IN THE SUPREME COURT OF FLORIDA

CARL ALLEN CARUTHERS,

Appellant,

v.

CASE NO. 64,114

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Carl Allen Caruthers, the capital criminal defendant below, will be referred to as "appellant." Appellee, the State of Florida, the prosecuting authority below, will be referred to as "appellee."

References to the eight volume record on appeal will be designated "(R:)." For the convenience of the Court, appellee would note that the legal documents filed in this cause will be found at R:1390-1480; the transcript of the May 24, 1983 hearing held on appellant's preliminary motions at R: 1245-1352; the transcript of the May 31 - June 4 trial at R: 1-1244; and the transcript of the July 18 sentencing at R: 1353-1389.

For the sake of clarity and exposition, appellee has taken the liberty of discussing appellant's Issues II and III in consolidation, inasmuch as they involve the same question of law.

All emphasis is supplied by appellee.

STATEMENT OF THE CASE AND FACTS

For purposes of resolving the legal issues presented upon appeal, appellee accepts appellant's statement of the case and statement of the facts as reasonably accurate portrayals of the legal occurences and evidence adduced below, subject to the following additions and/or clarifications:

The panoply of constitutional challenges to Florida's capital sentencing statute which appellant presents here as his Issue VII were presented below, were rebutted by appellee, and were found uncompelling by the trial judge during the pre-trial hearing (R 1245-1352; 1435-37).

Appellant admitted that he has had "quite a bit" of experience hunting with a shotgun (R 909). In November of 1982, appellant stole a .38 calibre pistol from Grady Adams which was later described by Florida Department of Law Enforement Firearms Examiner Donald Champagne as being "in good working order" (R 659; 852). Appellant secured four bullets for the purpose of shooting a troublesome dog the week before he used this pistol to kill Martha Zereski (R 797; 894; 1091).

Appellant was not drunk at 6 p.m. on the day of the killing according to Betty Boyd, and was not drunk at 7:30 p.m. according to James Coleman (R 779-780; 798). Appellant got the pistol and left in the car he had earlier stolen to go shoot the dog (R 892; 1091). Unable to locate his intended victim, appellant drove to the Han D Pak convenience store where Ms. Zereski, with whom he was acquainted, worked (R 1092; 899; 927-28; 1098). Appellant parked his car away from the highway and entered the

store concealing his loaded gun in his pants (R 1096). "As soon as" the other customer in the store left, appellant drew his gun on Ms. Zereski, demanded money, and took from the cash register (R 896-897; 718; 1100-1101). Appellant told Ms. Zereski he "didn't want to hurt her", but when she "jumped like she was going to run", appellant shot her three times, twice in the back (R 897; 910; 705; 843). At one point, appellant appeared to claim that only the first shot was uncalculated, stating that "as soon as it went off, I pulled two more rounds in her" (R 910).

Appellant reentered his vehicle and fled the scene so abruptly that Paul Chase, who was pulling into the parking lot, suspected that a robbery had just occured (R 666-667). Ronald Wadkins discovered the victim at 7:55 p.m. (R 672-674). Jeffry White arrived at 7:58 p.m. and noticed that Ms. Zereski's cigarette was still burning (R 679-680).

Appellant was not drunk at 8:05 p.m., according to Betty Boyd (R 784).

When Brenda Jenkins woke appellant and told him about the incident at the Han D Pak, appellant's first reaction was to grab his gun. He then repeatedly asked if Ms. Zereski was dead (R 920-21). Appellant asked "who would shoot an innocent lady?", when he visited the scene with Betty Boyd and James Coleman a short time later (R 786-787).

Appellant was not drunk when he was arrested around midnight, according to Sgt. Richard Dees and Captain Ronald Boswell of the the Santa Rosa County Sheriff's Department (R 770; 815-816). He was admittedly not drunk when he tendered a confession, the

voluntariness of which he has never challenged, to Lt. Maurice Coffman of the Sheriff's Department at 3 a.m. (R 891; 912-14; 860; 872-873).

In his closing for the guilt phase of the trial, Defense counsel argued without objection that the jury should not let sympathy for the victim play a part in their verdict (R 994). The judge instructed the jury without objection that "this case must not be decided for or against anyone because you feel sorry for anyone" and that "feelings of prejudice, bias or sympathy are not legally reasonable doubts, and they should not be discussed by you in any way" (R 1029-30).

Appellant's father, testifying for the defense during the penalty phase of the trial, wept and said of appellant, "I don't want him to die" (R 1073).

In his closing argument during the penalty phase, the prosecutor, without objection, asked the jury "not to be guided by mercy or vengence, or sympathy", particularly towards appellant's family (R 1186; 1205-06). Defense counsel agreed that a penalty of life imprisonment "would not be proper if it was based on sympathy for the appellant's family", and stated that he was not making such an argument (R 1231).

The prosecutor also, in closing, informed the jury that their finding that the murder was premeditated would not automatically justify a finding that it was also cold and calculated, stating:

> You've already decided it was a premeditated killing. In addition, you must find beyond a reasonable doubt that it was cold; it was calculated...

(R 1201). Defense counsel pursued this theme as follows:

> I think you further realize that it's not the law that all first degree premeditated and felony murders require the death penalty.... We're not talking about just premeditation... [T]here are the additional factors which you must find that it was committed in a cold and calculated manner. Now, that is different from the finding of at least a premeditated design that had to do at trial.

(R 1210; 1216). Defense counsel further informed the jury that their finding that the murder was premeditated would not automatically justify a finding that it was also committed to avoid a lawful arrest, stating:

> [A] finding of premeditation doesn't mean that the act even though premeditated, was committed for a particular purpose... of preventing a lawful arrest.

(R 1225-1226). The judge's instructions as to the mitigating circumstances the jury could consider if established by the evidence included:

> Two, that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired...
>
> Four, any other aspect of the defendant's character or record, and any other circumstance of the offense...

(R 1238). The judge further instructed that "[e]ach aggravating circumstance must be established beyond a reaonable doubt" (R 1238).

The judge found as aggravating factors that the murder was committed in the course of a robbery, that it was committed to avoid a lawful arrest, and that it was committed in a cold and calculated manner. The judge did not explicitly find that the latter two factors were not independantly established. He merely took the precaution, in view of the similarities in the evidence used to ascertain the existence of these factors, of finding that the death penalty would be justified even if these factors were later determined to be one and the same (R 1367-75;

1455-61). The judge found in mitigation that appellant had no significant criminal history. He also found that the supportiveness of appellant's family was a mitigating factor of modest and nondispositive weight, and that appellant's claim of intoxication as mitigation had been refuted by the evidence (R 1375-81; 1461-66).

ISSUE I

THE TRIAL JUDGE PROPERLY DECLINED TO EMPANEL JURORS WHO OPPOSE THE DEATH PENALTY FOR THE GUILT PHASE OF THE TRIAL.

ISSUES II and III (Consolidated)

THE TRIAL JUDGE PROPERLY PERMITTED COUNSEL FOR APPELLEE TO ASK PROSPECTIVE JURORS IF THEY COULD LAY ASIDE FEELINGS OF SYMPATHY FOR APPELLANT'S FAMILY IN CONSIDERING THE DEATH PENALTY, AND PROPERLY EXCLUDED THE OPINION TESTIMONY OF APPELLANT'S MOTHER THAT THE DEATH PENALTY SHOULD NOT BE IMPOSED.

ISSUE IV

THE TRIAL JUDGE PROPERLY DECLINED TO EXPLICITLY INSTRUCT THE JURY THAT ITS GUILT PHASE FINDING THAT THE MURDER WAS PREMEDITATED DID NOT NECESSARILY JUSTIFY A PENALTY PHASE FINDING THAT IT WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

ISSUE V

THE TRIAL JUDGE PROPERLY FOUND IN AGGRAVATION THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED PREMEDITATED MANNER, AND THAT IT WAS COMMITTED FOR THE PURPOSE OF AVOIDING A LAWFUL ARREST; AND THAT THE DEATH PENALTY WAS JUSTIFIED EVEN IF THESE FINDINGS SHOULD ONLY HAVE BEEN MADE IN THE ALTERNATIVE.

ISSUE VI

THE TRIAL JUDGE PROPERLY DECLINED TO FIND AS A MITIGATING FACTOR THAT APPELLANT WAS VOLUNTARILY INTOXICATED WHEN HE COMMITTED THE MURDER.

ISSUE VII

THE TRIAL JUDGE PROPERLY DECLINED TO HOLD THAT THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

ISSUE I

THE TRIAL JUDGE PROPERLY DECLINED TO EMPANEL JURORS WHO OPPOSE THE DEATH PENALTY FOR THE GUILT PHASE OF THE TRIAL.

ARGUMENT

Appellant first claims that, under the notorious decision of Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), appeal pending, Case No. 83-2113, ___F.2d___ (8th Cir. 1984), he was entitled to the empanelment of jurors who oppose the death penalty during the guilt phase of the trial because such jurors are allegedly statistically less likely to vote to convict a capital defendant than are jurors who favor the death penalty. Although appellant did make this legal argument below (R 1427-1429), he put on absolutely no evidence in support of his statistical assumption, and has at no time alleged that any particular juror selected to hear his case evinced any sign of bias whatsoever.

Appellant's failure to present evidence in support of his statistical assumption that the jurors who oppose the death penalty are less likely to vote to convict a capital defendant than are jurors who favor the death penalty constitutes a waiver of the right to urge the exclusion of the former category of jurors as error upon appeal. Hulsey v. Sargent, 550 F.Supp. 179 (E.D. Ark. 1981). "Reversible error cannot be predicated on conjecture." Jacobs v. State, ___So.2d___(Fla. 1984), 9 F.L.W. 66. See Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 776 (1979).

Moreover, even if appellant's Grigsby claim were properly

before the Court, it would be meritless. Grigsby is inconsistent with this Court's earlier decisions of Riley v. State, 366 So.2d 19 (Fla. 1978), cert. denied, ___U.S.___, 74 L.Ed.2d 294 (1982), and Gafford v. State, 387 So.2d 333 (Fla. 1980), which hold that jurors who oppose the death penalty may be properly excluded from the guilt phase of a capital trial. See also Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Grigsby is also inconsistent with this Court's later decision of Lusk v. State, ___So.2d___ (Fla. 1984), 9 F.L.W. 39, which affirms that the defense may dismiss for cause only those jurors who show actual prejudice towards the defendant, as opposed to those whose bias may be merely implied by their membership in a certain group.

Along parallel lines, Grigsby is inconsistent with our Supreme Court's earlier decision of Witherspoon v. Illinois, 391 U.S. 510, 518 (1968), in which the Court declined to judicially notice "that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction", and Smith v. Phillips, 455 U.S. 209 (1982), in which the Court held that the defense must show the actual prejudice, rather than the implied bias, of a juror in order to receive a new trial. Grigsby is also inconsistent with the Court's subsequent decisions of Maggio v. Williams, ___U.S.___, 78 L.Ed.2d 43, 47 (1983), affirming the foregoing interpretation of Witherspoon in vacating a stay of execution on what was essentially a Grigsby claim, and Sullivan v. Wainwright, ___ U.S. ___, 78 L.Ed 210, 212 (1983), denying a stay upon the petitioner's claim "that the jury that convicted him was biased in favor of the prosecution" and

indicating that this claim had been properly found "meritless" by both the state and federal courts. See also Woodward v. Hutchins, ___U.S.___ (1984), 34 Crim.L.Rptr. 4156, in which Justice Brennan dissented from the vacating of a stay of execution on the ground that the defendant had alleged a Grigsby claim.

Grigsby has thus in essence already been rejected by this Court and our Supreme Court, and this Court, while it should note appellant's waiver, may wish to also take this opportunity to make this rejection explicit, as was done by the Supreme Court of Arkansas in Rector v. State, 659 S.W. 2d 168 (Ark. 1983). It is respectfully submitted that the defense in Grigsby clearly began with the conclusion that the Arkansas capital law was unconstitutional in some way and worked backwards, selectively employing statistics to guile a receptive federal judge into validating the wholly illegitimate concept that individuals may be infallibly stereotyped on the basis of their membership in a certain group. Such an approach has no place in Anglo-American jurisprudence. See Pulley v. Harris, ___U.S.___ (1984), 52 U.S.L.W. 4141; McCorquodale v. Balkcom, ___F.2d___ Case No. 82-8011 (11th Cir. 1983); Alvord v. Wainwright, Case No. 83-3345, ___F.2d___(11th Cir. 1984). See also Huff, How to Lie With Statistics (1st ed. 1954), an excellent book with an unfortunate title, for an in-depth expose of the various methods of statistical manipulation.

ISSUES II AND III (Consolidated)

THE TRIAL JUDGE PROPERLY PERMITTED COUNSEL FOR APPELLEE TO ASK PROSPECTIVE JURORS IF THEY COULD LAY ASIDE FEELINGS OF SYMPATHY FOR APPELLANT'S FAMILY IN CONSIDERING THE DEATH PENALTY, AND PROPERLY EXCLUDED THE OPINION TESTIMONY OF APPELLANT'S MOTHER THAT THE DEATH PENALTY SHOULD NOT BE IMPOSED.

ARGUMENT

Appellant further alleges that the trial judge erred in permitting counsel for appellee to ask prospective jurors if they could lay aside feelings of sympathy for appellant's family in considering the death penalty, and in excluding the opinion testimony of appellant's mother that the death penalty should not be imposed (R 247; 291; 331-32; 359; 521-22; 1058-61). Appellee believes that both allegations are invalid, primarily because sympathy for a defendant's family is simply not a legitimate nonstatutory mitigating factor vis-a-vis a jury's consideration of the death penalty.

In arguing to the contrary, appellant relies principally on our Supreme Court's decisions of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). This reliance is misplaced. In both Lockett and Eddings, our Supreme Court struck down capital sentencing proceedings in which the sentencing judge was statutorily precluded from considering in his deliberation significant mitigating factors bearing upon the defendant's character and past, and the nature of the offense.[1] Here, in

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[1] In Lockett, the excluded evidence encompassed the defendant's "character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime", 438 U.S. 586,597, while in Eddings the exluded evidence encompassed the defendant's brutalized upbringing.

contrast, the sentencing judge precluded the jury from considering in its advisory deliberations the insignificant factor of sympathy for appellant's family, while making his own finding that the supportiveness of appellant's family was a mitigating factor of modest and nondispositive weight. These actions were clearly proper insofar as the character of appellant's family does not reflect favorably upon his character, or his record, or the nature of his offense--i.e., factors which the trier of fact should consider under Lockett. Indeed, the Lockett court explicitly noted that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing" upon these factors, 438 U.S. 586, 605. The foregoing is consistent with this Court's decision in Randolph v. State, ___So.2d___ (Fla. 1983), 8 F.L.W. 447, which, in holding that a murder victim's father could testify as to relevant information, states that "the Court must guard against the possibility that sympathy will be injected in the trial." See also Magill v. State, 386 So.2d 118 (Fla. 1980), cert.denied, 450 U.S. 927 (1981), holding that even precluding the defendant from testifying in mitigation that he felt remorse for his crimes was not reversible error; and Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982), holding that a finding in aggravation that the defendant felt no remorse was not reversible error.

Moreover, appellant has clearly waived consideration of the sympathy issues on appeal. As noted, defense counsel voiced no objection when the trial judge instructed the jury at the conclusion of the guilt phase of the trial that considerations of sympathy for any party could play no part in the jury's deliberations

(R 1029-30). Defense counsel even argued to the jury at this point that they should not let sympathy for the victim affect their verdict, and in his closing argument during the penalty phase even went so far as to agree with the prosecutor that a penalty of life imprisonment "would not be proper if it was based on sympathy for the (appellant's) family", and stated that he was not making such an argument (R 994; 1231). It is clear that a criminal defendant who seeks to maintain palpably inconsistent postions during the course of a criminal proceeding, in order to suit the needs of the moment, may be collaterally estopped from doing so. See State v. Beamon, 298 So.2d 376 (Fla. 1974), cert. denied, 419 U.S. 1124 (1975); see also McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971).

Appellee would further submit that the exclusion of the nonexpert opinion testimony of appellant's mother on the ultimate issue of whether the death penalty should be imposed was alternatively proper under Chapter 90, Fla. Stat., and interpretative case law. See Mills v. Redwing Carriers, Inc., 127 So.2d 453 (Fla. 2nd DCA 1961) (admission of nonexpert witness's speculation on the ultimate issue to be resolved invades the province of the jury); Farley v. State, 324 So.2d 662 (Fla. 4th DCA 1975), cert.denied, 336 So.2d 1184 (Fla. 1976) (admission of the opinion testimony of a witness that the defendants were guilty was improper); and Palm Beach County v. Town of Palm Beach, 426 So.2d 1063, 1070 (Fla. 4th DCA 1983)(even expert witnesses are not entitled to tender legal conclusions). See also Herring v. State, ___So.2d___ (Fla. 1984), 9 F.L.W. 49, holding proper the exclusion of testimony from three defense

lawyers that their clients had received life sentences upon pleading guilty to murders similar to that committed by the defendant. Moreover, any error in the exclusion of appellant's mother's testimony would be harmless in view of the fact that appellant's father, testifying for the defense during the penalty phase of the trial, wept and said of appellant, "I don't want him to die" (R 1073). See Magill v. State; Jackson v. Wainwright; cf Williams v. Maggio, 679 F.2d 381 (11th Cir. 1982), affirmed, Maggio v. Williams, holding that defense counsel in a capital case will not be held to have provided ineffective assistance at sentencing merely because he failed to investigate all possibly mitigating facets of the defendant's past.

ISSUE IV

THE TRIAL JUDGE PROPERLY DECLINED TO EXPLICITLY INSTRUCT THE JURY THAT ITS GUILT PHASE FINDING THAT THE MURDER WAS PREMEDITATED DID NOT NECESSARILY JUSTIFY A PENALTY PHASE FINDING THAT IT WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

ARGUMENT

Appellant next claims that the trial judge erred in declining to explicitly instruct the jury that its guilt phase finding that the murder was premeditated did not necessarily justify a penalty phase finding that the murder was committed in a cold, calculated and premeditated manner (R 1180-81). Appellee disagrees. As noted, the prosecutor, in closing, informed the jury that their finding that the murder was premeditated would not automatically justify a finding that it was cold and calculated, stating:

> You've already decided it was a premeditated killing. In addition, you must find beyond a reasonable doubt that it was cold; it was calculated...

(R 1201). Defense counsel pursued this theme as follows:

> I think you further realize that it's not the law that all first degree premeditated and felony murders require the death penalty... We're not talking about just premeditation... [T]here are the additional factors which you must find that it was committed in a cold and calculated manner. Now, that is different from the finding of at least a premeditatted design that had to do at trial.

(R 1210; 1211). The judge instructed the jury that, in accordance with Florida law, "[e]ach aggravating circumstance must be established beyond a reasonable doubt" (R 1238).

The propriety of jury instructions in capital sentencing proceedings should be assessed by viewing the instructions in their

entirety. See Jackson v. Wainwright. The Florida Standard Jury Instructions properly express Florida capital law. See Vaught v. State, 410 So.2d 147 (Fla. 1982); Peek v. State, 395 So.2d 492 (Fla. 1981), cert. denied, 451 U.S. 964 (1981). In Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), cert. denied, 459 U.S. 1111 (1982), this court held:

> Regarding Jent's second sentencing claim, he alleges that every person convicted of premeditated murder will start the sentencing proceeding with one aggravating circumstance already established. This, Jent argues, will violate due process by forcing the defendant to prove lack of premeditation in the sentencing phase of the trial. We do not agree that this will occur. As we stated in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 417 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), the aggravating circumstances set out in section 921.141 must be proved beyond a reasonable doubt. The level of premeditation needed to convict in the penalty phase of a first-degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor--"cold, calculated... and without any pretense of moral or legal justification."

Appellee inteprets this passage to hold, in harmony with the earlier cited general principles, that the judge's instruction that the jury find only those aggravating circumstances which were proved beyond a reasonable doubt was sufficient to apprise the jury of the distinction between their earlier finding of premeditation and their possible finding that the murder was committed in a cold, calculated and premeditated manner. See Herring v. State, ___So.2d___ (Fla. 1984), 9 F.L.W. 49. Note that in Combs v. State, 403 So.2d 418, 421 (Fla. 1981), cert. denied, 456 U.S. 984 (1982), this Court held that application of this aggravating factor to a murder occuring prior to the date of its enactment did not constitute an ex post facto operation

of the law inasmuch as this factor "adds nothing new to the elements of (murder)... but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant." Cf Menendez v. State, 419 So.2d 312 (Fla. 1982), holding that a capital defendant convicted of felony murder is not deprived of due process by a penalty phase finding that the murder was committed in the course of a felony.

ISSUE V

THE TRIAL JUDGE PROPERLY FOUND IN AGGRAVATION THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED PREMEDITATED MANNER, AND THAT IT WAS COMMITTED FOR THE PURPOSE OF AVOIDING A LAWFUL ARREST; AND THAT THE DEATH PENALTY WAS JUSTIFIED EVEN IF THESE FINDINGS SHOULD ONLY HAVE BEEN MADE IN THE ALTERNATIVE.

ARGUMENT

Appellant further claims that the trial court erred in finding in aggravation that the murder was committed in a cold, calculated and premeditated manner, and that it was committed for the purpose of avoiding a lawful arrest; and that the death penalty was justified even if these findings should only have been made in the alternative. The gravamen of appellant's complaint is that these two findings were based on the same evidence and that this evidence was insufficient to support either finding.

True, the trial judge did rely on essentially the same evidence--that appellant was acquainted with the victim and thus killed her to avoid detection-- to find that the murder was committed in a cold, calculated and premeditated manner and was committed to avoid a lawful arrest (R 1458-61). Appellee does not believe, however, that this consituted an improper "doubling up" of aggravating factors under the principles of Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), and its progeny, insofar as it is obviously possible for a defendant to commit an act with dual motives. In Herring v. State, this Court implied as much, concluding that

evidence that the defendant shot a convenience store clerk a second time, after dropping the clerk to the floor with his first shot, supported findings that the defendant had killed in a cold, calculated and premeditated manner and that he had killed to avoid a lawful arrest. The actual shooting here is virtually indistinguishable from that in Herring. As the Court will recall, appellant drew his gun on Ms. Zereski, demanded money, and took $54.96 from the cash register (R 896-897; 718; 1100-01). Appellant told Ms. Zereski, whom he knew, that he "didn't want to hurt her", but when she "jumped like she was going to run", he shot her three times, twice in the back (R 897; 910; 705; 843). At one point, appellant appeared to claim that only the first shot was uncalculated, stating that "as soon as it went off, I pulled two more rounds in her" (R 910). This testimony alone compelled the finding that the murder was committed in a cold, calculated and premeditated manner and for the purpose of avoiding a lawful arrest. Cf Hill v. State, 422 So.2d 816 (Fla. 1982), holding that the evidence sustained independent findings that a murder was committed in cold, calculated and premeditated manner and was heinous, atrocious and cruel.

Notwithstanding its belief that the two factors here were legally independently established by evidence that appellant was acquainted with the victim and thus killed her to avoid detection, appellee will now proceed, in accordance with the axiom that the decision of a trial judge must be upheld where he is right for any reason, City of Miami Beach v. 8701 Collins Ave., 77 So.2d 428 (Fla. 1954) and Cohen v. Mohawk, 137 So.2d 222 (Fla. 1962), to argue that these factors were independently

established by other evidence in the record. Supporting the finding that the murder was cold and calculated would be the evidence that appellant was experienced with firearms and stole a workable firearm, that he secured bullets for this firearm in order to shoot a dog, that he went to the convenience store in a stolen car after being unable to locate his intended victim, and that he shot Ms. Zereski in the back. (R 909; 659; 852; 797; 894; 1091; 892; 899; 927-928; 1098; 897; 910; 705; 843). Compare Cannady v. State, 427 So.2d 723 (Fla. 1983), in which, absent any evidence of this type of preparation or malice, a finding that a murder was committed in a cold and calculated fashion notwithstanding the defendant's disclaimers was held improper. Supporting the finding that the murder was committed to avoid a lawful arrest would be the evidence that appellant parked his car away from the highway; entered the store concealing his firearm; waited for another customer to leave before robbing and killing Ms. Zereski whom he knew; abruptly fled with three customers entering the store within a matter of minutes; immediately grabbed his gun when told about the incident later; sought to assure himself that the victim had died; and effectively denied his guilt by saying "who would shoot an innocent lady" when he revisited the scene (R 1096; 896-897; 718; 1100-01; 897; 910; 705; 843; 666-67;672-74; 679-680; 920-21; 786-87). Compare Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied, ___U.S.___, 74 L.Ed.2d 148 (1982), and Riley v. State, in which this Court, in validating findings that murders were committed to avoid lawful arrest, afforded prominence to the fact that the defendants knew their victims.

Although appellee thus believes both aggravating factors at issue here existed independently in two senses, the bottom line is that the judge below had the foresight and the prudence to find that the death penalty should be imposed even if this Court were to subsequently determine that these factors were one and the same. Appellant's claim that the aforecited evidence established neither that the murder was committed in a cold and calculated manner nor to avoid a lawful arrest is simply untenable. See Herring v. State.

ISSUE VI

THE TRIAL JUDGE PROPERLY DECLINED TO FIND AS A MITIGATING FACTOR THAT APPELLANT WAS VOLUNTARILY INTOXICATED WHEN HE COMMITTED THE MURDER.

ARGUMENT

Appellant next claims that the trial judge erred in failing to find as a mitigating factor that he was voluntarily intoxicated when he committed the murder. Appellee disagrees. As noted, the evidence of appellant's intoxication was conflicting, appellant claiming he was "drunk" when he committed the 7:50 p.m. murder while various witnesses testified that he was not drunk at 6 p.m., at 7:30 p.m., at 8:05 p.m., at midnight, and at 3 a.m. the next morning (R 1091; 779-780; 798; 784; 770; 815-816; 891; 912-14; 860; 872-873).

Where the evidence of a capital defendant's capacity to appreciate the criminality of his conduct is conflicting, the determination of whether this evidence establishes a mitigating circumstance is within the discretion of the trial judge. See Martin v. State, 420 So.2d 583 (Fla. 1982). In a case where the defendant's claim of voluntary beer and cannabis intoxication at the time of the homicide was rebutted by the testimony of witnesses that he seemed normal shortly thereafter, this Court held that the trial judge's refusal to consider intoxication in mitigation was proper. Stone v. State, 378 So. 2d 765 (Fla. 1979), cert. denied, 449 U.S. 986 (1980). For practical purposes, this case is no different than Stone. See also Simmons v. State, 419 So.2d 316 (Fla. 1982); Hall v. State, 403 So.2d 1321 (Fla. 1981). Moreover, the days of

voluntary intoxication as a total or partial defense for criminal conduct may well be numbered. See Linehan v. State, ___So.2d___ (Fla. 2nd DCA 1983), 8 F.L.W. 2706, review pending, Case No. 64,609 (Fla. 1984).

ISSUE VII

THE TRIAL JUDGE PROPERLY DECLINED TO HOLD THAT THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

ARGUMENT

Appellant closes by claiming for the record that the trial judge erred in declining to hold that the Florida capital sentencing statute is unconstitutional on its face and as applied (R 1435-1437). Appellee fully agrees with appellant that it would have been "futile" for him to have briefed his various constitutional challenges in detail insofar as "this Court has specifically or impliedly rejected each of these challenges" (Initial Brief of Appellant, p. 49). By the same token, it is unnecessary for appellee to respond to these challenges in detail. Appellee will thus rely here upon the prosecutor's rebuttal of the challenges below (See R 1245-1352), and note for the record that the Florida capital sentencing scheme is indeed constitutional in every way. See, e.g., State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied sub. nom. Hunter v. Florida, 416 U.S. 943 (1974); Proffitt v. Florida, 428 U.S. 242 (1976).

CONCLUSION

That the trial and sentencing for this mean convenience store killing were exceptionally error free for a capital case is evidenced by the fact that appellant's seven points upon appeal may be uncharitably condensed into the singular claim that he was constitutionally entitled to a jury and judge who would not follow the law. Appellee does not blame appellant in the least for his spirited effort, but it is obvious that he simply had nothing to work with. The judgment and sentence imposed must clearly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to Mr. Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32301 and a copy mailed to appellant Carl Caruthers, #090486, Flroida State Prison, Post Office Box 747, Starke, Florida 32091 on this 6th day of March, 1984.

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