IN THE SUPREME COURT OF FLORIDA

CASE NO. 62,127

ALDELBERT RIVERS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

BRIEF OF APPELLEE

* *

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

TABLE OF CITATIONS

CASES

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

INTRODUCTION

The appellant was the defendant in the court below. The appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appeared in the trial court. The symbol "R" will be used to designate the record on appeal. The symbol "TR" will be used to designate the transcript of proceedings. All emphasis has been supplied unless the contrary is indicated.

POINTS ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW "BACK STRICKING" DURING VOIR DIRE WHEN IT HAD, IN THE SAME TRIAL, PREVIOUSLY DONE SO?

II

WHETHER THE TRIAL COURT ERRED IN FAILING TO HAVE A PSYCHIATRIC EXAMINATION AND ORDER A COMPETENCY HEARING BEFORE TRIAL COMMENCE?

III

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ELICIT FROM A NONE EXPERT WITNESS A GENERAL OPINION AS TO THE DEFENDANT'S SANITY?

IV

WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE DEFENDANT'S STATEMENT?

V

WHETHER THE TRIAL COURT ERRED IN OVERRULING THE ADVISORY JURY'S SENTENCE OF LIFE IMPRISONMENT?

VI

WHETHER THE TRIAL COURT ERRED IN REFUSING TO DECLARE SECTION 921.141 UNCONSTITUTIONAL, BOTH ON ITS FACE AND AS APPLIED TO THE DEFENDANT?

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW "BACK STRICKING" DURING VOIR DIRE WHEN IT HAD, IN THE SAME TRIAL, PREVIOUSLY DONE SO.

Appellant's first Point on Appeal asserts reversal is mandated because the trial court violated Florida Rule of Criminal Procedure 3.310 in that during the middle of jury voir dire the court discontinued the practice of "back stricking."

The record reflects that the trial court during a majority of the jury voir dire allowed back stricking. (TR. 716-717). After a majority of prospective jurors had been seated, the trial court in an effort to move the case along announced to the State and defense that

> "Alright. Now hear me, no more back stricking. Tell me now any challenges you have because when we fill seats there is isn't going to be any more back stricking."
>
> (TR. 789).

The record reflects that no objection was raised by defense counsel to the court's pronouncement and in fact defense counsel affirmatively indicated on the record he was satisfied with those jurors seated after being given an oppor-

tunity to back strick one last time. (TR. 789). The record further reflects that defense counsel used all of his peremptory challenges (TR. 798) and a jury was seated shortly thereafter.

Those references cited by appellant in his brief on page nine which reflect that the trial court was "perturbed with the pace at which jury selection was progressing" do not support appellant's contention that the trial court was perturbed with back stricking but rather that the court was impatient for the most part with the repetitiveness of the State's and to some degree defense counsel's questioning of potential jurors.

Appellant's reliance on Peek v. State, 413 So.2d 1225 (Fla. 3d DCA 1982) and Knee v. State, 294 So.2d 411 (Fla. 4th DCA 1974) is misplaced. While both cases hold that back stricking is permissible pursuant to Fla.R.Crim.P. 3.310 prior to a juror being sworn to try the cause, the factual circumstances in those case are distinquishable from the instant cause.

In fact this Court's decision in Jones v. State, 332 So. 2d 615 (Fla. 1976) states specifically that while this Court did not condom the practice of disallowing challenges,

> ". . . Nevertheless, we failed to find from examination of the record that non-compliance with the rule resulted in prejudice to the appellant. In addition, when the rule is considered in pari materia with the provisions of other harmless error statutes, we fail to find that reversal is required. A careful review of the record convinces us that the evidence, those circumstancial, was so clear and convincing as to leave no reasonable doubt but that appellant was guilty of the crimes for which the jury convicted him. Where the evidence of guilt is overwhelming, even a constitutional error may be rendered harmless. "
>
> 332 So.2d at 615.

In the instant case the sufficiency of the evidence to convict has not been challenged and a review of the record in its entirety reflects that the evidence was overwhelming to convict appellant of murder and robbery.

It is further important to know that the record is void of any objection by defense counsel with regard to the trial court's ruling. In Denham v. State, 421 So.2d 1082 (Fla. DCA 1982) the Fourth District Court of Appeal in a similar circumstance held that the issue was not properly preserved for appellate review since the defense had not specifically objected to the trial court's practice. The court noted:

> "After a review of the briefs and record, we find the points urged on appeal lacking in merit. Appellant's contend they were improperly prevented from exercising a 'back stricking' against a pro-

> spective juror. We find that this issue was not properly preserved for appeal but in passing note that prospective jurors may be challenged at any time before the jury is sworn to try the cause. (Cites omitted) 'Back stricking' or back challenging should not be prohibited by a trial court. The appellant's convictions are hereby affirmed."
>
> 421 So.2d at 1082.

Similarly in the instant cause where Appellant failed to object and/or demonstrate prejudice with regard to the selection of the jury panel, appellee would submit that section 924.33 Florida Statutes applies sub judice. See also, Grant v. State, __So.2d __ (Fla. 4th DCA 1983) 1983 F.L.W. 975.

II

THE TRIAL COURT DID NOT ERR IN FAILING TO HAVE A PSYCHIATRIC EXAMINATION AND ORDER A COMPETENCY HEARING BEFORE TRIAL COMMENCE.

Appellant next argues that it was error for the trial court to not sua sponte have a psychiatric examination of appellant or order a competency hearing before trial when, on the day of trial, Judge Gable sat as the trial judge rather than Judge Scott who had heard all the previously filed pre-trial motions. Appellee would submit appellant's second point on appeal is totally void of merit. The record before this Court reflects that while the trial court may not have read, considered or evaluated psychiatric reports before adjudicating appellant's competent to stand trial, defense counsel made no effort to bring to the attention of the court the fact some problem existed. The record reflects that pre-trial appellant was examined by Doctor Charles Mutter a forensic psychiatrist, Doctor Anastasio Castillo a forensic psychiatrist and a privately retained clinical psychologist Doctor Jethero Demore. Doctor Mutter and Doctor Castillo both found appellant competent to stand trial and sane at the time he committed the crime. Doctor Demore (Dr. Toomer) who testified at the pre-trial suppress hearing indicated that appellant suffered from pathological intoxication and was not competent either to stand trial or sane at the time he committed the crime.

Sub judice Circuit Judge Scott ordered a competency hearing for appellant and pursuant to said order Doctor Mutter and Doctor Castillo examined appellant and found him to be sane. At the time of appellant's trial, even with a change of trial judges, there was nothing before the court that would have required Judge Gable to require further psychiatric examination and/or determine whether appellant was competent to stand trial in that appellant's competency or sanity was presumed and nothing was presented to court to reflect otherwise. Rule 3.210(b) Rule of Criminal Procedure provides:

> "If before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to stand trial, the court shall immediately enter its order setting a time for a hearing to determine defendants mental condition. . ."

The authorities cited by appellant in support of his point on appeal are distinquishable either factually or legally from the instant cause. For examination in Scott v. State, 420 So.2d 595 (Fla. 1982) the trial court failed to grant a psychiatric evaluation of appellant and order a competency hearing where

> ". . . The record in this case is replete with numerous instances both before and during trial wherein the trial court should have been alerted to the fact that a hearing was necessary.

> Prior to the commencement of the trial, counsel for appellant requested such a hearing. He made known to the court that he was having great difficulty in communicating with his client and that appellant was unable to assist him in the preparation of the defense. Later, before sentencing, defense counsel once again requested that appellant be evaluated, but this request was not act upon by the trial judge. In addition, an agreement had been reached between defense counsel and the State that the prosecutor would waive the death penalty if appellant agreed to have his case tried by a six person jury instead of twelve. The trial court was prepared to ratify this agreement. Appellant, personally, however, overrode his lawyer's recommendation and rejected this imminently favorable bargain. . . ."
>
> 402 So.2d at 597.

Sub judice appellant was examined pursuant to Fla.R. Crim.P. 3.210 and based on the reports available to Judge Scott pre-trial, Appellant was competent. Defense counsel at the commencement of trial before Judge Gable indicated that an insanity defense would be tendered but did not seek to have further psychiatric examination made of appellant and conceded that there had been no prior adjudication of insanity and therefore appellant went to trial with a presumption of sanity not having been disturbed.

There is nothing in this record to reflect or support appellant's contention that the trial court acted incorrectly in the instant cause.

III

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO ELICIT FROM A NONE EXPERT WITNESS A GENERAL OPINION AS TO THE DEFENDANT'S SANITY.

Appellant next argues that the trial court erred in overruling defense counsel's objection to the inquiry made of Detective Hall with regard to whether "based on the experience as a police officer and this contact with this defendant, did he appear that night to be suffering from any kind of -- of serious mental or motional illness?"

The record reflects that the trial court overruled defense counsel's objection that Detective Hall was not an expert and therefore did not have an expertise to testifiy as to the appellant's mental state, however, she did state "with the understanding he's answering solely from a laymen's point of view, without any psychiatric training, overruled." (TR. 1011).

Appellee would submit that based on the manner in which the question was asked and the qualification the trial court placed on the answer given, no error occurred sub judice. Moreover a review of the cross-examination of Detective Hall by defense counsel further supports this conclusion in that defense counsel made it a point to inquire of Detective Hall as to his training as a forensic psychiatrist or forensic

psychologist; whether he ever worked in a mental institution; or whether it was Detective Hall's job to analyze appellant with regard to his mental condition. (TR. 1029-1034).

Appellant's reliance on the decisions in Bowles v. State, 381 So.2d 326 (Fla. 5th DCA 1980) and Mills v. State, 367 So.2d 1068 (Fla. 2nd DCA 1979) are distinquishable from the instant cause. In both Bowles and Mills, supra the courts held that comments of lay witnesses with regard to their opinions as to the defendant's truth and veracity went to the very heart of the decision making process of the trier of fact. Clearly that is not the circumstances sub judice. Lay opinions of a witness who has sufficiently aquainted themself with a defendant or who as observed a defendant's conduct, may comment as to the character and conduct of the individual with regard to his sanity at that time. Opinions as to sanity or insanity are distinct and different from opinions as to "criminal capacity" which is a conclusion to be drawn by the trier of fact. While a non-expert witness cannot express a general opinion as to sanity nor give an opinion independent of the fact in circumstances within their own knowledge, they may tell the facts known to them which shows sanity or insanity as an expressed opinion thereon. Armstrong v. State, 11 So. 618 (Fla. 1892). Clearly a mental condition or behavior of a person may be established by the opinion of an ordinary witness when founded on observation. Mitchell v. State, 31 So. 242 (Fla. 1901).

Moreover lay or non-expert witnesses may be permitted to give an opinion regarding sanity of a person whose mental condition is an issue in criminal prosecution where that opinion is predicated on observation of the individual and not independent facts or circumstances not before that witness. Hixson v. State, 165 So.2d 436 (Fla. 2d DCA 1964). Terminally as observed in City of Orlando v. Newell, 232 So.2d 413 (Fla. 4th DCA 1970)

> "The Circuit Court reversed the conviction and granted the defendant a new trial because it was of the opinion that the municipal court had committed error in allowing into evidence, over objection, the opinion testimony of the arresting police officer to the effect that defendant was under the influence of intoxicating beverages to the extent that his normal faculities were impaired. The transcript of the trial proceedings establishes that the arresting police officer, before expressing such opinion, described to the trial court the defendant's act, conduct, appearance and statement as seen and heard by the police officer. The opinion testimony by the officer was properly admitted into evidence, Cannon v. State, 1926, 91 Fla. 214, 107 So. 360, and the Circuit Court erred in reversing the conviction."
>
> 232 So.2d at 413.

The same result should obtain sub judice. See also Eleuterio v. Wainwright, 587 F.2d 194 (5th Cir. 1979) and Hall v. State, 83 So. 513 (Fla. 1919).

IV

THE TRIAL COURT DID NOT ERR IN FAILING TO SUPPRESS THE DEFENDANT'S STATEMENT.

Appellant next argues that "the State failed to prove, by a clear and convincing evidence at the motion to suppress, that Doctor Toomer's conclusion, corroborated by Detective Hall's observations, that the defendant's statement was not voluntary, was incorrect." Appellee disagrees and would tender the record of the motion to suppress to refute said contention.

At the motion to suppress hearing Mr. Frank Hernandez testified that on May 30, 1981 he was at the China Inn Restaurant having dinner with his wife and children when three men entered the restaurant and yelled "its a hold up." (TR. 491-496). Mr. Hernandez testified that one of the men went to the register another went to the back door and the Appellant stayed at the front door. (TR. 496, 504, 507). Mr. Hernandez testified that appellant did all the shooting (TR. 498, 510) and was the robber who shot the waitress in the China Inn Restaurant. He further testified that after the waitress was shot the others got excited, took the money and one of the other guys shot into the ceiling. (TR. 499).

Michael Hernandez also testified that on May 30, 1981 he was with his family at the China Inn Restaurant and observed

the robbery that took place. (TR. 512-514). Michael Hernandez testified that the man at the front door was a black man wearing a hat and a beard (TR. 515). He testified that he saw a gun in appellant's hand when he ran in the door and that appellant yelled "this is a hold up." Mr. Hernandez testified he could positively identify appellant because he was approximately ten feet away from the appellant who was standing at the front door. (TR. 517). Mr. Hernandez further said he saw the woman, the waitress come out from the back of the restaurant and saw appellant shoot her. (TR. 518). His testimony reflects that the waitress ran away when she saw appellant and that Appellant shot her. At that point appellant said "let's go." (TR. 519). Michael Hernandez also testified that within 15 to 20 minutes after the robbery he again saw the appellant and was able to identify the appellant as the man who had robbed and shot the China Inn Restaurant. (TR. 520-521). Mr. Hernandez indicated that at the second viewing of appellant, appellant had no hat nor a shirt but he was positively able to identify appellant as the robber. (TR. 522).

Zigmas Kaulakis testified that he was also at the China Inn Restaurant the day it was robbed. (TR. 532). Mr. Kaulakis testified that he observed the robbers enter from the front door and heard them yelled "this is a hold up, freeze." A shot was fired and he saw three robbers disperse throughout the restaurant. The tall man with the gun stayed at the front door,

a slender black man ran to the register, and a heavier set man ran to the back door. (TR. 534). Mr. Kaulakis testified that the man at the front door was slender, about six feet tall with facial growth and a beret or a beanie on his head. (TR. 535). He was positively able to identify the appellant as the man at the front door. (TR. 540). Mr. Kaulakis testified that he heard more shots and then the robbers left telling everyone not to move. (TR. 537). Within 15 to 20 minutes of the robbery the defendant was returned with the police and Mr. Kaulakis testified that he was able to recognize the appellant as the man who robbed the restaurant although he had no shirt nor a hat when he was returned to the restaurant. (TR. 539). On cross-examination Mr. Kaulakis testified that the shots that were fired came from the individual who was standing at the front door. (TR. 549).

Eleanor Allport was also a patron of the China Inn Restaurant on May 30, 1981 when the robbery occurred. (TR. 551). She testified that she heard one of robbers yell "this is a hold up, everybody freeze" and that a shot was fired by the tall black man standing at the front door. (TR. 553). She testified that the man at the front was tall, black, wearing a beret and had facial hair and a goatee. He was wearing dark colored clothes and stood about ten feet from her location in the restaurant. (TR. 554). She testified that she heard two shots fired, a woman scream and that someone indicated that

a lady had been shot. (TR.556). At that point the robbers hurried up, got the money, and then fled. She testified that she was able to identify the appellant later that evening although his appearance had changed in that he had no hat nor shirt or sunglasses. (TR. 560).

Officer Ohanesian testified that he was working the 6:00 p.m. to 2:00 a.m. shift near the China Inn Restaurant when he received a call that shots had been fired at the restaurant. (TR. 571-572). Officer Ohanesian indicated that while he was at the restaurant investigating the robbery he received a call to go to a nearby cemetery approximately five blocks west of the restaurant where a suspect in the robbery was hiding. (TR. 573). Officer Ohanesian at that point identified the appellant as the individual who was hiding in the cemetery. (TR. 574). He testified that appellant had facial hair, no shirt, was sweating profusely and had dark pants on when he first observed them in the cemetery. Petitioner was given his Miranda rights (TR. 575) and then asked where his buddy was and where was the gun. To both questions appellant said he didn't know. (TR. 577). At this point without prompting appellant spontaneously asked Officer Ohanesian how the woman was inside the restaurant and at that time Officer Ohanesian told appellant that the woman had not made it. (TR. 578). On cross-examination Officer Ohanesian testified that appellant asked him about the woman in the restaurant

only after denying knowledge of the location of appellant's buddy and/or the gun. (TR. 583).

The last witness to testify at the motion to suppress hearing for the State was Officer Ben Hall. Officer Hall testified that he met appellant approximately 1:50 a.m. May 31, 1981 at the Meto Dade Headquarters where he intervied appellant concerning the robbery/murder at the China Inn Restaurant. (TR. 586). Appellant's interview followed a previous interview conducted by Officer Hall of appellant's cohort Robert Pressley. (TR. 588). Officer Hall testified he informed appellant of his constitutional rights and discerned from appellant whether he understood those rights based on the brief history obtained that appellant had a tenth grade education and was able to read the rights form. (TR. 589-590). Officer Hall asked appellant if he wanted to talk about the case and appellant in return asked him if he was going to get the electric chair. (TR. 594). Following a discussion of what happened in the restaurant appellant admitted that he shot the woman in red in the restaurant. (TR. 595). Officer Hall testified that appellant was very cooperative and did not appear to be intoxicated or on drugs although he appeared to be scared. (TR. 597). At 2:49 a.m. a formal statement commenced wherein appellant told Officer Hall that he had robbed the China Inn Restaurant and had shot the woman therein. (TR. 599-600). The formal statement was reduced to writing and

at approximately 6:11 a.m. May 31, 1981 appellant, after reviewing said statement, initialled each page and signed the last page. (TR. 601-602). Officer Hall testified that no promises were made nor threats nor physical force used to obtain the statement from the appellant. (TR. 603).

Doctor Jethro Dumore (Doctor Toomer) testified at the suppress hearing in behalf of appellant. (TR. 414-463). Doctor Dumore, a community clinical psychologist, testified that in evaluating appellant for approximately an hour he was able to diagnose that appellant suffered from pathological intoxication caused by prolong usage of alcohol and drug. (TR. 430). As a result of this diagnosis, Doctor Dumore testified appellant was insane at the time he committed the robbery and incompetent to stand trial. (TR. 431-433). He further testified that the disease caused bad judgement and would result in an individual being combatant and belligerent. On cross-examination Doctor Dumore testified that he administered one test, the Bender test, to appellant and although he found appellant to be oriented in time and space and person and appellant's memory as to recent and remote history was intact, (TR. 442-444), based on undefined circumstances Doctor Dumore found that appellant could not formulate the intent to knowingly and voluntarily answer questions after his Miranda warnings were given. (TR. 460).

Appellee would submits the authorities cited by appellant in support of reversal or suppression of the formal statement given do not in fact require a reversal sub judice. There was clear and convincing evidence presented at the suppression hearing that appellant knowingly and voluntarily waived his rights and gave a formal statement to Officer Ben Hall concerning the shooting at the China Inn Restaurant. The trial court in reviewing the motion to suppress granted in part appellant's motion with regard to the initial remarks made by appellant to Officer Ohanesian, however, he did not suppress appellant's spontaneous inquiry of Officer Ohanesian with regard to the condition of the woman shot and did not suppress the confession to Detective Hall. (TR. 472-474).

In the instant case appellant on more than one occasion was given his Miranda warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) and in fact on each occasion affirmatively waived his Miranda rights. The record is totally void of any evidence that any coercion or wrong doing occurred in obtaining said confession. The only thing appellant can point to is Doctor Dumore's diagnosis that appellant suffered from pathological intoxication and therefore could not knowingly and voluntarily make said statements. Doctor Dumore's examination of appellant came approximately three months following the commission of the crime and the admission which was made within hours of the crime. Clearly it was for the trial court to determine that based on the totality of the circumstances before

him whether the confession was in fact voluntary. The court found appellant's confessions was voluntarily and knowingly made and not under duress or mental impairment. As observed in Lindsey v. State, 63 So. 832 (1913) intoxication at the time of confessing would not bar admitting a confession into evidence unless the confessor is intoxicated to the degree of mania or is unable to understand the meaning of his statement. Such is not the case here. All witnesses who viewed appellant during the course of the robbery and the officers who interviewed appellant made no comment with regard to whether appellant was disoriented. Rather Officer Hall and Officer Ohanesian testified that appellant appeared scared but understood his rights and was responsive to questions tendered. In Myles v. State, 399 So.2d 481, 482 (Fla. 3d DCA 1981) Third District Court observed:

> "Although mental capacity may be considered in determining whether under the totality of circumstances a confession is voluntary, State v. Chorpenning, 294 So.2d 54 (Fla. 2d DCA 1974), the lack of mental capacity is generally considered only as it relates to credibility and not admissibility, see e.g., Palmes v. State, 397 So.2d 648 (Fla. 1981); Reddish v. State, 167 So.2d 858 (Fla. 1964), and a confession will not be excluded on these grounds where it is shown that the defendant understands his rights, see e.g., Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979); Lane v. State, 353 So.2d 194 (Fla. 3d DCA 1977).
>
> 399 So.2d at 482.

Since voluntariness must be determined based on the totality of the circumstances Brewer v. State, 386 So.2d 232 (Fla. 1980), appellee would urge that the factual circumstances developed sub judice support the trial court's conclusion that appellant's confession was voluntary.

Based on the foregoing appellee would urge this Court to affirm the trial court's denial of appellant's motion to suppress.

V

THE TRIAL COURT DID NOT ERR IN OVERRULING THE ADVISORY JURY'S SENTENCE OF LIFE IMPRISONMENT.

The trial court did not err in overruling the advisory jury's sentence of life imprisonment.

Appellant argues that the trial court erred in overriding the jury's recommendation of life imprisonment in that the trial court did not find that the evidence was clear and convincing that no reasonable person could differ pursuant to Tedder v. State, 322 So.2d 908 (Fla. 1975). Specifically appellant argues that the three aggravating circumstances found to exist by the trial court were not sufficient to overcome the one mitigating circumstances.

Appellee is not unmindful of this Court's decision in Tedder v. State, supra wherein this Court held

> "In order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

However, appellee would submit there have been occasions when this Court has found that a jury override of a life recommendation is justified. Appellee would urge the instant case is

one of those circumstances. The trial court found three aggravated circumstances and one mitigating circumstance applicable. The trial court in expressing disagreement with the jury's recommendation of life concluded

> "This Court is required to and does consider each of the mitigating in aggravating circumstances involved herein, and makes the following findings: . . .
>
> 3. The defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.
>
> The court believes that that definitely applies.
>
> The firing of a gun in a crowded restaurant not just once, not one shot killing Ms. O'Neal, but firing it twice or more with twenty or thirty people in a small crowded restaurant, its certainly, knowingly created a great risk of death to many people.
>
> The fact that we only had one dead body is not involved in the fault of Mr. Rivers.
>
> It is an act of God.
>
> 4. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.
>
> This jury has found the defendant guilty of robbery with a firearm.
>
> 5. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest, or effecting an escape from custody.

The court understands the argument that counsel has made, and understands that counsel does not believe that applies, and believes that paragraph was created for a specificate incident in a violation of the law.

The court disagrees.

The court believes that Anita O'Neal was killed because she was scared, she turned, and was going to run, and to make sure that she did not get out of that restaurant, and alert authorities and cause the apprehension of the defendant, committing the robbery, she was shot and killed; shot in the back.

6. The crime for which the defendant is too be sentenced was committed for financial game.

It was, of course, but that is part of number 4, and the court has already commented that the defendant has already been convicted of robbery with a firearm for financial game, and the court is not separately considering 6. . . .

9. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The court is of the opinion that the crime was committed in a cold, calculated manner without any pretense of moral or legal justification, but in an abundance of caution the court is not going to consider number 9, because the word "premeditated" is in that paragraph, and the jury did not mark premeditated, on the murder one verdict form....

With regard to the mitigating circumstances,

1. That the defendant has no significant history of prior criminal activity.

> That appears to be true in that the defendant has had no prior felony convictions.
>
> The court has heard the testimony of his own psychologist about his clashes with authority, but does not consider that to be any type of history of prior criminal activity, and considers that to be, yes, a mitigating factor. . . .
>
> I understand that Mr. Rivers had a bad childhood and that he has had some unfortunate things happen to him. That, however, is not a mitigating factor that the court is considering.
>
> The court has used as a basis for consideration in imposing sentence, no information whatsoever, not known to the defendant or his counsel of record.
>
> Upon the proceedings, findings of fact that the court has just reiterated, the court bases its sentence, and it being the opinion of this Court that there are sufficient aggravating circumstances to justify the sentence of death, and this Court, after weighing aggravated and mitigating circumstances, being of the additional opinion, that no mitigating circumstances exist, excuse me -- that only one mitigating circumstance existed to outweigh the three aggravating circumstances, now, therefore, notwithstanding the advisory sentence rendered to this Court by the trial jury, it is the judgment and sentence of this Court that you, Aldebert Rivers, be adjudicated guilty murder in the first degree, and that you be sentenced to death for the murder of Anita O'Neal. . . .
>
> (TR. 1455-1462).

Whereas here appellant was the leader in the robbery murder, fired the weapon which killed Anita O'Neal, and fired other shots into a crowded restaurant of twenty or

thirty people, a jury override was mandated. Johnson v. State, 393 So.2d 1069 (Fla. 1980); White v. State, 403 So.2d 331 (Fla. 1981); Buford v. State, 403 So.2d 943 (Fla. 1981); Hoy v. State, 353 So.2d 826 (Fla. 1977); Dobbert v. State, 328 So.2d 433 (Fla. 1976); Bolender v. State, 422 So. 2d 833 (Fla. 1982).

As observed in White v. State, supra

> ". . . In this case, the trial court properly found five aggravating and no mitigating circumstances under the death statute. The only colorable mitigating circumstance was the non-statutory consideration that the defendant was not the trigger man. We do not believe, however, that this fact along outweighs the enormity of the aggravating facts, especially in light of the defendant's full cooperation in the robberies and complete acquiescence in the cold blooded, systematic murder or attempted murder of aiding individuals. We hold, therefore, that the trial judge imposed the death penalty consistently with Tedder."

Appellant contends that the trial court erred in finding as an aggravating circumstance that his actions created a great risk of death to many persons. Appellee would submit the factual circumstances sub judice are practical identical to those found in Raulerson v. State, 420 So.2d 567 (Fla. 1982) wherein this Court faced with the same claim concluded:

> "Appellant's action did create a great risk of death to many persons. Section 921.141(5)(c), Florida Statutes (1973). There were four non-participating, unarmed, and innocent people present in the restaurant during the shoot out between appellant and the police. That they took refuge on the floor behind tables and counters certainly does not mean that they were in no risk of being killed. A gun battle in a confined area certainly created a 'likelihood' or 'high probability' that someone, bystanders or police officers, would be hit and killed. See, Kampff v. State, 371 So.2d 1007 (Fla. 1979); Section 921.141(5)(c) was applicable.
>
> 420 So.2d at 571.

In the instant case the facts clearly reflect that appellant created a great risk of death to more than two, indeed more than three persons at the China Inn restaurant that day. Although a waitress was the only victim, the recklessness of appellant in firing other shots into the restaurant, where at least twenty or thirty other individuals were located, resulted in a great risk to many person. See Zeigler v. State, 403 So.2d 365, 376 (Fla. 1981).

Appellant also argues that there was insufficient evidence to support that the killing was done in an effort to avoid detection. Judge Gable in concluding this aggravating circumstance applied noted that the waitress was shot as she attempted to leave the area. The evidence was clear and convincing that this aggravating circumstance was supported by the record, especially in light of the nature of the wound

and the inquiry of appellant when arrested at the cemetary some 15 to 20 minutes later. See Zeigler v. State, 376 So.2d at 376.

Appellant further argues that the third aggravating factor found by the court was that the murder was committed during the course of another felony was improper. A similar type argument was found to be wanting in Raulerson v. State, 420 So.2d at 571, wherein the court observed

> "Likewise without merit is appellant's speculation regarding improper doubling of aggravating circumstances."

In Raulerson this court said there was not an improper doubling where the court did not find that the killing was committed during the course of a robbery and therefore §921.141(5)(f) was a justifiable aggravating circumstance. Sub judice the court found "the murder for which the defendant is to be sentenced was committed while he was engaged in a commission of a robbery with a firearm. The court finds this aggravating factor applies. (TR. 237-238).

Lastly appellant asserts that the trial court erred in failing to consider appellant's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Appellant is seeking to have this Court reweigh

that mitigating evidence tendered to the trial court and conclude contrary to the court's finding. Appellee would submit that as again noted in Raulerson v. State, 420 So.2d at 572

> "Appellant argues that the court's failure to properly consider nonstatutory mitigating circumstances is evidence by its refusal to appoint experts to examine him with respect to the similarities between a cirstances of this crime and those of the murder of his 'stepfather' have the court comply with his request, he contends, the psychological information discovered could have effective the penalty imposed.
>
> The record demonstrates, however, that the court did consider appellant's mental condition. Several witnesses testified regarding appellant's relationship with his stepfather, and the effect on him of the latter's murder. The judge's findings, nevertheless, state that there was no evidence of extreme mental or emotional disturbance at the time of the crime.
>
> Appellant clearly is unhappy with the conclusions, but they are within the domain of the sentencing court and we find nothing in the record which mandates a different result. The judge was not compelled to call the expert's requested, and since he did consider the question, we will not fault his conclusion."

See also Hargrave v. State, 366 So.2d 1, 5, 6 (Fla. 1978) and Lucas v. State, 376 So.2d 1149 (Fla. 1979).

Judge Gable in determining that this mitigating factor was not applicable observed

> "The court finds that there was no credible evidence offered to indicate that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially altered or repaired. The court has considered both lay an expert's testimony in making this finding. The defense contention that defendant was suffering from a major mental illness diagnosed as pathological intoxication induced by the injection of drugs, was convincingly attacked and refuted by the two psychiatrist called by the State. In addition, there was opinion testimony from police officers that the defendant did not display any of the common symptoms characteristic of either drug or alcohol impairment to support the defense contention that defendant was in a pathologically intoxicated state and, therefore, insane at the time of the commission of the offense. Moreover, the defendant's conduct during the robbery, as described by eye witnesses, his expression of concern for the condition of the victim immediately upon his apprehension, and his concern over the death penalty, indicated to the court that defendant could and did appreciate the criminality of his conduct and could conform his conduct to the requirements of law, and that there was no substantial impairment thereof."
>
> (TR. 243).

Based on the foregoing appellee would urge that the trial court's findings of fact to support its overriding of the jury's recommendation of life in imposing the death penalty is supported by this record. The imposition of death should be affirmed.

VI

THE TRIAL COURT DID NOT ERR IN REFUSING TO DECLARE SECTION 921.141 UNCONSTITUTIONAL, BOTH ON ITS FACE AND AS APPLIED TO THE DEFENDANT.

Appellant's last point on appeal asserts that §921.141 Florida Statutes is unconstitutional on its face in that the aggravating and mitigating circumstances as enumerated in the death penalty statute are in impermissibly vagued and overbroad.

Appellant reviews a number of aggravating circumstances and urges that said circumstances are overbroad. A number of these contentions are not even applicable to appellant's case and therefore his standing to challenge their overbreath is suspect. Moreover United States Court in Proffitt v. Florida, 428 U.S. 242 (1976) dispelled any merit to appellant's contention that in fact §921.141 Florida Statutes is unconstitutional based on the vagueness or overbreath of the aggravating and mitigating circumstances. See also Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978).

Appellant complaint that the factor of a cruel, heinous or atrocious killing has been the subject of wide disparate application, has been rejected in a number of capitol cases. See Dobbert v. State, 375 So.2d 1069 (Fla. 1979).

Petitioner further argues that there is improper limitation of mitigating circumstances to the statutory mitigating circumstances found in the statute. Appellee would disagree in regard to appellant's case in that the trial court in reviewing a number of nonstatutory aggravating circumstances sub judice and reflecting upon the same, observed:

> "In conclusion, the court finds there is only one mitigating factor, either statutory or nonstatutory and three aggravating factors that apply in this case. The court has reviewed the entire record, including the testimony and evidence in the trial and the sentencing proceedings, to determine whether there might possibly exist any thing whatsoever of a nonstatutory mitigating nature, that could be considered by this Court in mitigation of the sentence. The court, after having conducten such an exhausted exmination was able to find only the one mitigating factor that, in the court's opinion was overweighed by the three aggravating factors previously found to apply by this Court.
>
> Moreover, this Court has used as a basis for consideration in imposing sentence, no information whatsoever not known to the defendant and/or his counsel of record, that the defendant or his counsel has not had an opportunity to explain or deny.
>
> Therefore, upon the preceeding specificate findings of fact, the court basis its sentence. It being the opinion of this Court that there are sufficient aggravating circumstances existing to justify the sentence of death; and that this Court, after weighing and considering the aggravating circumstances, not as a cold, numerical process, but as a matter of sound and reason judgment, being of the opinion that only one mitigating circumstance, either statutory or nonstatutory, has been demonstrated by testimony of facts and circumstances presented

> at trial or in the advisory sentencing proceeding and that mitigating circumstance is outweighed by the three aggravating circumstances previously innumerated; the court, in the exercise of sound judicial discretion, disagrees with the advisory sentencing recommendation entered by the trial jury."
>
> (TR. 244-245).

Appellant seeks to reargue whether the death penalty is an appropriate sentence in Florida. The people of the State of Florida have spoken and through their legislative leaders reimposed said sentence. Appellant's remaining challenges to the appropriateness of the death penalty in Florida and to its application have been refuted by this Court on a number of previous occasions. The McCrae v. State, 395 So.2d 1145 (Fla. 1980); Dobbert v. State, 375 So.2d 1069 (Fla. 1979); Raulerson v. State, supra Downs v. State, 386 So.2d 788 (Fla. 1980); Triner v. State, 386 So.2d 525 (Fla. 1980); Bolender v. State, 422 So.2d 833 (Fla. 1982); Porter v. State, __ So.2d __ (Fla. 1983) 1983 F.L.W. 53, 54; Magill v. State, __So.2d __ (Fla. 1983) 1983 F.L.W. 105; and Middleton v. State, __ So.2d __ (Fla. 1983) 1983 F.L.W. 9.

Based on the foregoing appellee would urge that §921.141 Florida Statute as applied and on its face is constitutional.

CONCLUSION

Based upon the foregoing appellee would urge this Court to affirm the judgment and sentence entered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee was furnished by mail to Randolph Q. Ferguson, Esquire, 1883 N.W. 7th Street, Suite #7, Miami, Florida 33125, on this 16th day of May, 1983.

CAROLYN M. SNURKOWSKI
Assistant Attorney General

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