as they mature, from one stage of life to another; has been moving through the "passages" or "transitions" or "seasons of a man's life" about which we are beginning to learn and understand -- for the first time (See Sheehy, Passages; Gould, Transitions; and Levinson et al., Seasons of a Man's Life). Insofar as Alvin Ford is not the same young man he was at sentencing, having then just reached his majority, his execution violates the first principle of retribution, that the penalty be paid by the man who committed the crime. After seven years, especially seven years on death row, that man no longer exists except in the most superficial ways; to execute Alvin Ford today mocks whatever justice there may have been in that sentence of seven years ago.

Beyond the injustice of punishing someone who is no longer the same person, except in outward ways, the ultimate tragedy of the passage of time is the emergence of a better person. The bitter irony of capital punishment today is the emergence of mitigating factors after sentence, factors that enrich the life of Alvin Ford today and those he has related to in and out of prison in that time. These factors elude the sweep of the statutory schedule of mitigating circumstances and present themselves only to you, the Governor and Cabinet, in clemency. Further, rehabilitation -- so obviously precluded

in principle by the death sentence -- ironically begins in practice for many of the inmates under sentence of death and progresses for as long as they live. It has been so for Alvin Ford, whose potential for rehabilitation was seen but underestimated by Dr. Taubel. The proof of that potential is in the Alvin Ford of today at age 28. His commitment to the old values has reappeared, as it is manifested in his letters from prison; his care for others appears time and again in word -- in letters and conversations, in whatever limited things a prisoner can do, and also in deeds of courageous effort to improve the lot of the prisoners and their loved ones who visit them. Truly, the old Alvin Ford has come home.

PRAYER FOR CLEMENCY

Clemency exists to correct for the workings of a legal system that yields from time to time a result that is not right. There are, regrettably , miscarriages of justice. Justice miscarries sometimes at the very outset, at the instant of conviction or sentence. Justice sometimes miscarries with the passage of time, as information and insight alters the understanding of the offense, or the offender, or both.

These occasions for mercy are present in the case of Alvin Ford. Rules of law, especially the requirements of Florida's brand new capital sentencing system, were applied mechanically; inadequately developed and insensitively interpreted without the findings of sufficiencies and weighings of evidence called for by the statute itself. Even the Supreme Court of Florida ignored the requirements of the developing law of capital sentencing. So, Alvin Ford was swept to death row in 1975, by a sentence so highly inappropriate to its real circumstances, especially as illuminated by his own account tragically disclosed so many years later.

In addition, so much more of Alvin Ford himself is known now, of his boyhood before he went out into the world, and of the life that took so quickly a tragic turn. So much more is known of his development since then--with maturity and remorse--that outweighs by so much the circumstances of the

offense when they are rightly understood.

The Alvin Ford of 1981 is still a young man of promise, a young man whose life in prison belies the expectations at the time of trial. No longer a boy of 20, Alvin Ford has become his former self, committed to traditional American values and our way of life, to which he dedicated himself when he launched the career that held such promise. Today he urges young and troubled people to have faith and confidence in that system, to learn and work to make their lives, the lives of their loved ones, and all our lives much better. Alvin Ford deserves our faith and confidence now, for he has earned it.

And so, on his behalf I present this prayer for the clemency it is the grace of the Governor and Cabinet to grant, this plea for the commutation of Alvin Ford's sentence from death to life.