IN THE SUPREME COURT OF FLORIDA

FILED

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SID J. WHITE
CLERK SUPREME COURT
By [signature]
Chief Deputy Clerk

BRYAN JENNINGS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 62,600

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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POINT ONE

THE TRIAL COURT DID NOT ERR IN ADMITTING THE DEFENDANT/ APPELLANT'S CONFESSION IN THAT IT WAS FREELY AND VOLUNTARILY MADE.

ARGUMENT

After the first trial, Appellant raised this very issue before this Court in his direct appeal. This Court reversed the conviction and vacated the death sentence herein. See Jennings v. State, 413 So.2d 24 (Fla. 1982). However, in remanding this cause for a new trial, this Court specifically reached this issue and stated as follows:

> "Although a new trial is required, we feel obliged to address one other question that will reoccur in a new trial. This is the admissibility of the statement Jennings made as a result of police interrogation and the evidence secured as a consequence thereof. Although we are concerned with some of the language in the majority opinion in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L. Ed. 2d 378 (1981), considering the totality of the circumstances, including the questions and statements of the interrogating officers and the responses thereto, we find that the court properly found the statement to be admissible." (footnote omitted) (emphasis added).

Id. at 413 So.2d 26.

This Court went on to state that:

> "The prelude to the interrogation concerning the crime concluded with an unequivocal agreement to proceed without counsel. Although the continued dialogue between the detectives and the defendant might have been a subtle attempt to have the defendant waive his right to counsel, we can discern no improper persuasion or acts on their part. To sustain Jennings' contention, we would have to say that his request for counsel was unequivocal, plus find that, before the officers could have any dialogue, Jennings would have to have initiated it. We hold that a suspect can waive the presence of counsel even though he has indicated a prior desire to have counsel if the waiver is not coerced, is freely given, and is a continuation of the original dialogue. These circumstances distinguish this case from Edwards. See Nash v. Estelle, 597 F.2d 513 (5th Cir.), cert denied, 444 U.S. 981, 100 S.Ct. 485, 62 L.Ed. 2d 409 (1979). We find the confession and the fruits of it properly admitted. (emphasis supplied).

Id. at 413 So.2d 27.

Appellant's reliance upon Brewer v. State, 386 So. 2d 232 (Fla. 1980) is misplaced. Unlike in Brewer, Jennings was never told; "now its the damn electric chair or life. Now that's the way-that's what it amounts to. But, if you-- you know, if you committed second degree murder, it's what? Five? What? Twenty? Twenty years to life and you're eligible for parole at five or seven, see? That's second degee." Brewer, supra at 233. Additionally, in Brewer, the officers told Brewer; "If you done it, tell us, and tell us right now, and we'll help you out on this thing." Id. at 234.

There were no threats made by the officers threatening

Appellant with the electric chair or like; or promises to help Appellant (R-890,905). Telling a defendant that he'd feel a whole lot better if he told the truth, is light years away from telling him, "If you done it, tell us, and we'll help you out on this thing." The totality of the circumstances in Brewer are grossly dissimiliar to the totality of the circumstances in the instant case.

The Appellee would maintain that because this Court adjudicated the propriety of the denial of the defendant/appellant's motion to suppress confession and fruits thereof in Appellant's prior appeal to this Court; that opinion affirming that the confession and the fruits thereof were admissible into evidence; must be treated as the law of the case on this issue. See State v. Rollins, 386 So.2d 619 (Fla. 3d DCA 1980); State v. Thompson, 357 So.2d 428 (Fla. 4th DCA 1978); Haddock v. State, 141 Fla.132, 192 So. 802 (1940). This case does not fall within the exception to the doctrine of the law of the case based upon a different factual posture on remand. Cape Coral Bank v. Kinney, 321 So.2d 597 (Fla. 2d DCA 1975) and Walker v. Atlantic Coastline Railroad Co.,121 So.2d 713 (Fla. 1st DCA 1960). Here, the facts remain unchanged.

Additionally, the Appellee would argue that the trial court should not have allowed Appellant to assert this issue during the new trial. "Having once successfully appealed a criminal conviction, a defendant is not entitled, during a new trial, to again raise matters previously expressly passed upon and found to be without merit by the appellate court."

State v. Thompson, infra. This being so, the question of the admissibility of the confession and fruits thereof was affirmed in the Appellant's first appeal; and therefore, its admissibility became the law of the case. Id. at 430; Jennings v. State, infra.

POINT TWO

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OBTAINED AS A RESULT OF THE DEFENDANT/ APPELLANT'S CONFESSION.

ARGUMENT

The Appellee would expressly rely upon its argument in Point One, in maintaining that Appellant's confession was freely and voluntarily made and therefore, the evidence obtained as a result of his confession was admissible evidence.

POINT THREE

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT/APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL ON COUNT I WHERE THE EVIDENCE WAS SUFFICIENT TO ESTABLISH PREMEDITATION.

ARGUMENT

The testimony of Allen Kruger, which establishes that the Appellant dropped little Rebecca Kunash out of the window and picked her up over his head and slammed her down on the pavement twice, is sufficient to establish premeditation (R-451). Additionally, Kruger's testimony that Appellant told him that he carried the girl to the river and held her head under the water for ten (10) minutes and left her there for the crabs, turtles and sharks was further evidence of premeditation.

Doctor Adamson's testimony corroborated Kruger's testimony as to the fact that little Rebecca Kunash was drowned; and that with the extent of her injuries; the cause of death could have resulted from either the injuries to her head or from the fact that the defendant/appellant held her head under water (R-235,243). Either way, little Rebecca Kunash was incapable of surviving when she was thrown or placed in the river.

When the Appellant moved for an acquittal, he admitted the facts adduced in evidence and every conclusion favorable to the Appellee which is fairly and reasonably inferable therefrom.

Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975).

Based upon the foregoing facts, the Appellee would maintain that in the case sub judice there was ample evidence from which the jury could have found premeditation. "If the evidence shows that the accused had ample time to form a purpose to kill the deceased and for the mind of the killer to become fully conscious of his own design, it will be deemed sufficient in point of time in which to enable the killer to form a premeditated design to kill. Green v. State, 93 Fla. 1076, 113 So. 121, 122 (1927); Buford v. State, 403 So.2d 943, 949 (Fla. 1981). The act of holding the child under water for ten (10) minutes; after crushing her skull to a pulp; was clearly an act establishing a well-defined purpose and intention to kill.

Appellant further maintains that he was intoxicated and couldn't form the specific intent to kill. The Appellant's confession disputes this contention. Appellant stated that after he left the "Booby Trap," he decided to go for a swim to kind of sober up; and that he jumped into the ocean itself (R-880). Additionally, Appellant's friend testified that Appellant was able to walk to his car and unlock the door without much difficulty; and that he was not falling down drunk (R,546-548).

In view of the defendant/appellant's detailed confession giving a detailed account of the crime, is obviously inconsistent with his contention that he had a diminished or impaired mental capacity because of excessive consumption of alcohol. See Stone v. State, 378 So.2d 765, 772 (Fla. 1980).

The trial court ruled that there was sufficient

evidence of premeditation and denied Appellant's motion for judgment of acquittal and that ruling comes to this Court with a presumption of correctness. Appellant's arguments relative to the expert's testimony during the penalty phase is irrelevant to his motion for judgment of acquittal in that the record is void of any motion for new trial.

POINT FOUR

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT/APPELLANT'S MOTION FOR MISTRIAL MADE AFTER THE PROSECUTOR'S CLOSING ARGUMENT AT THE GUILT PHASE.

ARGUMENT

The comment of the prosecutor was a fair comment in response to defense counsel's remarks relative to the defendant's right to make a free call to an attorney (R-583). Defense counsel's motion for mistrial was based upon the grounds that the prosecutor's remark was a misstatement of the law; designed to prejudice and inflame the jury. Defense counsel further based his motion for mistrial on the ground that the rights of little Rebecca Kunash have nothing to do with the constitutional rights of the defendant (R-605).

The prosecutor simply asked the jury to weigh the evidence against the defendant in light of his constitutional rights; and not to forget the victim.

This Court should not presume that jurors are led astray to wrongful verdicts by the impassioned eloquence of the prosecutor. See Johnson v. State, 348 So.2d 646 (Fla. 3d DCA 1977). A considerable degree of latitude is allowed prosecutors in closing argument to the jury. Thomas v. State, 326 So.2d 413, 415 (Fla. 1975). The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas, supra.

It has long been held that the granting or denial of a motion for mistrial is a matter of discretion with the trial judge. Abbottv. State, 334 So.2d 642, 646 (Fla. 3d DCA 1976). A new trial should be granted when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. den., 430 U.S. 104, 97 S.Ct. 308, 50 L.Ed. 2d 282 (1977). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks. Id. See Breedlove v. State, 413 So.2d 1 (Fla. 1982). In Breedlove, this Court found similar comments (referring to a victim's right's in their own home to be free from violence), to not be so prejudicial as to require a new trial. Specifically, in Breedlove, this Court noted the comments which read:

> "When we walk the streets we take our chances." In response to an objection the court said: "Stay on the evidence in this case." The prosecutor then said:"One place in the world where we ought to be free from this kind of violence, this kind of crime, is in our own home." The court overruled an objection to this remark.

Id. at 413 So.2d 8, Note 11.

This Court went on to add:

> "These comments appear to reflect common knowledge and are probably the sentiments of a large number of people. They do not appear to be out of place."

Id. 413 So.2d 8, Note 11.

In reviewing prosecutorial comments for possible prejudice, this Court must not consider the comments in isolation. The comments must be evaluated in the context not only of the prosecutor's entire closing argument but of the trial as a whole. Cobb v. Wainwright, 609 F.2d 754, 755 N. 1 (5th Cir. 1980), cert. denied 100 S.Ct. 2991, 447 U.S. 907, 64 L.Ed. 2d 857 (1980). Appellant must establish that the comments were prejudicial Black v. State, 383 So.2d 295 (Fla. 1st DCA 1980). In the instant case, Appellant has failed to establish that the objected to comments were prejudicial.

The Appellee would urge the Court to reaffirm its reasoning in Breedlove; that the objected to remarks herein, may have been improper (of which we do not concede that they were), but not so prejudicial as to require a new trial. The Appellee would further argue that the evidence is overwhelming that Appellant is guilty of murdering little Rebecca Kunash. The prosecutor's argument did not contribute to Appellant's conviction. Therefore this Court should affirm the trial court's denial of defendant/appellant's motion for mistrial. Compare, Zamot v. State, 375 So.2d 881 (Fla. 3d DCA 1979). See also Blair v. State, 406 So.2d 1103 (Fla. 1981).

POINT FIVE

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THREE PHOTOGRAPHS OF THE SIX YEAR OLD VICTIM.

ARGUMENT

Relevancy remains the basic test for admissibility of gruesome photographs. Bauldree v. State, 284 So.2d 196, 197 (Fla. 1973); Foster v. State, 369 So.2d 928 (Fla. 1979). In Foster, this Court reaffirmed that:

> "Thus, the current position of this court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of 'whether cumulative,' or'whether photographed away from the scene' are routine issues basic to a determination of relevancy, and is not issues arising from any 'exceptional nature' of the proffered evidence.

Id. at 369 So.2d 930.

The photograph of the victim was relevant to the issue of the identity of the victim (R,222-223). In Foster this Court squarely ruled that; "A defendant cannot, by stipulating as to the identity of a victim and the cause of death, relieve the State of its burden of proof beyond a reasonable

doubt. Id. at 930. The two photographs of the victim's vagina (showing trauma thereto) was relevant to the issue of penetration; which the State must prove to sustain a conviction for sexual battery, alleged in Count Five of the indictment (sexual battery by placing his penis in the victim's vagina) (R,680-681).

The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error. Foster, infra; State v. Wright, 265 So.2d 361 (Fla. 1972). The photographs of the victim's vagina was relevant also to corroborate the doctor's testimony regarding penetration. The photographs were relevant and therefore admissible. Id. The view of the victim's vagina was neither gory nor inflammatory beyond the simple fact that no photograph of a dead body is pleasant. See Alford v. State, 307 So.2d 433, 441 (Fla. 1975), (wherein this Court noted that the trial judge ruled a close-up photograph of the victim's vaginal area revealing injury to that area; but based upon the above referenced rationale, this Court ruled that the pictures were admissible). Id.

POINT SIX

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT/APPELLANT'S MOTION FOR MISTRIAL DURING THE PENALTY PHASE.

ARGUMENT

The objected to remark made by Doctor Wilder, a State's witness, was not responsive to the prosecutor's question:

> [PROSECUTOR] Based upon your evaluation of Mr. Jennings, do you have a medical term that you would apply to a person with his character orders and his mental state at the time of May 11, 1979?
>
> [DR. WILDER] Well, yes, but I would apply it only because of history, not because of anything I observed about him at that time.
>
> [PROSECUTOR] And what history were you aware of at the time of your examination?
>
> [DR. WILDER] He allegedly had committed a number of crimes while in the service, attacking people, robbing people and doing things of that kind, and in addition to the one for which he was being charged at the time.
>
> Usually, people who do repeated things which are against the law, we refer to them as sociopaths. That is, people who have no regard for the rights of others, have no regard for the feelings and have no regard for the norays of the community, for the laws of the community. So, the term, sociopath, is used for them. (R-692).

[PROSECUTOR] For that class of people, generally?

[DOCTOR WILDER] Yes. (R-693).

At that time the prosecutor asked to approach the bench and counsel for defendant/appellant moved for a mistrial (R-693). Clearly, the above mentioned statement was not responsive to the prosecutor's question. Mr. Hunt, the prosecutor, was simply trying to find out the medical term for his conclusion (R-694).

Unlike in Maggard v. State, 399 So.2d 973, 977 (Fla. 1981), the State did not present any evidence of Jennings' prior criminal record for violence. A state's witness inadvertently injected this evidence, in an answer that clearly was not responsive to the prosecutor's question. Additionally, contrary to Appellant's assertion, Doctor Wilder's statement could not be considered as "extensive evidence" such as that presented in Maggard. The prosecutor agreed prior to trial to not argue any evidence of Appellant's prior criminal record because Appellant was a juvenile at the time he committed those offenses. This was not the situation as that in Maggard, where the trial judge denied Maggard's motion to exclude evidence of his prior nonviolent crimes and the court denied that motion, even though Maggard agreed not to argue that he had no significant history of prior criminal activity.

Likewise, Stewart v. State, 51 So.2d 494 (Fla. 1951) cited by Appellant is inapplicable to the instant case. Stewart involved the prosecuting attorney who made improper comments;

not a witness for the prosecution, as were the facts herein.

After a curative instruction from the trial judge, the jurors clearly indicated that they would not consider Doctor Wilder's testimony regarding "so-called alleged past criminal acts" (R,694-695).

Doctor Wilder's response went beyond the prosecutor's question. This statement was not made during the guilt phase. Doctor Wilder's testimony was used to rebut the defense of insanity, not to prove that Jennings was the murderer of Rebecca Kunash. The trial judge gave a curative instruction directing the jury to disregard the objected to statement. Therefore, the Appellee would submit that Appellant has failed to show that Doctor Wilder's testimony was prejudical to him. See United States v. Roberts, 470 F.2d 1190 (5th Cir. 1972); and United States v. Carter, 526 F.2d 1276 (5th Cir. 1976). In view of the manner in which the comment came in, the trial judge's instructions and the nature of the overall evidence in the case, indicates that no reversible error occurred.

POINT SEVEN

THE APPELLANT WAS NOT DEPRIVED OF A FAIR TRIAL BY THE COURT'S DENIAL OF HIS REQUEST FOR SPECIAL JURY INSTRUCTIONS AT THE PENALTY PHASE.

ARGUMENT

The defendant/appellant submitted several written instructions at the penalty phase (R,1131-1143). The trial court denied all of those charges except part of one, providing that; "the mitigating circumstances which you may consider are unlimited. You may consider any evidence presented at trial or the sentencing proceeding in mitigation of the defendant's sentence." (R-1139). The defendant failed to object to the denial of his request for special jury instructions (R-813).

As a general matter, a reviewing court will not consider points raised for the first time on appeal. Dorminey v. State, 314 So.2d 134 (Fla. 1975). Where the alleged error is giving or failing to give a particular jury instruction, this Court has invariably required the assertion of a timely objection. Febre v. State, 158 Fla. 853, 30 So.2d 367 (1947) and Williams v. State, 285 So.2d 13 (Fla. 1973). The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings Castor v. State, 365 So.2d 701, 703 (1978).

To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the puntative error and to preserve the issue for intelligent review on appeal. Id. at 703. Except in cases of fundamental error, appellate counsel must be bound by the acts of trial counsel. Id. This issue is therefore not preserved for appellate review.

Nevertheless, the Appellee would point out that if anything, the jury instructions herein, were more favorable to the defendant/appellant. The trial judge bent over backwards in compliance with Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), to provide the jury with all of the statutory mitigating circumstances, as well as any other they may wish to consider (R,838-839,1139), that were supported by the evidence.

However, the Appellee would point out that Appellant's reliance upon Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980), is misplaced. Under Georgia law, the jury imposes the sentence of death. Id. at 100 S.Ct.1764. Whereas in Florida, the trial judge imposes the sentence of death. Therefore, even if the jury instructions are later found to be inadequate, the sentence of death should be affirmed, because the trial judge, utilizing the guidelines designed by the legislature, must still determine whether the ultimate penalty is warranted. This is a valid measure to assure that the Florida death penalty is applied in a manner that avoids the arbitrary and capricious infliction of the death penalty.

Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976).

POINT EIGHT

THE TRIAL JUDGE DID NOT ERR IN INFORMING THE JURY THAT SEVEN OR MORE COULD AGREE ON WHAT SENTENCE SHOULD BE RECOMMENDED TO THE COURT.

ARGUMENT

The trial judge instructed the jurors as follows:

> In these proceedings, it is not necessary that the advisory sentence of the Jury be unanimous. Your decision may be made by a majority of the Jury. The fact that the determination of whether a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.
>
> Before you ballot, you should carefully weigh, sift and consider the evidence and all of it, realizing that human life is at stake and bring to bear your best judgment in reaching your advisory sentence.
>
> If a majority of the Jury determined that the Defendant should be sentenced to death, you will complete this verdict form. It says advisory sentence. A majority of the Jury, by a vote of, and you would just put the numbers in, advise and recommend to the Court that it impose the death penalty upon the Defendant, Bryan Frederick Jennings, dated at Sanford,Florida, this blank day of July, 1982. On the other hand, if, by six or more votes, the Jury determines that the Defendant should not be sentenced to death, (R-839)

> your advisory sentence will be on this form. It says advisory sentence. The Jury advises and recommends to the Court that it impose the sentence of life imprisonment upon the Defendant, Bryan Frederick Jennings, without possibility of parole for twenty-five years, dated Sanford, Florida, this blank day of July, 1982 to be signed by your Foreman.
>
> You will now retire to consider your recommendation. When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your Foreman and returned to the Court. (R,840-841).

The language used by the trial judge--when seven or more are in agreement as to what sentence should be recommended to the court, etc. ...,--is taken verbatim from the standard jury instructions which this Court has adopted. See Fla.Std. Jury Instr. (Crim.) pp. 81-82 (1981). Appellant's assertion that this language deprives Appellant of a tie vote and is tantamount to an "Allen"[1] charge is ludicrous in light of the final vote of nine to three (R-845).

Counsel for defendant/appellant did not object to the above referenced instruction (R-841). Therefore, this issue is not preserved for appellate review. Castor v. State, infra.

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[1] Allen v. United States, 164 U.S. 492 (1896).

POINT NINE

THE TRIAL COURT DID NOT ERR IN ITS REFUSAL TO CERTIFY THE DEFENDANT AS A MENTALLY DISORDERED SEX OFFENDER.

ARGUMENT

The Appellant contends that it was error for the trial court to refuse to certify the Appellant as a mentally disordered sex offender. In the instant case the crimes were committed in May of 1979, prior to the 1979 amendment to Chapter 917 which became effective July 1, 1979. The Appellant correctly maintains that the provisions of the 1977 statute would be the standard to determine whether the Appellant should be certified as a mentally disordered sex offender. See Durbin v. State, 385 So.2d 172 (Fla. 4th DCA 1980).

Doctor McMahon, a clinical psychologist, testified during the penalty phase that Appellant was very angry about a number of things that occurred on the previous day and on the day of the crime (R-768,781-782). She testified that he looked for someone to be angry at; that he looked for a way to vent his anger, and one of the ways he vented his anger was sexually (R-768).

She further testified that Appellant understood right from wrong; that he understood the consequences of his actions (R-771). Additionally, she testified that Appellant met the criteria of the mentally disordered sex-offender statute (R-776). She testified that Appellant had a character

defect, and was antisocial (R-778,791). She testified that Appellant was unable to explain why he returned to the Kunash home the second time (R-788).

Doctor McMahon further testified that Appellant fit the criteria of the mentally disordered sex offender act in that (1) he is not psychotic; (2) that he has an emotional disorder such that he would commit further sexual acts if allowed to go at liberty (R,792-793). However, she conceded that treatment of persons with Appellant's problem have not been all that successful (R-793).

Doctor McMahon further testified that if Appellant were angry enough, that she thought he would have hurt anyone in his way, even if he were sober (R-795).

Doctor Gutman, a psychiatrist, testified that Appellant was not insane; that he knew right from wrong; and that he had a long-term character and behavior disorder (R-714). He also testified that Appellant fit the criteria of the mentally disordered sex offender statute (R-724), yet he did not agree that Appellant was treatable (R-725). He testified that Appellant knew full well the nature of his acts; that he did not have any delusions or hallucinations under which he was operating (R-727). He further testified that alcohol was not a serious mitigating factor, although it did have some influence on him (R-729-730). Doctor Gutman testified that the term "mentally disordered sex offender" was not a medical term (R-730). Doctor Gutman stated ultimately that Appellant's acts were deliberate (R-734).

Doctor Wilder, a psychiatrist, testified that Appellant

had a character or personality disorder, that was not usually easily changed; that these kinds of disorders do not yield very well to treatment (R-695,805). He further testified that Appellant did not suffer from any mental disease or defect (R-695-696). He also testified that Appellant's acts were deliberate and that he understood what he was doing (R-697).

The testimony of Doctor Gutman and Doctor Wilder, two psychiatrists, indicates that Appellant's acts were deliberate and that he understood the nature of his acts.

The question of a defendant's mental condition at the time of the offense in question is a question of fact for the jury. Williams v. State, 45 Fla. 28, 34 So. 279 (Fla. 1903). In Byrd v. State, 297 So.2d 22 (Fla. 1974), this court reemphasized that a jury does not necessarily have to take expert testimony over non-expert testimony. They may disbelieve the non-expert if that is there inclination. Id. at 24. In the instant case, the trial court held a hearing to determine if it should certify the defendant as a mentally disordered sex offender, unlike in Rosier v. State, 374 So.2d 1041 (Fla. 2d DCA 1979), where the trial court refused to hear Rosier's motion to determine whether he was a mentally disordered sex offender; or Messer v. State, 330 So.2d 137, 142 (Fla. 1976), where the trial court refused to give the defendant an opportunity to present psychiatric testimony to the jury during the sentencing portion of the proceedings.

In the instant case, the trial judge exercised the broadest of latitude in admitting psychiatric testimony to the

jury during the penalty phase of the proceedings. Subsection 921.141 (1), Florida Statutes (1979) provides in part:

> "In the proceeding, the 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)."

The above-quoted language clearly indicates that the procedure followed by the trial court in the case sub judice comports with the requirements for a hearing under Subsection 917.14 and 917.19 Florida Statutes (1977). By the varied terms of the act, certification under Section 917.14 is discretionary. The failure to certify will not be error unless the record reveals clear abuse of judicial discretion. LeDuc v. State, 365 So.2d 749 (Fla. 1978); Peek v. State, 395 So.2d 492, 496 (Fla. 1981). Section 917.19 Florida Statutes (1977) leaves the ultimate decision of whether to declare the defendant a mentally disordered sex offender to the trial court.

In the instant case, the trial court held a hearing to determine whether the Appellant was a mentally disordered sex offender and found that he was not. Furthermore, the court found that under Subsection 921.141 (6)(b) that there was no mitigating circumstance in the instant case (R-1047).

The Appellant has failed to demonstrate that the trial judge clearly abused his judicial discretion in his refusal to certify the Appellant to be a mentally disordered sex

offender. Absent a record that he abused his discretion, error will not lie. _LeDuc_, _supra_.

POINT TEN

THE SENTENCE OF DEATH IMPOSED UPON APPELLANT IS JUSTIFIED IN THAT IT IS BASED UPON APPROPRIATE AGGRAVATING CIRCUMSTANCES AND THERE ARE NO MITIGATING CIRCUMSTANCES THAT OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

ARGUMENT

In the instant case, the trial court found that there were no mitigating circumstances existing, either statutory or otherwise which outweighs any aggravating circumstance to justify a sentence of life imprisonment rather than a sentence of death (R-1047-F). Specifically, the trial court found that there were three aggravating circumstances that justify the imposition of the death penalty:

AGGRAVATING CIRCUMSTANCES

1. As an aggravating circumstance, the Court finds that the murder of Rebecca Kunash was committed by the Defendant while he was engaged in the comission of, or flight after commiting, the crimes of burglary, kidnapping and rape (Sec. 921.141 (5)(d), Fla.Stat.).

2. As an aggravating circumstance, the Court finds that the murder of Rebecca Kunash was especially heinous, atrocious, or cruel (Sec. 921.141 (5)(h), Fla.Stat.).

3. As an aggravating circumstance, the Court finds that the murder of Rebecca Kunash was committed in a cold, calculated and premeditated manner without any pretence of moral

or legal justification (Sec. 921.141 (5)(i), Fla.Stat.) (R-1047-D). The death sentence imposed upon Bryan Jennings must be affirmed. A review of the evidence and findings below will lead this Court to the inescapable conclusion that a sentence of death is warranted.

A. THE TRIAL COURT DID NOT ERR IN FINDING THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS AND CRUEL TO SUPPORT THE IMPOSITION OF THE DEATH PENALTY.

The Appellant's contention that the trial court erred in finding the aggravating circumstance of heinous, astrocious and cruel to support the imposition of the death penalty is wholly untenable. In his findings to support this aggravating circumstance, the trial judge found that the victim, Rebecca Kunash, while sleeping in her bed, was abducted by the defendant/appellant who rendered her unconscious by placing his hand over her mouth and nose. That Appellant gained entry to the Kunash home by forcibly removing the screen and opened the window. That Appellant took Rebecca to his car and proceeded to an area near the Girard Street Canal on Merritt Island. There, he raped Rebecca, severely bruising and lacerating her vaginal area; using such force that he bruised his penis. In the course of events, the defendant/appellant lifted Rebecca by her legs, brought her back over his head, and swung her like a sledge hammer onto the paved ground, fracturing her skull and causing extensive damage to her brain. The Court further found that the Defendant took Rebecca into the canal and held

her under the water until she drowned. At the time of her death, Rebecca Kunash was six (6) years of age, thirty-nine (39) inches tall and weighed forty-five (45) pounds (R-1047C-1047D).

Additionally, the Appellee would point out that Doctor McMahon's testimony indicates that while Bryan was sexually assaulting Rebecca, she regained consciousness; and at that time a car approached and he became frightened and threw the child--(R-774).

In State v. Dixon, 283 So.2d 1,10 (Fla. 1973) this Court stated that:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily torturous to the victim. (Emphasis added).

Id. at 9.

Jennings highlights several cases in particular, all of which allegedly involved defendants equally or more deserving of the death penalty than he but in all of which the Florida Supreme Court reversed sentences of death. The first case cited by the Appellant is Purdy v. State, 343 So.2d 4 (Fla. 1977). The Appellant contends that Purdy supports his contention that the rape of a child under eleven (11) does not support the death penalty. The Appellee would disagree. The facts in

Purdy are not similar to the facts in the instant case. In Purdy, the rape of the seven (7) year old child did not lead to her death. The child was left alive, and other than evidence of physical abuse, the child showed no signs of extreme emotional or psychological distress. Purdy, supra at 5. In Purdy, this Court concluded that:

> Although the trial judge found the act for which appellant was convicted to be "especially heinous, atrocious or cruel," nothing was shown to distinguish this crime from any other violation of the same statute. The findings in the evidence do not show how this involuntary sexual battery of a child not more than eleven (11) years old of age was especially aggravated under the terms of the death sentence law.

Id. at 6.

This court's decision in Purdy hinged on the fact that no further physical harm was done to the child outside of the sexual battery. In the instant case, the Appellant murdered a six (6) year old child by holding her head under water until she drowned. Certainly, a rape/murder of a six (6) year old is worse than the rape of a six (6) year old child standing alone. The rape of Rebecca Kunash and her subsequent murder requires a finding that this crime was especially heinous, atrocious and cruel.

The second case relied upon by Appellant is Halliwell v. State, 323 So.2d 557 (Fla. 1975), which Appellant cites for the proposition that the rape murder of Rebecca Kunash was not especially heinous, atrocious or cruel. Again, the facts

in Halliwell are not similar to the facts in the instant case. In Halliwell, the defendant beat his victim to death with a breaker bar and then dismembered the body. The jury convicted him of first degree murder and recommended the death penalty, which the trial court imposed. The Florida Supreme Court affirmed the conviction but reduced the sentence to life imprisonment. The court found the defendant had no prior arrests and was a decorated Green Beret in the Vietnam War. It found further that the defendant had acted "under emotional strain over the mistreatment of [the women he loved] by the victim" and that the dismemberment occurred after death. Thus the death penalty was not warranted. Id. at 561.

In Halliwell this Court's decision emphasized that "if the mutilation had occurred prior to death or instantly thereafter, it would have been more relevant in fixing the death penalty." Id. at 561. In the instant case, the mutilation of a child by crushing her skull, causing a hemorrhage between the cerebral membrane and the brain itself, occurred prior to death; and would have resulted in her death even if the Appellant had not drowned her (R,235-237, 243).

The third, fourth and fifth cases cited by the Appellant are Burch v. State, 343 So.2d 831 (Fla. 1977), and Chambers v. State, 339 So.2d 204 (Fla. 1976) and Jones v. State, 332 So. 2d 615 (Fla. 1976). In Burch, the defendant murdered his victim by stabbing her over thirty (30) times after an unsuccessful rape attempt. Burch, supra at 832. Following a jury conviction of first degree murder with a recommendation of life imprisonment, the trial court imposed capital punishment. The Florida

Supreme Court affirmed the conviction but reduced the sentence to life. The court quoted Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), in recognizing that a jury recommendation of life is entitled to great weight. It then found "that at the time of the offenses the defendant was mentally disturbed." Burch, supra at 834. Burch also had no prior history of criminal conduct. Id. at 833-834. These mitigating circumstances, held the court, were sufficient to preclude imposition of the death penalty. Chambers v. State, involved a case in which the Appellant severely beat his girlfriend to death. Her brain was battered by a continuing, massive, indiscriminate beating. Chambers, supra at 205. In Chambers, the jury recommended a life sentence was appropriate. The trial judge however sentenced the Appellant to death. The trial judge found that the defendant in Chambers had a significant history of drug usage and was under the influence of some mental or emotional disturbance, but that any such distrubance was self-induced by the use of the illegal drugs and was not a mitigating circumstance. The jury had before it evidence that the Appellant and the victim had voluntarily shared a long standing sado-masochistic relationship which included severe and disabling beatings. The jury also knew that the victim had herself obtained the Appellant's release from jail on the day he had beaten and dragged her through the streets in an unholy rage. This court found that the totality of the circumstances existent in the instant cause, and the weighing of mitigating and aggravating circumstances did not warrant the imposition of the death penalty. Id. at

207. The court determined that the jury's recommendation of life sentence was appropriate. Id. at 208.

In Jones v. State, the defendant in Jones raped his victim and then murdered her by stabbing her thirty-eight (38) times. Id. at 616. The jury convicted him of first degree murder and recommended life imprisonment. The trial court sentenced him to death. The Florida Supreme Court found that the defendant "suffered a paranoid psychosis to such an extent that the full degree of his mental capacities at the time of the murder is not fully known." This mitigating circumstance, according to the court, was "determinitive," and sufficiently outweighed the aggravating circumstances. The defendant's sentence was therefore reduced to life imprisonment. Id. at 619.

In the above cited cases of Purdy, Halliwell, Burch, Chambers, and Jones--the Florida Supreme Court, after balancing the aggravating and mitigating circumstances, found that sufficient mitigating circumstances existed to outweigh the aggravating circumstances and preclude the imposition of the death penalty. In Tedder, the only case in which the court did not appear to balance, at least not expressly, aggravating and mitigating circumstances, this court announced the rule that when the jury recommends life imprisonment the trial court should impose capital punishment only when "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, supra, 322 So.2d at 910. That was not the situation in Tedder,

so the Florida Supreme Court reversed the death sentence. That also was the situation in Jones, Burch and Chambers. In each case the jury recommended life and the trial court sentenced the appellants to death. That is not the situation in the instant case, because the jury recommended that Jennings receive the death penalty (R-845).

The Appellant further contends that even if this Court finds sufficient factual basis for the aggravating fact of heinous, atrocious and cruel; that the finding is improper because the judge failed to consider and weigh the alleged fact that these acts were committed while the Appellant was acting under the influence of extreme mental and emotional disturbance, which prevented him from exercising his ability to conform his actions to the requirement of the law. The Appellant cites in support of his position Huckaby v. State, 343 So.2d 29 (Fla. 1977) and Miller v. State, 373 So.2d 82 (Fla. 1979). The facts in Huckaby and Miller are dissimilar to the facts in the instant case. In Huckaby medical tests showed an abnormality of Huckaby's brain wave pattern, suggesting a possible organic cause for his antisocial behavior. See Huckaby, supra at 31. In the instant case, there is no evidence suggesting that the Appellant Jennings had a possible organic cause for his antisocial behavior. In Miller v. State the trial judge specifically found as a mitigating circumstance that due to mental sickness, the defendant's [Miller] capacity and ability to conform his conduct to the requirements of the law were substantially impaired. Miller supra, at 884. In addition, the trial court in Miller specifically

found that the evidence presented at the sentencing hearing indicated that the defendant was suffering from mental illness at the time the murder was committed. In Miller this Court reversed the appellant's sentence of death based on the trial court's consideration of a non-statutory aggravating factor. Id. at 883. The facts in Miller are substantially different from the facts in the instant case. After Miller was charged with first degree murder, he was found incompetent to stand trial and was committed to the state mental hospital at Chattahoochee. After two and a half years confinement and treatment, he was sufficiently competent to stand trial. Apparently his mental illness was in remission through the use of tranquilizing drugs. Psychiatric testimony presented at the sentencing hearing concluded that Miller was suffering from paranoid schizophrenia and hallucinations. He had been comitted to mental hospitals on several previous occasions, and had a long history of drug abuse. Miller had a severe hatred for his mother, and had planned to kill her after his release from the Lee County Jail, just prior to the murder in that case. Miller had been raised primarily by his mother, who had been married four times. For many years prior to that time, Miller's mother had refused any contact with her son. On several previous occasions, Miller had suffered hallucinations in which he saw his mother and other persons, in a "yellow haze." On at least one previous occasion, he had senselessly assaulted another woman during such hallucinations. He testified that at the time of the murder, he saw his mother's face on that fifty-six year old woman taxi driver,

in a "yellow Haze", and proceeded to stab her to death. Miller, supra at 885 n.4.

In the instant case, the Appellant did not suffer from paranoid schizophrenia or hallucinations (R 727). The Appellant Jennings was not neurotic or psychotic. Doctor Gutman testified at the sentencing proceeding that Appellant knew right from wrong, and that his acts were deliberate (R 714, 734). Doctor Gutman further testified taht he felt that the Appellant Jennings was capable of conforming his conduct to what society expects (R 729).

The Appellee would maintain that the Appellant's position that the trial court improperly applied the aggravating circumstance that this crime was heinous, atrocious, and cruel is highly untenable in light of the facts detailed above.

B. THE TRIAL COURT DID NOT ERR IN FINDING THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED.

The findings of the court were that the defendant/ Appellant had driven by the Kunash home earlier in the evening; gone to Rebecca's window where he saw her asleep. That he left only to return a short time later. The court found that at that time Appellant made a conscious decision to enter her room and did so. That Rebecca Kunash offered no threat to the defendant. From the initial abduction to the final premeditated act of drowning her, defendant's acts represented a cold and calculated indifference to the feelings or life of Rebecca Kunash (R 1047 D).

Appellant now maintains that the trial judge following his first trial did not find this aggravating circumstance, and to permit this to occur, would violate his right against being placed in double jeopardy.

Appellant mistakenly relies upon this Court's statement in State v. Dixon, that the aggravating circumstances actually define those crimes punishable by death and must be proved beyond a reasonable doubt. Id. 283 So.2d 1,9. Appellant argues that aggravating circumstances are analogous to individual offenses; and by failing to make this finding after the first trial; that he was acquitted of that particular factor.

The Appellee would invite Appellant to read further to the next paragraph, wherein the Appellee would maintain, this Court explains that the aggravating factors represented "situations" wherein the death penalty was applicable absent overriding mitigating factors. Id at 9.

The Appellee would maintain that the finding that the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, does not add an entirely new factor as an aggravating circumstance, but only reiterates in part what is already present in the elements of premeditated murder, with which Appellant was charged and which the evidence clearly supported. Therefore, the finding of this factor was proper and did not violate the prohibition against ex post facto laws as set forth in Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) and State v. Williams, 397 So.2d 663

(Fla. 1981). See also Combs v. State, 403 So.2d 418, 421 (Fla. 1981), cert. denied, 102 S.Ct. 2258 (1982).

C. THE TRIAL COURT DID NOT ERR IN FINDING THE AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED DURING THE COMMISSION OF A FELONY TO SUPPORT THE IMPOSITION OF THE DEATH PENALTY, WHEN THE FELONY FORMED THE UNDERLYING BASIS FOR THE FELONY MURDER CONVICTION.

The Appellant contends that a death sentence for a felony murder cannot be supported by an aggravating circumstance which takes into account the same underlying felony in which the murder was committed. The Appellee would maintain that the Appellant's position is unsupported by the law. In Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976), this Court stated that:

> The aggravating circumstances of Florida Statute §921.141(6), F.S.A., actually defined those terms - when read in conjunction with Fla. Stat. §782.04(1) and 794.01(1), F.S.A. - to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury ....
>
> Fla. Stat. §921.141(6)(d), F.S.A., provides that the commission of a capital felony as part of another dangerous and violent felony constitutes not only a capital felony under Fla. Stat. §782.04(1), F.S.A., but also an aggravating capital felony. Such a determination is, in the opinion of this Court, reasonable.

Alford, supra at 444. The Appellant improperly concludes that the use of an underlying felony as an aggravating circumstance violates the principles enunciated in Furman v. Georgia, 408 U.S. 238 (1972). In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the United States Supreme Court found that the Florida statute has a provision designed to ensure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases. Proffit, supra at 96. S.Ct. 2969; State v. Dixon, 283 So.2d at 10. Florida courts consistently compare the circumstances of the case under review with those of previous cases in which it has assessed the imposition of death sentences. Alford, supra at 445.

In Proffitt, the Supreme Court found that the requirements of Furman are satisfied and the sentencing authority's discretion is guided and channelled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. On its face the Florida System satisfies the constitutional deficiencies identified in Furman. Proffitt, supra at 96 S.Ct. 2967.

D. THE TRIAL COURT DID NOT ERR IN FINDING NO MITIGATING FACTORS PRESENT.

The Appellant contends that the trial court erred in rejecting three of the statutory mitigating circumstances and in rejecting or not considering the existence of non-statutory factors in mitigation. The Appellee would contend that Appellant's position is without merit.

Appellant argues that his heavy alcohol consumption, coupled with his emotional disorder, establishes that he was unable to conform his conduct to the requirements of law. Sections 921.141(6)(b) and (f), Fla. Stat. (1979).

The Appellee would point out that Dr. Gutman and Dr. Wilder testified that Appellant was able to conform his conduct to the requirements of law; and that alcohol was not a serious mitigating factor (R 695-697, 729). Additionally, all three experts agreed that it was highly unlikely that Appellant's emotional disorder could be successfully treated. (R 695, 725, 793, 805).

This Court rejected a similar argument in Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert. denied, 102 S.Ct. 1039 (1982), wherein, Buford, convicted of the rape/ murder of a seven year old child; argued that he had diminished capacity due to the excessive consumption of alcohol, drugs and marijuana. The court rejected Buford's argument because he knew the difference between right and wrong; unlike in Jones v. State, 332 So.2d 615 (Fla. 1976). This Court should

accordingly, reject Jennings' contention.

> It has long been held that the question of a defendant's mental condition at the time of the offense is a question of fact for the jury.

Williams v. State, 45 Fla. 128, 34 So. 279 (1903). In Byrd v. State, 297 So.2d 22, 24 (Fla. 1974) this Court stated that:

> We here must re-emphasize that a jury does not necessarily have to take expert testimony over non-expert testimony. They may disbelieve the expert and believe the non-expert if this is their inclination,...

Byrd, supra at 24. In the instant case, after a hearing to determine if the Appellant was suffering under the influence of extreme mental or emotional disturbance, the trial court found that he was not and that this was not a mitigating circumstance present in the instant case (R 1006-1107). The trial court found that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired. Based upon the evidence heard at the sentencing proceeding the Appellee would maintain that the trial court was correct in concluding that this was not a mitigating factor here. The Appellant was twenty years old at the time he committed the crime, and he was above average intelligence. The Court found that though he was of a young age, and was of above average intelligence, that this was not a mitigating

circumstance here. This Court has consistently affirmed sentences of death wherein the appellants were young in age. See Meeks v. State, 336 So.2d 1142 (Fla. 1976), Hoy v. State, 353 So.2d 826 (Fla. 1978); Jackson v. State, 366 So.2d 752 (Fla. 1978); Buford v. State, infra; Brown v. State, 381 So.2d 690 (Fla. 1980); Neary v. State, 384 So.2d 881 (Fla. 1980); Thompson v. State, 389 So.2d 197 (Fla. 1980); and King v. State, 390 So.2d 315 (Fla. 1980).

With respect to the non-statutory mitigating factors that the Appellant had an unstable family life, that Appellant appeared to show remorse for his actions, there is nothing in the record to indicate that the trial judge did not consider these non-statutory mitigating factors, but simply that he declined to find that the record justified the conclusion that these were in fact such mitigating factors, that would outweigh the three aggravating circumstances.

In conclusion, the Appellee would maintain that the case of Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976) is directly on point with the instant case. In Alford the body of a thirteen year old female victim was discovered lying on a trash pile. She had been raped, both vaginally and rectally, was blindfolded, and shot five or six times. The defendant was a twenty-seven year old male and had no significant record of prior criminal activity. In Alford this Court held that the death sentence was appropriate.

The Appellee would further point out this Court's holding in Goode v. State, 365 So.2d 381 (Fla. 1978) wherein the defendant Goode, age twenty-two committed a crime in a manner which this Court found was unnecessarily torturous to the victim. Both the jury and the judge considered the question of whether the mental capacity of the Appellant Goode was "substantially impaired" so that he could not appreciate the criminality of his conduct or conform his conduct to the requirement sof law. In Goode this Court found that the imposition of the death penalty was proper. The Appellee would maintain that as in Goode and Alford, that the jury and the trial judge considered the question of his age, mental capacity, and the non-statutory mitigating factors included in the Appellant's brief, and that the record will substantiate that those factors did not outweigh the two aggravating circumstances.

Accordingly, the judgment and sentence of the circuit court should be affirmed.

POINT ELEVEN

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

ARGUMENT

Appellant suggests that the Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied. A review of cases that he cites will serve to show that these contentions are without merit.

Appellant cites Mullaney v. Wilbur, 421 U.S. 685, 95 S.Ct. 1881 (1975) for the proposition that the Florida statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors. The case held that a Maine law requiring the defendant to establish by a preponderance of evidence that he acted in the heat of passion on sudden provocation, in order to reduce murder to manslaughter, is violative of due process. Appellee fails to see any relevant connection between Maine law and the present case.

Appellant then cites Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980), for the proposition that the aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. The United States Supreme Court in reversing a death sentence based on Georgia law cites Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2967 (1976), as a valid example of a capital sentencing scheme which provides

"specific and detailed guidance."

Appellant's argument that the Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, and limitations on consideration of and weight given to mitigating evidence and factors, is without merit. The constitutional infirmities of the Ohio death penalty in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), cited by Appellant for the above proposition, were compared to the valid Florida capital sentencing statute in Proffitt v. Florida, supra.

The Florida death penalty scheme, under which a trial judge weighs nine (9) aggravating factors against seven (7) mitigating factors to determine whether the death penalty shall be imposed, under which the trial judge focuses on the circumstances of the crime and the character of the individual, under which the court sets forth in writing its findings upon which the sentence of death is based, and under which there is automatic review by the Supreme Court of Florida is sufficient, on its face, to avoid constitutional deficiencies arising from arbitrary and capricious imposition of death penalty. Proffitt v. Florida, supra. The court also held that imposition of death penalty is not cruel and unusual punishment.

The constitutionality of the Florida capital sentencing statute both as to due process arguments and cruel and unusual punishment arguments has repeatedly and recently been upheld. Spinkellink v. State, 313 So.2d 666 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973); Ford v. State, 374 So.2d 496 (Fla. 1979);

Foster v. State, 369 So.2d 928 (Fla. 1979); Songer v. State, 365 So.2d 696 (Fla. 1978); Jackson v. State, 366 So.2d 752 (Fla. 1978); Raulerson v. State, 358 So.2d 826 (Fla. 1978); Gibson v. State, 351 So.2d 948 (Fla. 1977); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Meeks v. State, 364 So.2d 461 (Fla. 1978); Cooper v. State, 339 So.2d 1133 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975); McCrae v. State, 395 So.2d 1145 (Fla. 1980); Peek v. State, 395 So.2d 492 (Fla. 1981).

There is no merit in Jennings' contention that the State should have been required to provide defense counsel with advance notice of the aggravating factors on which it intended to rely. See Spinkellink v. Wainwright, 578 F.2d 582, 609 (5th Cir. 1978), Menendez v. State, 368 So.2d 1278, 1282 n.21 (Fla. 1978).

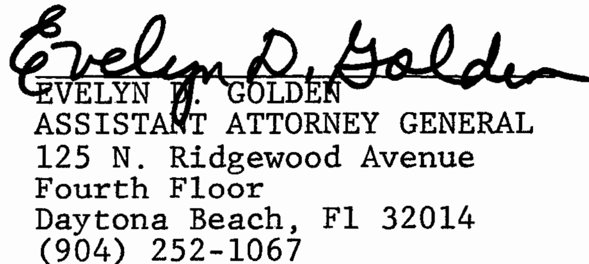
Additionally, Appellant's contention that this Court has rendered Florida's death penalty unconstitutional because of its decisions in Quince v. State, 414 So.2d 185, 187 (Fla. 1982), cert. denied, Case No. 82-5096 (U.S. Sup. Ct. October 4, 1982), and Brown v. Wainwright, 392 So.2d 1327 (1981), cert. denied, 102 S.Ct. 542 (1981); clearly, in light of the United States Supreme Court's denial of certiorari jurisdiction, defeats Appellant's assertion. Surely, if this Court's announced function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision was deficient in any respect, the supreme court would have said so. Appellant's assertion is clearly untenable in fact and law.

CONCLUSION

Appellee, the State of Florida, in conclusion would state that based upon the foregoing reasoning and cited authorities, Appellee would respectfully request that this Honorable Court in all respects affirm the order, judgment and sentence of the trial court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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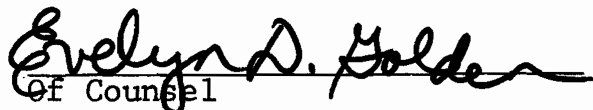
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by mail to: Christopher S. Quarles, Assistant Public Defender, 1012 South Ridgewood Avenue, Daytona Beach, Florida 32014 on this 8th day of March, 1983.



Of Counsel