IN THE SUPREME COURT OF FLORIDA

GERALD EUGENE STANO,)
Appellant,)
vs.) CASE NO. 63,947
STATE OF FLORIDA,)
Appellee.)
)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, GERALD EUGENE STANO, was the Defendant and Appellee, STATE OF FLORIDA, was the Prosecution in the Criminal Division of the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida. In this brief, the parties will be referred to either by name or as they appear before this Honorable Court.

The following symbols will be used:

"R" - Record on Appeal

"SR" - Supplemental Record on Appeal

"AB" - Initial Brief of Appellant

POINT I

THE SENTENCE OF DEATH WAS PROPERLY IMPOSED ON APPELLANT PURSUANT TO § 921.141, FLA. STAT. (1981).

ARGUMENT

(A) Introduction:

The penalty of death is appropriate based on the trial court's finding of six (6) previous first degree murder convictions.

Acting upon the advice of counsel, Appellant, GERALD EUGENE STANO, pleaded guilty to first degree murder in each of the instant cases and waived his right to an advisory jury at the sentencing hearing (R 288-324). Following hearing testimony and argument at the penalty phase hearing, the trial court sentenced GERALD EUGENE STANO to death for each of the two (2) first degree murder convictions.

In Case No. 83-188-CC, involving the murder of Susan Bickrest on or about December 20, 1975 (hereinafter referred to as the Bickrest case), the trial judge found four (4) aggravating circumstances pursuant to § 921.141 (5), Fla. Stat. (1981): (b) GERALD EUGENE STANO had been previously convicted of six (6) capital felonies; (h) the crime was especially heinous, atrocious, or cruel; (i) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, and; (d) the crime was committed while the defendant was engaged in a kidnapping (R 621-23).

In Case No. 83-189-CC, involving the murder of Mary Kathleen Muldoon on or about November 11, 1977 (hereinafter referred to as the Muldoon case), the trial court found three (3) aggravating circumstances: (b) GERALD EUGENE STANO had been previously convicted of six (6) capital felonies;

(h) the crime was especially heinous, atrocious, or cruel, and; (i) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (SR 3-4).

In each case, the trial court expressly considered and rejected each and every mitigating circumstance enumerated in § 921.141(6), Fla. Stat. (1981) (R 623-4; SR 5-6). However, the trial court did find the following nonstatutory mitigating factors in each case: (a) the defendant's difficult early childhood; (b) the defendant's marital difficulties, and; (c) the defendant's confession and guilty pleas to these and other murders (R 624; SR 6). Although the trial court found these factors to have been established, it concluded in each case that they were entitled to little weight (R 624; SR 6).

Before this Court, Appellant disputes the applicability of many of the aggravating factors found by the trial court, as well as finding fault with the court's failure to find certain statutory mitigating factors. However, Appellant did not dispute, either before the trial court or this Court, the propriety of the finding of six (6) previous convictions for first degree murder (AB 10). In concluding that the death penalty was appropriate in each of the instant cases, the trial court stated as follows:

> The Court is aware it is not to engage in a mere mechanical tabulation of criteria, but rather it is to carefully weigh and evaluate the evidence. In this case, the large number of prior murder convictions is the dominant factor. This criteria is entitled to great weight. By itself, it would outweigh the mitigating factors and call for the death penalty.

(R 624-5; SR 6) (emphasis added)

Based on the foregoing, the State submits that regardless of

the propriety of the trial court's findings regarding the remaining aggravating circumstances, the sentences of death imposed on GERALD EUGENE STANO must be affirmed. Appellant does not, and indeed he cannot, dispute the propriety of the court's finding regarding the aggravating circumstance set forth in § 921.141(5)(b), Fla. Stat. (1981), and the trial court found that this factor alone justified imposition of the death penalty.

In Elledge v. State, 346 So.2d 998 (Fla. 1977), this Court was compelled to reverse a sentence of death because of improper reliance on a nonstatutory aggravating factor. In support of that result, this Court stated as follows:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered.

Id. at 1003.

In the instant case, unlike Elledge, we certainly can know that even if any or all of the remaining aggravating circumstances were improperly applied, the weighing process would not be affected. The trial court explicitly and unequivocally found that standing alone, the prior murder convictions factor would outweigh the mitigating factors and call for the death penalty. This conclusion is not undercut by the fact that the trial court found what it enumerated to be three (3) nonstatutory mitigating factors, as the trial court expressly found these factors to carry "little weight". Furthermore, it is well established that penalty phase procedures are not a mere counting process, but rather "a reasoned judgment as to what factual situations require imposition of death and which can be satisfied by life imprisonment in light of the totality of

the circumstances present." State v. Dixon, 283 So.2d 1 (Fla. 1973).

Just as Appellant does not dispute the applicability of this finding, it is beyond dispute that his six (6) prior first degree murder convictions are a "dominant factor" in the totality of the circumstances present. The State submits that it is likewise beyond dispute that this factor alone justifies imposition of the death penalty. Certainly society is entitled to protect itself from persons such as GERALD EUGENE STANO. However, there comes a point when mere protection is patently insufficient. There comes a point, when the sheer scope of the tragedies and pain wrought by one man become so immense, that death is the only appropriate penalty. Such is the case sub judice.

In summary, the State contends that regardless of this Court's treatment of the remaining aggravating circumstances, the penalty of death is appropriate based on the "dominant factor" which Appellant himself concedes was properly applied. This is so because based on the trial court's meticulous written findings, we can know that the result of the weighing process would not have been different had any impermissible factors (assuming such are shown) not been present. See, Brown v. State, 381 So.2d 690 (Fla. 1980); see also, Jackson v. Wainwright, 421 So.2d 1385, 1388 (Fla. 1982); Lusk v. State, 9 FLW 39 (Fla. January 26, 1984).

Accordingly, the State would urge that the sentences of death imposed on GERALD EUGENE STANO be affirmed.

(B) The trial court properly considered mitigating evidence presented pursuant to §921.141(6), Fla. Stat. (1981), and the court's findings regarding mitigating circumstances were proper.

As to each case, Appellant argues that the trial court erred in failing to find certain statutory mitigating factors and in assigning "little

weight" to those nonstatutory mitigating factors which the court found were established. Specifically, Appellant argues that the evidence presented at the sentencing hearing established both that he was under the influence of extreme mental or emotional disturbance when the crime was committed [§ 921.141(6)(b), Fla. Stat. (1981)], and that his capacity to conform his conduct to the requirements of the law was substantially imparied [§ 921.141(6)(f), Fla. Stat. (1981)]. This contention is without merit.

In its written findings of fact in support of the death penalty, the trial court rejected each of the aforecited mitigating circumstances. With regard to §921.141(6)(b), Fla. Stat. (1981), the court, in each case, found as follows:

> Evidence was presented pertaining to this circumstance. Much of it was conflicting. After carefully considering all the testimoney, reports, other evidence, and hearing argument of counsel, the Court finds the Defendant was not under the influence of extreme mental or emotional disturbance when the crime was committed. The Court adopts and accepts the sentence hearing testimony of Doctors Carrera and Barnard regarding this criteria.

(R 624; SR 5)

With regard to § 921.141(6)(f), Fla. Stat. (1981), the court, in each case, found as follows:

> Evidence was presented pertaining to this circumstance. Much of the evidence was conflicting. After carefully considering all the testimony, all the psychiatrists reports, the PSI, and having heard argument of counsel, this Court finds this criteria has not been established. The court adopts and approves the sentence hearing testimony of Doctors Carrera and Barnard concerning this criteria.

(R 624; SR 5-6)

It is well established that it is within the province of the trial court to determine whether a particular mitigating factor has been proven. Wilson v. State, 436 So.2d 908 (Fla. 1983); Daugherty v. State, 419 So.2d 1067 (Fla. 1982); Riley v. State, 413 So.2d 1173 (Fla. 1982); Lucas v. State, 376 So.2d 1149 (Fla. 1979). The State submits that the trial court acted well within its province when it determined that the aforecited mitigating factors were not established.

Clearly, this is not a case where the trial court failed to consider unrefuted medical testimony relating to one of the mental mitigating factors. Compare, Mines v. State, 390 So.2d 332 (Fla. 1980). Rather, the findings of the trial court evince that the court considered all the evidence presented on these issues. Indeed, the court explicitly relied on some of that evidence in finding the three nonstatutory mitigating factors which were established (R 624; SR 6). In light of that, Appellant's claim that the court "overlooked" certain evidence or testimony favorable to him is clearly misguided. The court certainly recognized that much of the evidence presented it was conflicting in nature. However, the simple fact remains that the court below simply resolved those conflicts adversely to Appellant. That ultimate conclusion is amply supported by the record before this Court, and Appellant has demonstrated no basis for overturning the reasoned decision of the sentencing court.

After having examined Appellant on a number of occasions, both Dr. Carrera and Dr. Barnard testified that Appellant was not under the influence of extreme mental or emotional disturbance at the time of either of the charged offenses (R 171, 122; R 134, 135). Similarly, the doctors agreed that GERALD EUGENE STANO'S capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was not

substantially impaired (R 121-3; R 135, 136). This opinion was shared by Dr. Robert Davis, the Psychiatrist who treated Appellant in 1976 in connection with his marital problems (R 155-58).

In contrast, the defense presented the opinions of two (2) medical experts who were themselves unable to agree on the precise nature and extent of Appellant's alleged mental deficiencies. Dr. Ann McMillan, pursuant to stipulation of the parties, opined that Appellant was under the influence of extreme mental or emotional disturbance at the time of each offense and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (R 113-14). Dr. Fernando Stern similarly testified that Appellant was under the influence of mental or emotional disturbance during the commission of each of the crimes (R 152-3). Dr. Stern further agreed that STANO'S ability to conform his conduct to the requirements of the law was substantially impaired, yet he found that Appellant's capacity to appreciate the criminality of his conduct was unimpaired (R 153-4).

Based on the foregoing, it is apparent that the trial court was presented conflicting evidence regarding these two (2) statutory mitigating factors. The proper arbiter for determining the presence of statutory mitigating factors, and thus resolving these conflicts, is clearly the sentencing court. Here, the court's finding that these factors were not established is more than amply supported by the evidence, and that conclusion should be accepted by this Court. Fitzpatrick v. State, 437 So.2d 1072, 1078 (Fla. 1983).

In Martin v. State, 420 So.2d 583 (Fla. 1982), the sentencing court was, as here, presented with conflicting evidence regarding the defendant's mental condition. However, on appeal, this Court affirmed the actions

of the trial court in concluding that the mental mitigating circumstances did not apply. See also, Moody v. State, 418 So.2d 989, 995 (Fla. 1982). A similar result is mandated here. Appellant's argument to the contrary simply ignores the fact that while the court may resolve such evidentiary conflicts in favor of the appellant, it is not compelled to do so. Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978). Here, there is a more than sufficient evidentiary foundation on which to base the trial court's determination. Accordingly, that decision should be affirmed in all respects.

Appellant next seeks to predicate error on the fact that Dr. Carrera relied on an "improper" standard to determine STANO'S capacity to conform his conduct to the requirements of the law. However, this argument ignores the fact that it is the ultimate responsibility of the trial judge, not an expert witness, to apply the findings of the expert to the statutory provisions. There is absolutely no indication in the record that the trial court made any error in determining the applicability of § 921.141(6)(f), Fla. Stat. (1981). That the trial court specifically adopted and approved the testimony of doctors Carrera and Barnard relating to his rejection of STANO'S mental status as a mitigating circumstance is merely recognition of the fact that the court accepted the findings and conclusions of the doctors, not that it abdicated its responsibility to apply the law to those conclusions. Appellant's assertions to the contrary have absolutely no support in the record before this Court.

Relatedly, Appellant asserts that the trial court erred in basing its rejection of the two (2) statutory mitigating factors upon allegedly incompetent and improper testimony (AB 20). Once again, however, there is absolutely no indication, even assuming the testimony were incompetent

and improper[1], that the trial court in any way relied upon it to reach its ultimate conclusion. Such a conclusion is clearly not mandated by the fact that the court overruled objections to such testimony. Furthermore, the "door" to any speculation by Dr. Carrera on redirect examination was clearly opened by Appellant himself on cross-examination when he inquired about the possible irresistible or uncontrollable "impulse" cause by his extreme anger (R 139). In light of that line of questioning, it was clearly permissible for the State to inquire of the doctor's opinion, based on the evidence, regarding Appellant's ability to control his anger.

Finally, Appellant contends that the trial court erred in concluding that the three (3) nonstatutory mitigating factors which it found were entitled to "little weight". The State would respond that just as it is the province of the trial court to determine the presence of mitigating factors, so is it the province of that court to assign weight to those factors so found. Daugherty v. State, supra; Quince v. State, 414 So.2d 185 (Fla. 1982); Riley v. State, supra; Smith v. State, 407 So.2d 894 (Fla. 1981); Lucas v. State, supra. Mere disagreement with the force or weight to be given such mitigating evidence is an insufficient basis for challenging a sentence. Quince v. State, supra; Hargrave v. State, supra. That the facts of the instant case are distinguishable from those in Quince v. State, supra, does not vitiate these well established principles. Furthermore, the State takes issue with Appellant's

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[1]The State submits that Dr. Carrera's characterization of his testimony in this regard as "speculative" in no way renders it incompetent. Dr. Carrera's opinion was clearly based upon "the way [Appellant] tells the story" (R 139) and as such is perfectly admissible as an expert opinion.

assertion that the trial court's failure to cite any reason for the weight assigned somehow renders the sentence of death invalid. It seems evident to the State that the mitigating factors found are entitled to little weight given the shockingly evil and conscienceless nature of these crimes. The trial court's failure to express the obvious is hardly grounds for the reduction of sentence.

In summary, it is evident that the court below carefully and meticulously considered all evidence in mitigation. Determining the applicability and persuasiveness of that evidence is peculiarly the duty of the sentencing court. Appellant's mere quarrel with the court's ultimate conclusion is insufficient to demonstate error when those conclusions are more than adequately supported by the record before this Court. Accordingly, the sentence of death imposed upon GERALD EUGENE STANO must be affirmed.

(C) As to both murders, the trial court properly found that each was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

As to both murders, the sentencing court found, pursuant to § 921.141(5)(i), Fla. Stat. (1981), that each was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The State submits that these findings are amply supported by the evidence presented, and should therefore be affirmed by this Court.

With regard to the murder of Susan Bickrest, the trial court made the following findings of fact in support of its conclusion that this aggravating factor had been established:

> This Court finds a high level of premeditation in this homicide (see State vs. Dixon, 283 So.2d 1 (Fl. 1973), cert. denied, 416 U.S. 943 (94 S.Ct. 1951, 40 L.Ed.2d 295)

> and Canady vs. State (sic), 427 So.2d 723 1983). There is no doubt but that the Defendant knew what he was ultimately going to do from the beginning. His knowledge is shown by his statement in Exhibit 14, Page 3: "She wandered (sic) what was going on, see she ahh had a funny feeling I guess that something was not ahh kosher, you know it wasn't mixing right and ahh. . . something was gonna happen." Additionally, the Defendant stopped the excape (sic) or exit from the vehicle by the victim (Exhibit 14, p. 4). He knew what he was going to do with her. He also drove from some 25 minutes, south 17 1/2 miles to a secluded spot to commit the murder. This murder was cold, calculating and premeditated.
>
> There was no pretense of moral or legal justification. There is no reason for this murder. It is the murder of a stranger recently met. There is no evidence of robbery or rape. It is competely senseless.

(R 623)

As Appellant correctly notes, the level of premeditation required to establish this circumstance is higher than the level required to convict in the guilt phase of the first degree murder trial. Jent v. State, 408 So.2d 1024 (Fla. 1982). This aggravating circumstance ordinarily applies to those murders which are characterized as executions or contract murders, although that description is not intended to be all inclusive. McCray v. State, 416 So.2d 804 (Fla. 1982). This circumstance is appropriate when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. Preston v. State, 9 FLW 26 (Fla. January 19, 1984).

The facts of the Bickrest case evidence just such a lengthy, methodic and involved series of events with the prepetrator having ample opportunity to reflect upon and revel in his ultimate purpose. Appellant

first spotted his prey at a bar (R 213). After stopping to get a six-pack of beer, Appellant "figured, well, I'm going to go see if I can find her" (R 213-14). Appellant then happened to spot the victim's car pulling off one of the side streets and followed that vehicle to the victim's home (R 214). After the victim exited her vehicle, Appellant began talking to her, and eventually the victim entered Appellant's vehicle (R 215). When the victim became "crabby", Appellant struck and apparently stunned her (R 215). Appellant related that the victim apparently "had a funny feeling, I guess, that something was, was not kosher, you know, it wasn't mixing right and something was going to happen" (R 217).

At one point during the drive, Appellant was compelled to pull over for a "rest stop" (R 218). At that time, the victim attempted to exit the vehicle, but Stano pushed her back in and locked the doors (R 218). Appellant's vehicle was equipped with anti-theft locks which were difficult to unlock if your hands were perspiring (R 218-19).

Appellant then drove to Interstate 95 before his victim, apparently having regained her senses, began "bitching and raising hell" (R 215). Appellant thereupon pulled over "and just strangled her right there and then" (R 215). He then carried the victim, apparently still alive, to a marsh area and laid her down on a sandy area (R 216). Ms Bickrest's body was subsequently found at a location approximately seventeen (17) miles from her apartment (R 196-97).

The State submits that the circumstances of this case demonstrate precisely the type of methodic, lengthy series of events intended to be embraced within a "cold and calculated" murder. In its capacity as finder of fact, the court below determined that "[t]here is no doubt but that the defendant knew what he was ultimately going to do from the

beginning" (R 623). Accordingly, the Appellant was presented the opportunity to reflect upon his ultimate purpose during a drive lasting approximately twenty-five minutes and covering approximately seventeen (17) miles (R 196-97). Furthermore, the circumstances of this case, taken in conjunction with the facts of the Muldoon slaying, demonstrate an unmistakable pattern of picking up a stranger, stunning them with a blow, driving them to an isolated spot, and executing them (see, e.g., SR 5). This clearly was not an impromptu killing, but rather one carried out pursuant to a well defined scheme.

Furthermore, as the trial court noted, this murder amounted to little more than killing for killing's sake. As in Jones v. State, 8 FLW 362 (Fla., September 15, 1983), the record herein is absolutely devoid of any evidence tending to justify this killing. It was, beyond and to the exclusion of any reasonable doubt, committed in a cold, calculated, and premeditated manner without any pretense whatsoever of moral or legal justification.

Appellant seeks to escape this conclusion by arguing that his acts were in reaction to his extreme anger, and thus he lacked the requisite calculatedness (AB 24). The State would respond that extreme anger such as Appellant alleges prompted him in no way excludes a finding that his crime was highly premeditated and calculated. It is wholly conceivable that one affected by extreme anger may still be capable of plotting and executing a violent murder. Indeed, the facts of the instant case demonstrate that Stano was able to control his anger until he reached an area of relative seclusion. His vicitm's "bitching", rather than causing an explosive reaction, likely prompted him to determine that the time for safely toying with his once-stunned prey had come to an end. Based on the

facts of this case, it was well within the trial court's province as finder of fact to determine that Appellant's anger did not affect the methodic, calculated nature demonstrated by other evidence of the crime.

Finally, Appellant's argument that the finding of this aggravating factor is improper because the trial court impermissibly "doubled" the fact that Stano prevented his victim from exiting his vehicle is wholly without merit. In support of his contention, Appellant relies on this Court's opinion in Provence v. State, 337 So.2d 783 (Fla. 1976). However, Provence merely held that in the context of a robbery/ murder, the fact that the murder occurred during the course of a robbery and that the crime was committed for pecuniary gain constitutes only one aggravating factor. Id. at 786. Here, however, the trial court relied on the aforecited fact in this instance to establish the defendant's state of mind. In the case of the court's finding that the murder was especially heinous, atrocious and cruel, and that it occurred in the course of a kidnapping, this fact was relied on to establish the victim's state of mind, specifically, her fear, and her unwilling confinement. These are clearly separate and distinct characteristics of the crime, its perpetrator, and its victim. As such, no impermissible doubling has occurred in the instant case. See e.g., Mason v. State, 438 So.2d 374, 379 (Fla. 1983); Waterhouse v. State, 429 So.2d 301 (Fla. 1983); Hill v. State, 422 So.2d 816 (Fla. 1982). Finally, even assuming an impermissible doubling had occurred, the finding of a cold and calculated manner is nevertheless supportable by evidence independent of that complained of.

As to the murder of Mary Kathleen Muldoon, the trial court made the following findings of fact in support of its conclusion that this aggravating factor had been established:

> The Court finds a high level of premeditation in this homicide. (See State vs. Dixon, 283 So.2d 1 (Fl. 1973), cert. denied, 416 U.S. 943 (94 S.Ct. 1941, 40 L.Ed.2d 295) and Canady vs. State (sic), 427 So.2d 723 (Fla. 1983)). There is not doubt but that the Defendant knew what he was ultimately going to do with Ms. Muldoon. He drove for some 30 to 45 minutes in a southerly direction for approximately 20 miles to a secluded dirt road. His victim was stunned by the initial blow. She was ordered out of the car, hit again, then promptly shot. This pattern of picking up a stranger, stunning them with a blow, driving them to an isolated spot, and murdering them appears in the companion case, 83-188-CC. This murder was cold, calculating and premeditated. Additionally, the evidence indicates this murder was much like a contract execution. The victim was ordered out of the car by the Defendant carrying a gun. She was again knocked down. The gun was placed to her head and fired. Execution murders can support a finding of this criteria. (McCray vs. State, 416 So.2d 804 (Fl. 1982) at p. 807.)
>
> There was no pretense of moral or legal justification. It was the murder of a stranger within an hour of picking her up at a bar. Although there was mention of sex there was no evidence of rape. There was no evidence of robbery. The murder is completely senseless.

(SR 4-5)

As in the Bickrest murder, the facts of the Muldoon case evidence the type of lengthy, methodical murder process envisioned by this Court in Preston v. State, supra. Having met his young victim at a bar, Stano and she left for the beach (R 558). Once there, Stano stunned Ms. Muldoon with a blow to the head, apparently put her in his car, and drove to New Smyrna Beach, an area some twenty (20) miles south (R 558-559, 180-181). Having found a secluded spot, Stano stopped, ordered Ms. Muldoon out of the car, struck her once more, and shot her in the side of the head (R 559). The medical examiner described the gunshot wound as being of the

"near contact" variety consistent with the gun being placed close to the head at the time of the shot (R 71-72).

Taken in conjunction with the facts of the Bickrest murder, the circumstances of this case clearly disclose the pattern of operation noted by the trial court. As with Bickrest, this clearly was not a spontaneous murder but rather one committed pursuant to an obviously discernable method whereby the perpetrator is allowed ample opportunity to contemplate his deed. Once again, the trial court determined that there was "no doubt" that Stano knew what he was ultimately going to do with Ms. Muldoon (SR 4-5). This fact is more than sufficiently borne out by the pattern of senseless killings committed by Appellant, as well as the fact that there was no discernable motive involved. Appellant was once again afforded ample opportunity to contemplate his ultimate goal.

Another factor supporting the trial court's conclusion is the specific manner of killing as that manner reflects on Stano's state of mind. Mary Kathleen Muldoon, once knocked senseless, was absolutely and utterly helpless when she found herself in the woods of New Smyrna Beach. GERALD STANO ordered her out of the car, beat whatever resistance she had left out of her, placed a gun to her head and fired. This was nothing short of an execution. Circumstances such as this mandate the application of the aggravating circumstance of § 921.141(5)(i), Fla. Stat. (1981). McCray v. State, supra.

Furthermore, as the trial court noted, this killing carried no pretense whatsoever of moral or legal justification. It was completely motiveless and senseless. As in Jones v. State, supra, the record is absolutely devoid of any evidence tending to justify this killing. It was, beyond and to the exclusion of any reasonable doubt, committed in a cold,

calculated and premeditated manner without any pretense of moral or legal justification.

As with the Bickrest murder, Appellant seeks to avoid this conclusion by pointiong out the extreme anger STANO apparently felt at the time of the murder. Once again, the State would point out that even accepting this hypothesis as true, such anger does not negate a finding of cold and calculated behavior. This clearly was not a case of a spontaneous explosion of rage, as the victim clearly did nothing to warrant such a reaction prior to the time STANO shot her. It seems evident that any rage Appellant felt was kept well in check until such time as he could dispose of his victim pursuant to his own chosen method. It was within the sentencing court's province to determine that the anger STANO felt did not affect his ability to patiently plot and carry out his crime. This Court should not overturn that reasoned decision based on mere gross speculation to the contrary.

Finally, Appellant seeks to challenge this finding based on the supposed reliance of the trial court upon facts which were not in evidence (AB 27). Initially, the State contends that it is clearly up to the trial court to determine whether the argument of the prosecutor regarding the operation of the murder weapon was a permissible inference. Secondly, there is no indication that the trial court in anyway relied on this inference to support its ultimate conclusion. That the trial court overruled Appellant's objection merely means the court did not find the matter objectionable. Appellant stretches credulity too far in asserting that this action somehow indicates that the trial court found this argument persuasive. Finally, the trial court's conclusion as to this aggravating factor is supported by evidence wholly independent of the inference which Appellant

now complains of.

In summary, as to both cases, the totality of the circumstances demonstrate that each murder was committed in a cold, calculated, and premeditated manner. The highly premeditated and methodical nature of these crimes mandates the finding of this aggravating circumstance. Furthermore, the record in each case is devoid of any evidence tending to justify these senseless crimes. The trial court's conclusion to that effect should be affirmed.

(D) As to both murders, the trial court properly found that each murder was especially heinous, atrocious, or cruel in accordance with § 921.141 (5)(h), Fla. Stat. (1981).

As to both murders, the trial court found, pursuant to § 921.141 (5)(h), Fla. Stat. (1981), that each was especially heinous, atrocious, or cruel. This finding was clearly proper given the evidence presented and this Court's previous interpretations of the foregoing statutory provision. Each murder was clearly "accompanied by such additional acts as to set the crime apart from the norm of capital felonies." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

With regard to the murder of Mary Kathleen Muldoon, the trial court made the following findings of fact in support of its conclusion that this aggravating factor had been established:

> The Defendant's statement (Exhibit 15) establishes that the Defendant picked up the victim and drove to the beach. According to the Defendant they discussed sex and while the Defendant wanted it, Ms. Muldoon did not. She was knocked half conscious by a blow from the Defendant. He drove her quite some distance to a secluded spot. Armed with a pistol he ordered her out of the car. He again hit her in the head hard enough to knock her down. He then placed the pistol to her head and shot her.

> The victim was hit by at least two severe blows while alive. Repeated blows while alive can support this creteria (sic) (see Simmons v. State, 419 So.2d 316 (Fl. 1982) at P. 319.) Because of the blows, the length of the drive, and the secluded destination, she must have know (sic) what was going to happen. She had to have been terrified. There is more here than just murder with a single shot. The victim was physically abused while having time to fear and contemplate her ultimate fate.
>
> The homocide (sic) was distinguishable from other murders in that there is no discernable motive. Other murders are accompanied by greed, lust, passion, a desire for pecuniary gain, or a need to eliminate witnesses. While we may not approve of these motives, we can at least understand them. Here there was no motive. Sex was not the motive. There was no evidence of an attempted rape, and as Dr. Barnard said, sex was not the primary issue. The killing was done for killing's sake. It was utterly and completely senseless.
>
> The Defendant has exhibited no remorse for this killing that the Court can detect. While lack of remorse is in itself not an aggravating circumstance, it is a factor to be considered in determining this criteria (State vs. Sireci (sic), 399 So.2d 964 (Fl. 1981) at P. 971.)
>
> For the above reasons this Court concludes this murder was extremely and outrageously wicked, shockingly evil and vile. There was utter indifference to suffering. There was no pity or mercy. The entire set of circumstances establish the murder was especially heinous, atrocious, or cruel.

(SR 4)

Each and every finding made by the trial court is well supported by the record herein, and each more than supports the trial court's conclusion. As to the repeated blows suffered by Ms. Muldoon, it is evident that these occurred well before death. Compare, Simmons v. State, 419 So.2d 316 (Fla. 1982). Furthermore, these blows were not merely incidental contact.

The first blow, inflicted at the beach, was sufficient to, in the Appellant's words, knock his victim "half out" (R 558). The second, inflicted immediately before the victim was shot, was "hard enough in the head, that she fell to the ground" (R 559). The State submits that this pre-death physical abuse is clearly not the norm for capital felonies.

Relatedly, it cannot be disputed that Ms. Muldoon's "terrified" state of mind is adequate in itself to support this criteria. Appellee is not unmindful of the decisions of this Court holding that a gunshot wound to the head resulting in instantaneous or near instantaneous death is not normally in and of itself sufficient to constitute a heinous, atrocious, or cruel crime. See e.g., Cooper v. State, 336 So.2d 1133 (Fla. 1976); Odom v. State, 403 So.2d 936 (Fla. 1981). However, in the instant case, this single shot execution was clearly accompanied by the victim's fear and contemplation of her impending fate. See, Preston v. State, 9 FLW 26 (Fla. January 19, 1984). One can envision the victim, having been savagely struck for no apparent reason, being driven approximately twenty (20) miles to a secluded spot, ordered out of the car, and struck once again with sufficient force to drive her to the ground. As the trial court found, because of the blows, the length of the drive, and the secluded destination, she must have realized her fate. To say she must have been terrified is hardly overstatement. Clearly, this mode of killing, whereby the victim is subjected to what is nothing less than absolute mental anguish and despair over her fate is not the norm of capital felonies. This factor absolutely mandates the finding of heinous, atrocious or cruel. See e.g., Routly v. State, 8 FLW 398 (Fla. September 29, 1983); Smith v. State, 424 So.2d 726 (Fla. 1982); Griffin v. State, 414 So.2d 1025 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982);

Jones v. State, 411 So.2d 165 (Fla. 1982); White v. State, 403 So.2d 331 (Fla. 1981); Buford v. State, 403 So.2d 943 (Fla. 1981); Knight v. State, 338 So.2d 201 (Fla. 1976). The cruelty of this crime is almost unfathomable.

Appellant asserts that the victim was likely in a daze as a result of the initial blow, and hence the trial court erred in drawing the conclusion that she had time to contemplate her fate. The State would respond that there was more than sufficient evidence to justify the trial court's findings. Ms. Muldoon was allowed thirty (30) to forty-five (45) minutes to recover from the initial blow (R 181). Ms. Muldoon was certainly sufficiently lucid to comply with Stano's demand to exit the vehicle, and for all indications was able to stand (R 559). Additionally, it appears that she was sufficiently coherent to once again argue with her killer. Based on these facts, she was clearly capable of comprehending her hopeless position. Appellant's related argument that because Ms. Muldoon did not see the gun she did not know what was going to happen is clearly misguided given the events preceding the fatal shot. While she may not have known her precise fate, she clearly had a reasonable expectation of its general nature. This is clearly not a case like Maggard v. State, 399 So.2d 973 (Fla. 1981), where the victim had no inkling of his impending fate.

As additional factor setting this crime apart from the norm of capital felonies is the absolutely callous indifference for human life demonstrated by this Appellant. See, Henry v. State, 328 So.2d 430 (Fla. 1976). For all indications, GERALD EUGENE STANO cared not about the terror which he placed his victim in prior to finally executing her. Indeed, it would appear that his actions stemmed in part from a desire to exercise control over those who he felt had questioned his authority (R 131).

Additinally, even after shooting his victim, Stano left her to die from a combination of the bullet wound accompanied by drowning. This prolonged death took, in the opinion of the medical examiner performing the autopsy, approximately thirty (30) minutes to complete (R 73-74).

Finally, the heinousness and atrocity of this crime is demonstrated by its complete and utter senslessness. While we cannot condone, for example, an ordinary robbery-murder, we can at least understand the perpetrator's motive. Here, there was no motive, no cause for this senseless execution. Compare, Sullivan v. State, 303 So.2d 632 (Fla. 1974). It was nothing less than a successful hunting expedition where the killing was committed solely for killing's sake. It was extremely and outrageously wicked, shockingly evil and vile, and completely and utterly merciless. State v. Dixon, supra. Death is the only appropriate penalty.

As to the murder of Susan Bickrest, the trial court made the following findings of fact in support of its conclusion that the murder was especially heinous, atrocious, or cruel;

> Susan Bickrest was strangled. Strangulation can justify this criteria (see Smith vs. State, 407 So.2d 894 (Fl. 1982) at P. 903). In addition to the strangulation, there was evidence Ms. Bickrest was beaten. Dr. Schwartz's testimony and exhibits 1 and 4 show a swollen left eye with bruise below, scratches on the nose, and lacerations of the lip. Even the Defendant admitted to hitting her at least once (Exhibit 14, Pgs. 2, 3 and 4). A severe beating can support the criteria (see Arango vs. State, 411 So.2d 172 (Fl. 1982). While the beating here may not be so severe the evidence indicates she was struck more than once while alive. Repeated blows while alive can also support this criteria (See Simmons vs. State, 419 So.2d 316 (Fl. 1982) at P. 319).
>
> Ms. Bickrest also knew what was going to happen to her. The Defendant himself said, "she wandered (sic) what was going on, see she

> ahh had a funny feeling I guess that something was ahh not ahh kosher . . . you know it wasn't mixing right and ahh . . . something was gonna happen" (Exhibit 14, p. 3). She must have been terrified. She tried to escape, but was stopped (Exhibit 14, P. 4). Finally Dr. Schwartz testified her actual death by strangulation was "prolonged".
>
> The Defendant has exhibited no remorse for this killing that the Court can detect. While lack of remorse is in itself not an aggravating circumstance, it is a factor to be considered in determining this criteria (State vs. Sireci (sic), 399 So.2d 964 (Fl. 1981) at P. 971). There is further evidence of lack of remorse. The Defendant's tape recorded confession of the murder sounds like one recalling a Sunday picnic. There is no remorse.
>
> This particular homocide (sic) also has a quality that distinguishes it from other capital crimes. In most other murders there are motive, present such as passion, lust, greed, the desire for pecuniary gain, or the need to eliminate a witness. While we may not approve of these other motives we can at least understand them. There is no discernable motive here. This killing was for Killing's sake. It was completely senseless.
>
> Based on the above this Court finds the murder was extremely and outrageously wicked; it was shockingly evil and vile. There was utter indifference. There was no pity or mercy. The entire set of circumstances establish the murder was expecially (sic) heinous, atrocious or cruel.

(R 622-23)

Again, the trial court's findings in this respect fully support a finding that this murder was especially heinous, atrocious, or cruel. This conclusion should therefore be affirmed in all respects by this Court.

Susan Bickrest was manually strangled (R 51, 215), and her death was accompanied by evidence of drowning (R 51). A homicide committed through strangulation has repeatedly been held to be heinous, atrocious, and

cruel. Adams v. State, 412 So.2d 850 (Fla. 1982); Smith v. State, 407 So.2d 894 (Fla. 1981); Alvord v. State, 322 So.2d 533 (Fla. 1975). Appellant's attempts to distinguish the holding in Smith v. State, supra, are misplaced. In Smith, this Court found that the manner of strangulation was more heinous, atrocious, and cruel than the defendant's action in cutting open his victim's chest and looking at her heart. Clearly, Smith, read in conjunction with Adams and Alvord, does not require evidence that the victim shook spasmodically and stared in her murderer's eyes in order to justify this finding. Indeed, given Ms. Bickrest's argumentative nature, it is likely in any event that her death was not a quiet, submissive one.

Furthermore, there was substantial evidence demonstrating that Ms. Bickrest was beaten prior to her death. Stano himself admits striking her with the hand carrying his school ring hard enough to "shut her up for a little bit" (R 215). Furthermore, the injuries reflected in State's Exhibits 1 and 4 (R 487, 490) all were inflicted prior to death (R 54). Compare, Simmons v. State, supra. Appellant would ask this Court to reweigh and reevaluate this evidence to determine that Ms. Bickrest was not in fact "beaten". However, this is clearly not the duty of this Court. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). This Court's sole evidentiary concern is to determine whether there was sufficient competent evidence upon which the judge could base his determination. Here, the medical evidence, taken in conjunction with Appellant's own admissions, clearly supports the lower court's finding.

Furthermore, as with the Muldoon murder, there is substantial evidence to support the court's finding that Ms. Bickrest was subjected to agony over the prospect that death was soon to occur. See, Preston v. State, supra, and cases cited therein. Appellant himself indicates that

Ms. Bickrest knew that things were not "kosher" (R 217). Having been once struck hard enough to stun her, Ms. Bickrest attempted to escape, but was stopped (R 218). Again, one can envision the victim trying vainly to lift the anti-theft locks installed on Stano's automobile, yet failing because of her own terror. The victim was subjected to a drive lasting approximately twenty-five (25) minutes and ending in a secluded spot. Her knowledge of her fate is clearly demonstrated by the fact that she continally, up until the time her life was choked from her, attempted to resist and evade her killer. These facts not only support the trial court's findings, they absolutely mandate the finding of this aggravating circumstance (see, cases cited, supra, in support of this finding in the Muldoon case).

Appellant's contention that the trial court's reliance on Ms. Bickrest's attempted escape to support this and other aggravating factors constituted impermissible "doubling" is clearly misplaced. In each case, this fact was used to establish separate and distinct facets of the charged crime. No impermissible "doubling" has occurred. Waterhouse v. State, 429 So.2d 301 (Fla. 1983). In any event, this finding was more than sufficiently supported by evidence wholly independent of the attempted escape.

Finally, as with the Muldoon murder, the heinousness and atrocity of this crime is demonstrated by its complete and utter senseless and merciless qualities. As in Muldoon, this was nothing less than a successful hunting expedition where the killing was committed solely for sake of killing. Viewed in the totality of the circumstances, it was extremely and outrageously wicked, shockingly evil and vile, and completely and utterly merciless. State v. Dixon, supra. Death is the only appropriate penalty.

As to both murders, the Appellant seeks to avoid the well

supported conclusion of the trial court in this regard by alleging that the court impermissibly relied on GERALD EUGENE STANO'S complete lack of discernable remorse for his acts. In this respect, Appellant relies on this Court's recent decision in Pope v. State, 8 FLW 425 (Fla. October 27, 1983). Appellee must disagree with Appellant's assessment of the Pope decision. In Pope, the trial court attempted to infer lack of remorse from the defendant's steadfast denial of guilt. Id. at 426. In response, this Court recognized the problems inherent in inferring lack of remorse from the exercise of a constitutional right. However, in these cases, as in Sireci v. State, 399 So.2d 964 (Fla. 1981), the trial court inferred lack of remorse from an examination of the defendant's own statements about the crime. Furthermore, the trial court's orders explicitly evidence that it was aware that lack of remorse is not in itself an aggravating circumstance.

In any event, the specific holding of the Pope decision was that "henceforth lack of remorse should have no place in the consideration of aggravating factors." 8 FLW at 427 (emphasis added). In each of the instant cases, the trial judge's sentencing order substantial predated the Pope decision, and thus the result urged by Appellant is not warranted. Under these facts, the trial court's otherwise proper reliance on Sireci v. State, supra, cannot be urged as grounds for reversal. Furthermore, as in Pope, the applicability of this aggravating factor has been proven beyond a reasonable doubt without regard to STANO'S remorse or lack thereof. Any error by the trial court was thus harmless.

Finally, the Appellant argues that even given the factual basis supporting the finding of this aggravating factor, this finding is improper because of the trial court's alleged failure to consider and

weigh the fact that the perceived heinousness of the offenses was directly caused by Stano's mental problems (AB 30). Again, as is argued more fully in Point I(B), supra, there is absolutely no indication that the trial court failed to consider this particular facet. Rather, it is simply the case that the trial court did not agree with Appellant's contentions regarding these mitigating factors.

In Michael v. State, 437 So.2d 138 (Fla. 1983), this Court recognized that the defendant's emotional and mental problems do not affect the application of the aggravating factors of heinous, atrocious, or cruel, or cold, calculated, and premeditated. Id. at 142. Rather, they affect the weight to be given the mitigating factors. In the instant cases, the trial court found, based on competent, substantial evidence, that the mental mitigating factors did not apply. That decision was one well within the province of the trial court. See e.g., Smith v. State, 407 So.2d 894 (Fla. 1981). Additionally, it is worthy of note that in each of the cases relied on by the Appellant, the aggravating factors at issue were nevertheless found to apply, but were outweighed by mitigating factors either found or not considered. Miller v. State, 373 So.2d 882 (Fla. 1979); Huckaby v. State, 343 So.2d 29 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). Neither of those circumstances are present in the instant case. In any event, even indulging in Appellant's arguments, it is apparent that evidence of mental or emotional disturbance does not necessarily outweigh a heinous, atrocious, and cruel crime. Foster v. State, 369 So.2d 928 (Fla. 1979); see also, Goode v. State, 365 So.2d 381 (Fla. 1978). It was within the province of the trial court to determine just that.

In summary, as to each of these murders, Appellant in essence asks this Court to somehow determine that the circumstances present did

not deviate from the norm of capital felonies. Such a finding would indeed be sad commentary on the state of our society. However, more importantly, such a finding would ignore the compelling factual justifications underlying the trial court's reasoned decision. Weighing and considering all the pertinent evidence, the court below properly determined these crimes to be heinous, atrocious, and cruel. That decision should be affirmed in all respects.

(E) As to the murder of Susan Bickrest, the trial court properly found, pursuant to § 921.141(5)(d), Fla. Stat. (1981), that the murder was committed while the defendant was in the course of the commission of a kidnapping.

In his final challenge to the aggravating circumstances found by the trial court, Appellant argues that the trial court erred in finding that the murder of Susan Bickrest was committed while the defendant was in the course of a kidnapping. This contention is without merit.

In Schneble v. State, 201 So.2d 881 (Fla. 1967), this Court held that:

> While it is true that, before a confession may be received in evidence there must be some independent proof, either direct or circumstantial, of the corpus delicti, it need not be proved beyond a reasonable doubt, it being enough if the evidence tends to show a crime was committed.

Id. at 883. (emphasis added)

Thus, it is clear that Florida law does not require that every element of an offense be established by evidence outside of the confession. Canet v. Turner, 606 F.2d 89 (5th Cir. 1979); see also, Hester v. State, 310 So.2d 455 (Fla. 2d DCA 1975).

In the instant case, Susan Bickrest's body was found floating in a creek some seventeen (17) miles away from her apartment (R 196-197). Her death, it was determined, was caused by strangulation accompanied by evidence of drowning (R 36). Based on the location of the body and the cause of death, the evidence was more than sufficient to demonstrate that Ms. Bickrest reached her final destination through the criminal agency of another. Justus v. State, 438 So.2d 358 (Fla. 1983); Stone v. State, 378 So.2d 765 (Fla. 1979). This evidence was sufficient to corroborate and validate Appellant's confession, and that confession was more than adequate to support the trial court's findings.

A case similar to the one at bar was presented this Court in Adams v. State, 412 So.2d 850 (Fla. 1982). In Adams, the eight (8) year old victim was last seen leaving her school at about 2:30 p.m. on January 23, 1978. Her body was found in a wooded area on March 15, 1978. In his written statements, the defendant stated that he observed the victim walking home from school and stopped to offer her a ride. She got in the car, and the defendant drove away with her. The defendant recalled "being stopped somewhere and she was screaming and I put my hand over her mouth", and she stopped breathing. Id. at 851.

In support of its finding that the death penalty was appropriate, the trial court in Adams found, inter alia, that the murder was committed while in the course of a kidnapping. The court relied on Adams' confession, as well as the fact that the victim did not return home from school as she usually did. Id. at 854-5.

In response to Adams' argument that this evidence was insufficient to prove that the murder was committed in the course of a kidnapping, this Court quoted the following language from its opinion in Brown v.

Wainwright, 392 So.2d 1327, 1331 (Fla. 1981), wherein this Court's function in reviewing a death sentence was described as follows:

> This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law.
>
> * * *
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment.
>
> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

412 So.2d at 855 (citations omitted)

In accordance with the aforequoted, this Court found that there was substantial competent evidence from which the judge could properly find that the murder was committed in the course of a kidnapping. 412 So.2d

at 855. A similar result is mandated here.

GERALD EUGENE STANO confessed that after luring his victim into the car, he hit her in the face when she became "crabby" (R 521). He further stated that after being struck, she tried at one point to get out of the car (R 523). STANO prevented her exit and locked her in the vehicle. STANO and Ms. Bickrest traveled some further distance in the car before she once again began to "raise hell", at which time STANO strangled her (R 521).

Based on these facts, the court below could, and indeed did, find that STANO forcibly confined his victim during the course of a murder. That finding is based on substantial, competent corroborated evidence and should not be disturbed on appeal. Cf., Spinkellink v. State, 313 So.2d 666 (Fla. 1973) (defendant's admission used to establish that murder was committed in connection with a robbery).

STANO seeks to avoid the well reasoned decision of the trial judge by arguing that it is a "reasonable" hypothesis that, despite preventing his victim's departure, he had no dire intentions toward her and thus was guilty at most of false imprisonment. Interestingly, none of the statements given by Appellant himself detail any such frame of mind. Furthermore, such an assertion is logically inconsistent with the trial court's finding, based on Appellant's statement and the previously discussed "pattern" of operation, that Appellant knew at all times what he intended to do with his victim (see, R 623). As for Appellant's assertion that the "sudden" nature of his final attack indicates no previous dire intentions, the State would reiterate that this is wholly consistent with the actions of one who, with the intent to murder, determines that because of his victim's resistance, the time has come to commit the act. Whether, given these facts, Appellant's hypothesis was "reasonable", was for the judge as finder-of-fact to determine. Williams v. State, 437 So.2d 133

(Fla. 1983); Rose v. State, 425 So.2d 621 (Fla. 1982). The court simply and properly determined that it was not. The court's conclusion that the confinement was with the intent to commit or facilitate the commission of the felony of murder is amply supported by the record herein.

Appellant's last ditch argument that the confinement of Ms. Bickrest was merely incidental to the murder is patently without merit. Had no confinement occurred, no murder would have occurred. Furthermore, Appellant's actions in transporting his victim to a secluded spot clearly made commission of the murder easier and substantially lessened the risk of detection. The movement and confinement was neither slight nor inherent in the nature of the crime of murder. Accordingly, it is evident that kidnapping occurred in addition to and separate from the charged crime of murder. Faison v. State, 426 So.2d 963 (Fla. 1983); Sorey v. State, 419 So.2d 810 (Fla. 3d DCA 1982); Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980).

Finally, as has been argued previously, the trial court did not improperly "double" aggravating factors by relying on the fact of Ms. Bickrest's attempted escape to support this and other findings. Appellant's argument is seemingly that once the State uses a particular piece of evidence to support an aggravating circumstance, Provence v. State, 337 So.2d 783 (Fla. 1976), dictates that it may not use the evidence again. This clearly is not the case. Provence merely prohibits using the same factual circumstances to establish two or more aggravating factors which refer to the same aspect of the crime. That the crime occurred during the commission of a kidnapping, that it was cold and calculated, and that it was heinous, atrocious or cruel, clearly refers to separate and distinct aspects of the

crime, its victim, and its perpetrator. No impermissible doubling has occurred in the instant case. Mason v. State, 438 So.2d 374, 379 (Fla. 1983); Waterhouse v. State, 429 So.2d 307 (Fla. 1983); Hill v. State, 422 So.2d 816 (Fla. 1982).

Based on the foregoing, the trial court's finding that the murder of Susan Bickrest was committed during the course of a kidnapping should be affirmed. Adams v. State, supra.

(F) Conclusion

Based on the foregoing, Appellee would submit that no error has occurred such as would require either resentencing or reduction of sentence. The record reflects that he trial court considered all evidence in mitigation. The determination of the applicability of any statutory mitigating factors was peculiarly for the trial judge to determine. Furthermore, the aggravating factors found by the trial court are more than supported by substantial, competent evidence. Those aggravating factors far outweigh the nonstatutory mitigating factors found by the trial court, and thus mandate that death is the appropriate penalty. Finally, for the reasons set forth more fully in Point I(a), supra, the State would note that even should this Court determine that one or more of the aggravating circumstances were improperly applied, resentencing is nevertheless not warranted. Justice demands imposition of the death penalty, and that penalty is appropriate given the facts and circumstances of these cases. Accordingly, that sentence should be affirmed.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO PRECLUDE IMPOSITION OF THE DEATH PENALTY OR IN IMPOSING THE PENALTY OF DEATH.

ARGUMENT

In his second point on appeal, Appellant asserts that the trial court erred in denying his Motion to Preclude Imposition of the Death Penalty and in sentencing him to death. The thrust of Appellant's argument is that a life sentence would be consistent, rational and proportional when compared with similar cases. Appellee disagrees.

Initially, it should be noted that Appellant's reliance on Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), is misplaced inasmuch as the decision of the Ninth Circuit Court of Appeals was subsequently reversed by the United States Supreme Court.[2] Pulley v. Harris, 52 U.S.L.W. 4141 (January 23, 1984, U.S. S.Ct. Case No. 82-1095). In Harris, a majority of the High Court held that the Eighth Amendment, applicable to the states through the Fourteenth Amendment, does not require a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with penalties imposed in similar cases. Id. at 4143. The Court specifically noted that Proffitt v. Florida, 428 U.S. 242 (1976), which upheld the Florida death penalty statute, does not require such review. Id. at 4143. Rather, the references in Proffitt to the review function of this Court were intended to focus upon the statutory provision for some sort of prompt and automatic appellate review.

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[2] In fairness to the Appellant, the decision of the United States Supreme Court was not rendered until some twenty (20) days after the filing of the initial brief in this cause.

Despite the fact that such review is not mandated by the federal constitution, this Court has assumed the duty of reviewing each case in which a defendant is sentenced to die, "in light of the other decisions [to] determine whether or not the punishment is too great." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); see also, Sullivan v. State, 441 So.2d 609 (Fla. 1983); Messer v. State, 439 So.2d 875 (Fla. 1983).

Appellant urges that in order to discharge its duty under State v. Dixon, supra, this Court should compare the two (2) instant cases with the six (6) murders for which he was previously sentenced to consecutive life terms (AB 43). However, this manner of review is clearly not required. As was stated in Sullivan v. State, supra, "[p]roportionality review is a process whereby we review the case before us in light of the cases that have been previously decided." Id. at 613. That is, this Court's review process is limited in this regard to comparing sentences imposed on similarly situated defendants. There is no requirement that this Court compare one crime with others committed by the same defendant. Indeed, why should this defendant be afforded such additional protection based on the fact that he, unlike others, chose to commit multiple murders?

Furthermore, STANO'S assertion that the circumstances surrounding his eight (8) murder convictions are "almost indistinguishable" has no support, other than the most superficial, in the record before this Court. Even if the type of review which Appellant seeks were appropriate, there is nothing in the record before this Court on which such review could be based. The six (6) unrealted murders for which Appellant was sentenced to life imprisonment were not and could not be appealed to this Court. Thus, how could this Court conduct the review requested by Appellant?

Finally, the State takes issue with Appellant's assertion that

he was sentenced to death because of his bad memory at the time he was giving statements on the other Volusia County murder cases. GERALD EUGENE STANO has twice been sentenced to death because he committed two (2) calculated, heinous and merciless murders. By exercising its discretion in his favor on earlier occasions, the State most certainly did not either guarantee or entitle STANO to similar treatement in the future. Such discretion does not render the present death sentences invalid. Gregg v. Georgia, 428 U.S. 153, 225-6 (1976) (White, J., concurring).

In accordance with the proper review function of this Court, the death sentences imposed upon GERALD EUGENE STANO should be reviewed in light of other cases in which the sentence of death has been imposed. To that end, the State recognizes that no two (2) murders, or murderers, are identical. Indeed, in light of Appellant's six (6) previous first degree murder convictions, there are no cases closely similar to those at bar. However, in addition to that dominant factor, the State would rely on those cases cited herein in support of the trial judge's conclusions as to the other aggravating factors to in turn support the conclusion that the punishment in these cases is appropriate.

In summary, the sentences of death imposed upon GERALD EUGENE STANO are entirely rational, consistent, and proportionate to both the crimes committed and to the sentences imposed on other defendants for similar crimes. The trial court did not err in concluding just that, and as a consequence did not err in denying Appellant's Motion to Preclude Imposition of the Death Penalty. These sentences should therefore be affirmed by this Honorable Court.

POINT III

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONALLY SOUND ON ITS FACE AND AS APPLIED; APPELLANT HAS FAILED TO PRESERVE THE MYRIAD ISSUES HE NOW RAISES FOR APPELLATE REVIEW.

ARGUMENT

In his final point on appeal, Appellant raises a number of varied and undetailed challenges to the constitutionality of Florida's death panalty statute. In doing so, the Appellant candidly and correctly concedes that this Court has rejected each of these challenges in the past. Appellant fails to apprise this Court, however, of the fact that the various arguments he now raises for the first time on appeal have never been presented specifically to the trial court so as to preserve them for appellate consideration by this tribunal. Indeed, Appellant's trial court challenge to the constitutionality of § 921.141, Fla. Stat. (1981), was limited solely to the assertion that the aggravating factor enumerated in § 921.141 (5)(i), Fla. Stat., was violative of the constitutional protections against ex post facto laws. (R 269). Inasmuch as further review of the various and sundry arguments raised in Point III of the Appellant's Initial Brief clearly reveals that most if not all of the issues and subissues have never been specifically presented to the trial court by motion or otherwise, they have not been preserved for appellate review under this State's contemporaneous objection/motion rule. See, Fla. R. Crim. P. 3.190(b,c); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Williams v. State, 414 So.2d 509 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

At any rate, the State submits and Appellant concedes that each of the constitutional challenges he now raises has been previously rejected.

In fact, as this Court noted in Lightbourne v. State, 438 So.2d 380 (Fla. 1983), Florida's death penalty statute has been repeatedly upheld against claims of denial of due process, equal protection, as well as against assertions that it involves cruel and unusual punishment. See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); Ferguson v. State, supra; Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); Alvord v. State, 322 So.2d 533 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973).

Appellant raises nothing but vague, unspecific, and unsupported assertions that the capital sentencing statutes are constitutionally infirm, and each such assertion should be readily rejected. For example, STANO argues that the statute does not sufficiently define aggravating circumstances; that it fails to provide a standard of proof for evaluating aggravating and mitigating factors; and that it does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and (other unnamed) factors (AB 46-47). This Court, however, has continuously held that the aggravating and mitigating circumstances enumerated in § 921.141 are not vague and provide meaningful restraints and guidelines to the discretion of judge and jury. Lightbourne v. State, supra; State v. Dixon, supra. Furthermore, the constitutionality of the statute and the mechanics of its operation have been consistently upheld despite numerous and varied challenges. Proffitt v. Florida, supra; Spinkellink v. Wainwright, supra; Ferguson v. State, supra; Alvord v. State, supra.

Furthermore, STANO'S time-worn accusation that the death penalty by electrocution is cruel and unusual or that the failure to require notice

of aggravating circumstances as well as the "arbitrary and unreliable application of the death sentence" results in a denial of due process have likewise been consistently rejected. Proffitt v. Florida, supra; Spinkellink v. Wainwright, supra; State v. Dixon, supra.

Similarly, Appellant's arguments that the "cold, calculated, and premeditated" aggravating circumstance outlined in § 921.141(5)(i) makes the death penalty virtually automatic absent a mitigating circumstance is preposterous in light of this Court's consistent and clear pronouncement that such an aggravating factor does not apply in all premeditated murder cases but only under certain factual circumstances. Harris v. State, 438 So.2d 787 (Fla. 1983); Jent v. State, 408 So.2d 1024 (Fla. 1981). Furthermore, Appellant's argument that application of this aggravating circumstance to this particular defendant is violative of the constitutional protections against ex post facto laws is meritless in light of this Court's holdings in Combs v. State, 403 So.2d 418 (Fla. 1981), and later cases.

The State submits that the remainder of STANO'S hodgepodge of constitutional challenges are equally unsupported, unspecific and without merit. For example, STANO'S claim that a defendant's due process rights are violated by failure to notify him of the aggravating circumstances to be utilized to justify the imposition of the death sentence has been previously raised and disposed of in Sireci v. State, 399 So.2d 964, 965-66 (Fla. 1981); see also, Menendez v. State, 368 So.2d 1278 (Fla. 1979). Indeed, as STANO clearly concedes, each of the constitutional arguments he raises has been clearly or implicitly rejected by this Court and the United States Supreme Court, each of which have upheld both the underlying statutory framework for the imposition of a death sentence and the actual application of that process. Accordingly, the Appellant's various vague allegations

attacking the facial constitutionality of the statute as well as its operation should be rejected as being without legal or factual support. Indeed, like STANO'S contention that this Court has abandoned its duty to make an independent determination of whether or not the death penalty has been properly imposed, the various contentions raised by the Appellant are totally without evidentiary support or legal basis. Accordingly, the State would pray that the sentence of death imposed upon GERALD EUGENE STANO be affirmed in all respects.

CONCLUSION

Based on the foregoing arguments and authorities presented, Appellee respectfully prays this Honorable Court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished, by delivery, to Christopher S. Quarles, Assistant Public Defender for Appellant, this 10th day of February, 1984.

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