IN THE SUPREME COURT OF FLORIDA

WILLIAM EUTZY,

Appellant,

vs. CASE NO. 64,212

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
Assistant Attorney General

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301
(904) 488-0600

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

William Eutzy was the defendant below and will be referred to as Appellant. The State of Florida was the prosecuting authority below and will be referred to as Appellee or the State.

The following symbol will be used in this Brief followed by the appropriate page number(s) in parentheses:

"R" -- Record on Appeal.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case. The following statement of facts is submitted because Appellant's statement of facts is not written in a light most favorable to sustain the trial court's rulings.

The State's first witness at trial was Pensacola Police Officer Paul Ferguson who testified that his place of duty was the Pensacola Regional Airport (R 105). He was working the midnight shift on February 26, 1983, when he observed Appellant and a white female walking around the terminal. He asked them for identification and Appellant identified himself as Raymond Sanders and provided a government vehicle identification card in that name (R 107). Appellant told Ferguson that he was waiting for a flight, and Ferguson did not see either Appellant or the woman after he left work at 8:00 a.m. that morning (R 109). Ferguson testified that when he came to work that evening, he observed a West Hill Cab which was parked on the side of the road near Tippen Avenue just prior to midnight (R 110).

According to Ferguson, when he first saw Appellant, Appellant was wearing a brown cowboy hat and glasses, and Appellant had a moustache and a stubble of a beard (R 111).

Mary Louise Kirkland, a cab driver with the West Hill Taxi Company, testified that on February 26, 1983, she was working the

airport between 10 a.m. and 12 p.m. (R 117). She observed Appellant and a rather fat, long haired white woman get into the victim's [Herman Hugley] cab between 6:30 and 7:00 p.m. (R 118, 119).

Rosemary Kirkland, the dispatcher with West Hill Taxi Company, testified that she was working on the afternoon and evening of February 26, 1983, and that the victim had notified her about 6:30 p.m. that he was taking two people he had picked up at the airport to Pensacola Beach (R 121). About 7:15 p.m., the victim notified her that they were going to Fort Walton Beach, however twenty minutes later he called and told her they were instead going to Panama City (R 121). Around 11 p.m. that same evening, the victim called her and told her he had just returned, but when she tried to call him back she received no response (R 122).

The State's next witness was Soliver Dolby, a Security Supervisor assigned to the Pensacola Junior College main campus (R 124). He testified that he had not seen the taxi cab around 11 p.m. although he probably would not have noticed it because there were always other cars in the area. He first noticed the taxi approximately 4:20 a.m. the next morning when he saw police cars and flashing lights (R 125).

Roy Duggen testified that around 11:30 p.m. on the 26th, he was returning home from a Boy Scout banquet with his wife and daughter when he noticed a white cab which was parked in an unusual manner on Tippen Street (R 128). He remembered the incident because he had

mentioned to his wife that the cab was parked in a place in which you would never see a vehicle (R 128).

Mary Beasley, another cab driver with West Hill, testified that she last saw the victim between 6 and 6:30 p.m. on the evening of the 26th. She did not see anyone get into the victim's cab because she was in line in front of the victim's cab (R 131). She next saw the victim's cab approximately 4 a.m. the next morning when she noticed that it was parked in an unusual manner on Tippen Avenue (R 131). She stopped her vehicle and went to the victim's cab, and when she determined that something was wrong with Mr. Hugley, she called for assistance (R 132). She testified that if she were going to drive a fare to Panama City, she would collect the money in advance and that a driver could also collect a half fare returning to Pensacola (R 134). A round trip would be worth approximately $135 (R 135). On cross-examination, she testified that "we are supposed to collect the money before we go out of town" and that she would definitely collect the money first if two people wanted her to drive that long a distance (R 136).

Pensacola Police Officer Larry Giles testified that he was on duty the evening of the murder and that he had seen the victim's taxi parked alongside the road and had thought that it was strange for a taxi to be parked at that location at that time of the morning (R 140). He didn't have time to stop because he was on the way to

the scene of an accident, but he did shine his spotlight around the area to see if anyone was walking around. While he was at the scene of the accident, he told another officer about what he had seen and that officer went to investigate (R 140). He secured the crime scene until other officers could arrive (R 143).

Investigator Gary Meisen of the Pensacola Police Department testified that during his investigation of the crime, he learned from Jackie Humel that the people she had seen at the airport with the cab driver the evening of the murder might be hitchhiking on I-10 just outside Pensacola (R 149). Appellant and Laura Eutzy were apprehended on I-10 shortly thereafter. A pistol was taken from Laura Eutzy, and Meisen realized that it was the same caliber as the murder weapon (R 151). The pistol was sent to Tallahassee for testing that day. Meisen was contacted later that same afternoon by David Williams of the Florida Department of Law Enforcement who told him that the weapon taken from Laura Eutzy was positively the murder weapon (R 152).

Jackie Humel testified that she worked at the airport as part of a cleaning crew and that she was working the 5 p.m. to 11 p.m. shift on the 26th of February. Mark Miller pointed out two persons to her--the male had a cowboy hat, black hair behind his ears, and glasses. The woman was stout, had long black hair, and was wearing a jacket. The man was wearing jeans and a flannel shirt (R 156). After she got off work she was driving on Tippen Avenue when she saw

the victim sitting in his cab. She stopped to see if he was all right, and he replied that his vehicle was not broken down and that he was waiting on someone. The person he was waiting on was leaning inside the door and she recognized him as the same person she had seen earlier at the airport (R 157, 158).

The next witness was James Richbourg, a Pensacola Police Officer, who testified that he investigated the crime scene and collected an expended cartridge from the left rear floorboard of the taxi (R 163). He was present at the autopsy and took custody of a bullet which was removed from the victim's body (R 167). He also assisted Jackie Humel in preparing a composite of the man she had seen with the victim (R 166).

Charles Meadows, a Security Officer for the Pensacola Holiday Inn, testified that approximately 11 p.m. on the evening of the 26th, he saw Laura Eutzy. He identified Appellant as the man he had seen the next day (R 180). Pensacola Police Officer James Duck testified that he apprehended Appellant and Laura Eutzy while they were hitch-hiking on the interstate (R 190) and took a pistol away from Laura Eutzy after she told him that she had a gun in her purse (R 191).

Laura Eutzy then testified that she and Appellant had arrived in Pensacola approximately 10:30 p.m. on the evening of February 25, 1983 (R 195). They were on the way to Missouri which was where her mother lived. After spending approximately one hour at the Holiday Inn at the University Mall, they walked to the airport (R 196).

They stayed there all day Saturday just waiting around (R 197, 198).

She explained that she owned a handgun and that it had been bought in Slidell, Louisiana, after Appellant told her that she needed one for protection (R 198). Appellant helped her select the gun and told her it was a woman's gun (R 198, 199). She testified that she had the gun in her possession when she arrived in Pensacola and that she thought that it was located in her purse.

Approximately 7 p.m. on the evening of February 26, she and Appellant caught a cab at the airport and started for the Holiday Inn at Pensacola Beach (R 200). However, instead of going to Pensacola Beach, they first headed for Fort Walton Beach but then changed plans and headed for Panama City (R 201). She testified that she was asleep in the back seat of the taxi cab most of the trip and that she thought the gun was in her possession at that time (R 201). When they returned to the Holiday Inn at University Mall in Pensacola, she left the cab and went to the bathroom. Appellant told her that he would be in in a few minutes, and he returned approximately thirty minutes later (R 202, 203). She had no money in her possession while she was riding in the taxi, and she believed that Appellant had approximately $5.00 (R 203). She did not know how the cab fare would be paid, but Appellant told her that "he would take care of it." (R 204) When Appellant returned, he told her he hadn't taken care of the fare, and he told her that he had hit the cab driver and knocked him out but had not hurt him. They spent the rest of that evening at the Holiday Inn, the next day at the Mall, and the next

evening again at the Holiday Inn (R 204).

On Monday morning, she obtained a newspaper and Appellant attempted to take it away from her. When she asked him why, he told her that there was nothing in it that she could not read and gave the paper back to her. She then read the headline that the cab driver had died and when confronted with this information, Appellant insisted that he didn't want to talk about it (R 205). Appellant told her that he had not informed her of what had happened to the cab driver because he didn't want her to worry about it and he thought that she might turn him in to the police (R 205). She also testified that she would have turned Appellant in but that he would not let her out of his sight (R 206).

While they were still at the Holiday Inn on Monday morning, Appellant gave the pistol back to her. She claimed that she had not opened her purse at any time between Saturday night and Monday morning and that she had not noticed that the gun was missing (R 207). She admitted giving inconsistent statements when first confronted with her involvement in the crime, but she stated that she did this because she was afraid of Appellant (R 209).

The next witness was the pathologist, Dr. James Potter. He testified that he performed an autopsy on the victim and that the cause of death was a gunshot wound to the head (R 241). On cross-examination, he testified that the bullet had entered just slightly behind and above the victim's ear (R 241).

Florida Department of Law Enforcement Analyst David Williams, testified that the bullet which was in evidence had been fired from the gun which was in evidence (R 248). According to Williams, the test pound pull on the trigger of the gun was a little bit harder than average (R 250). Because of the residue on the victim's cap, Williams estimated that the pistol had been fired from between three and six inches from the victim's head (R 251).

The State then rested its case, and Appellant moved for a judgment of acquittal (R 257). According to Appellant, there had been no evidence of a robbery or an attempted robbery and that a judgment of acquittal should be granted at least as to the portion of the indictment charging felony murder (R 257). The trial court disagreed and ruled that there was some evidence that Appellant owed a significant amount of money for the cab fare and that the victim was found with no money on his person (R 258). The trial court also noted that the cab driver was found dead with absolutely no money on his person and that circumstantially robbery could be proven (R 258, 259). The prosecutor noted that there had been evidence that Appellant had used force and that it should be a jury question whether robbery was applicable to the case (R 259). The court agreed and denied the motion.

After closing arguments, the trial court instructed the jury. The record reveals that no objections were made by defense counsel concerning the jury instructions and that the only comments made

were in response to the trial court's question whether there were any comments about the instructions. Specifically, defense counsel stated "I'm satisfied." (R 294)

During deliberation over the verdict, the jurors requested that they be re-instructed on the definitions of second and third degree murder (R 295). Even though the jury was subsequently re-instructed on those definitions, the jury returned a verdict of guilty of first degree murder as charged (R 305).

During the sentencing phase of the trial, the State's first witness was Jack Shiver from the Escambia County Division of Corrections (R 311). He testified that after Appellant was arrested, he told him that he had been previously convicted and sentenced to prison for the crimes of forgery and auto theft (R 315). Appellant's prior robbery conviction was admitted into evidence over Appellant's objection that there had been no testimony or evidence to tie Appellant to the 1958 conviction (R 321). The objection was overruled because of the previous testimony that Appellant had admitted such a conviction (R 321).

The State rested and the defense presented no evidence or testimony (R 322). After argument by counsel and instructions by the court, the jury recommended a life sentence (R 335).

The trial court found that there were three aggravating circumstances in the case. First, the trial court found that Appellant

had previously been convicted of robbery, a crime involving the use or threat of violence. Second, the trial court found that Appellant had either robbed the victim or was attempting to rob the victim when the murder occurred and that the aggravating circumstance of §921.141 (5)(d) was applicable (R 340). Finally, the trial court found that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification and thus the aggravating circumstance of §921.141(5)(i) was applicable. The court found that there were no mitigating circumstances applicable and that nothing in mitigation had been presented in either the guilt or sentencing portions of the trial (R 341). The trial court then imposed a sentence of death (R 341).

ARGUMENT

ISSUE I

THE TRIAL COURT'S REJECTION OF THE JURY'S LIFE RECOMMENDATION IS SUPPORTED BY THE EVIDENCE IN THE RECORD.

Appellant first contends that the trial court improperly overrode the jury's recommendation of life imprisonment. Appellant, citing to Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), has argued that since the jury recommended life, this is a case for which no reasonable person could differ as to what the punishment should be. However, the fallacy behind Appellant's argument is that a jury recommendation of life imprisonment, followed by a trial court's imposition of the death penalty, would never be allowed to stand.

Florida's capital sentencing process has been specifically upheld by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In fact, the court noted that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since the trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." Id. 428 U.S. 252, 49 L.Ed.2d 923. See also Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134, 1145 (1983).

Appellant has cited numerous cases to support his contention that a death sentence was improper in this case. Obviously, space limitations prevent distinguishing each case on its facts--suffice it to say, however, that most of the cases relied upon by Appellant unlike Appellant's case, contained either non-statutory mitigating evidence in the record or the trial court's specific finding of a statutory mitigating circumstance. See, e.g., Cannady v. State, 427 So.2d 723 (Fla. 1983). In that case, one of the three statutory aggravating circumstances was rejected by this Court and there were two statutory mitigating circumstances which were applicable. Also, there was evidence of non-statutory mitigating evidence in the record. However, in Appellant's case, there was nothing in mitigation, either statutory or non-statutory, and three aggravating circumstances were found. Under those circumstances, as Appellant has recognized, a death sentence is proper. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

Appellant's reliance on Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982), is misplaced for the same reason as is his reliance on Cannady. In Gilvin, unlike Appellant's case, there was evidence of non-statutory mitigating circumstances upon which the jury's life recommendation could have been based. Also, there was an improper doubling up of aggravating circumstances. Under those circumstances, reasonable men could differ--again, in Appellant's case, there was nothing in mitigation, either statutory or non-statutory and the trial court found three statutory aggravating circumstances.

Appellant's reliance on Washington v. State, 432 So.2d 44, 48 (Fla. 1983), is similarly misplaced. In that case, not only did the prosecutor himself ask that the jury's life recommendation be followed, but also there were two statutory mitigating circumstances as well as non-statutory mitigating evidence which had been introduced by the defense. Also, one of the aggravating circumstances was rejected by this Court. While the list of distinguishable cases could go on for many more pages, the State submits that the point has been made.

Appellant's theory that a jury recommendation of life can be sustained only if the aggravating circumstance of §921.141(5)(h), Fla. Stat., is interesting, but it is not supported by the statute which lists eight other aggravating circumstances, only one of which is necessary to sustain a death sentence. State v. Dixon, supra.

Appellant seems to be arguing that since this wasn't a very grisly murder, a death sentence is inappropriate. The State emphatically disagrees--there was absolutely no reason for Appellant to have murdered a defenseless cab driver. If as Appellant has contended, there was no money involved, that is all the more reason why this crime is reprehensible. While the undersigned is certainly not saying that it is all right to murder for money, at least there is a perverted reason for the killing. Moreover, if Appellant were correct that a killing had to be sloppy, bloody, or gruesome, in order to

sustain a jury override, would that mean that efficient, skillful murderers who manage to kill with only one bullet are rewarded for an especially antiseptic murder? Obviously not.

Appellant has also based his argument on the fact that the State did not even attempt to argue the applicability of §921.141(5)(h). Is Appellant seriously suggesting that a prosecutor should argue the applicability of a statutory aggravating circumstance which this Court would not uphold? The prosecutor should be commended for arguing that only three statutory aggravating circumstances should be found.

Appellant has also argued that the jury might have recommended life because it did not believe Laura Eutzy's testimony that she was unaware that Appellant had taken the gun from her. This is speculation at best--the fact that Laura Eutzy knew that Appellant had taken the gun has absolutely nothing to do with the circumstances of the crime and Appellant's degree of culpability. It is Appellant's culpability which is at issue here, and it should make no difference as to Appellant's sentence whether Laura Eutzy knew that Appellant had the gun. In fact, it would make a death sentence even more appropriate for Appellant if he asked for the gun a day prior to the crime.

But all this is speculation, and the State doesn't want to be guilty of the same speculation for which Appellant has been criticized.

The point is that there were three aggravating circumstances and nothing in mitigation, either statutory or non-statutory. Under these circumstances, reasonable men certainly could differ. The trial court's sentence is supported by the record and the law.

In summary, there was a finding by the trial court of multiple aggravating circumstances. The trial court also found that there was nothing in mitigation, either statutory or non-statutory. Under these circumstances, even when a jury recommends a life sentence, the Court has upheld the trial court's decision to impose a death sentence. See, e.g., Routly v. State, 440 So.2d 1257, 8 F.L.W. 388, 391 (Fla. 1983). Appellant should not be persuasive on this point.

ISSUE II

THE TRIAL COURT'S FINDING OF THE AGGRAVATING CIRCUMSTANCE OF §921.141(5)(i), FLA. STAT., IS SUPPORTED BY THE RECORD.

Appellant next contends that the trial court should not have found that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The State disagrees and submits that the trial court's finding of this aggravating circumstance is supported by the record.

This particular aggravating circumstance was added to the death penalty statute by the Legislature in 1979 in response to this

Court's opinions in Riley v. State, 366 So.2d 19 (Fla. 1978), and Menendez v. State, 368 So.2d 1278 (Fla. 1979). Both of those cases involved execution type killings and in both the Court emphasized that the proof had not been strong enough to show that the murder was committed for the purpose of avoiding arrest within the contemplation of the death penalty statute.[1]

The State submits that if ever there were an execution type killing, this is the case. Counsel for Appellant has repeatedly argued that there was no evidence of a robbery and that the State did not prove the reason for the murder (Brief of Appellant at 31). However, those are the precise reasons why this murder was cold, calculated, and premeditated without any pretense of moral or legal justification. There simply was no reason for Appellant to kill the cab driver, perhaps, other than the fact that Appellant was just plain mean and vicious. The victim was shot in the side of the head from a distance of approximately three to six inches--a classic execution style killing. Moreover, there were no signs or evidence of a struggle prior to the shooting, and Appellant certainly did not offer a theory of self defense. There was evidence that Appellant planned to "take care" of the cab fare, and he did this after letting Laura Eutzy get out of the cab at the Holiday Inn.

Although Appellant has argued that there was insufficient proof of premeditation, Appellant has also recognized that the type and location of the wound "is circumstantial proof of premeditation ...." (Brief of Appellant at 31) The State submits that this factor,

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[1] A copy of the Staff Analysis of Senate Bill 523 has been appended to this brief.

coupled with Appellant's taking the gun from Laura Eutzy sometime at least prior to the last cab drive and the fact that Appellant was seen near the cab after he had caused the victim to drive the cab to a secluded area, is more than sufficient to justify the added amount of premeditation required under this Court's decisions. See Routly v. State, supra; Smith v. State, 424 So.2d 726 (Fla. 1982); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982).

Appellant's reliance on Cannady v. State, supra, to support his argument that this aggravating circumstance should not have been found is misplaced. This is because in Cannady there was evidence of self defense in that the defendant claimed he had not meant to commit the murder and that he had acted in self defense after the victim jumped at him. Id. 427 So.2d 730. In Appellant's case, however, there was no claim of self defense, and there was absolutely no evidence of any reason to justify the murder of the cab driver. Appellant has also relied on Washington v. State, 432 So.2d 44, 48 (Fla. 1983). However, in that case the Court found that there was no proof of additional premeditation--in Appellant's case, there was proof that Appellant procured the weapon sometime prior to the last cab ride, let off Laura Eutzy so that she could not see the murder, caused the cab driver to drive to a remote location out of normal view of passersby, and finally shot the victim in a manner which even counsel for Appellant has recognized supports proof of premeditation. The State submits that this aggravating circumstance is

amply supported by the record and evidence adduced at trial and that the trial court properly found that the murder was committed in a cold, calculated, premeditated manner without pretense of moral or legal justification (R 376, 377).

ISSUE III

THE TRIAL COURT PROPERLY FOUND THAT THE MURDER WAS COMMITTED IN THE COURSE OF AN ATTEMPTED ROBBERY.

Section 921.141(5)(d), Fla. Stat., reads in its entirety:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb. (Emphasis added)

This aggravating circumstance does not require that there must be actual proof of a robbery. Rather, all it requires is a factual finding that the defendant was attempting to rob when the murder occurred. According to Appellant, this aggravating circumstance should not have been found because there was no proof that the victim had ever had any money on his person prior to the murder. In other words, Appellant's conduct should be excused because the victim had no money. However, this argument fails in light of the Legislature's clear intent to make the aggravating circumstance applicable to

attempted felonies as well as completed felonies.

Notwithstanding the fact that there was clear proof of an attempted robbery, the State submits that circumstantially the evidence was sufficient to show that a robbery had occurred. This is because the jurors could use their common sense to infer the fact that the cab driver who had been working that day prior to picking up Appellant and Laura Eutzy certainly must have had some money on his person. Of course, as the trial court found, there was no money on the victim's body when it was discovered (R 376). See Knight v. State, 402 So.2d 435, 436, n. 2 (Fla. 3rd DCA 1981) (victim found dead from strangulation and battering and his wallet and contents were missing); Ferguson v. State, 417 So.2d 631, 635 (Fla. 1982) (murder victims had had jewelry and valuables on their persons before they were killed although no jewelry or valuables were ever recovered).

Finally, there was evidence in the record that the cab ride was worth between $90 and $135. Since the victim had no money on his person when his body was discovered, the trial court could properly find that Appellant had actually committed a robbery. See Ferguson, supra. The trial court also found that the fact that Appellant procured the weapon at least prior to the last cab ride demonstrated Appellant's intent to rob (R 376). Accordingly, there actually was a robbery in fact as the trial court found.[2]

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[2] Contrary to Appellant's argument, the jury's finding of premeditated murder does not constitute an implied acquittal of the robbery because felony murder was not found. The jury was instructed that they could find Appellant guilty of either premeditated or felony murder, but not both (R 294). The evidence supported both theories.

In summary, this aggravating circumstance includes attempts to rob as well as actual robberies. In the alternative, there was sufficient circumstantial evidence to demonstrate that the victim was robbed of his money at some time prior to Appellant's fleeing the scene of the crime. Finally, there was evidence in the record to support the trial court's finding that Appellant stole at least the value of the cab ride from the victim. Accordingly, Appellant's argument should be rejected.

ISSUE IV

THE ISSUE OF WHETHER THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DURING THE PENALTY PHASE WERE CONSTITUTIONALLY ADEQUATE HAS NOT BEEN PRESERVED FOR APPEAL.

Counsel for Appellant has recognized that there was no objection to the jury instructions as given (Brief of Appellant at 39), yet he has raised the issue anyway. The State submits that because of the lack of an objection, the issue has not been preserved for appeal. Williams v. State, 414 So.2d 509, 511 (Fla. 1982); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); Castor v. State, 365 So.2d 701, 703 (Fla. 1978); State v. Barber, 301 So.2d 7 (Fla. 1974). The State respectfully requests that the Court not rule on the merits of this issue in order to preserve the State's waiver argument for use during future federal habeas review which is certain to come regardless

of how the Court ultimately decides this case. See Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Assuming only for the sake of argument that the Court wishes to consider the issue, it should be noted that Appellant's jury was given the standard jury instructions which have been approved by the Court on numerous occasions. See, e.g., Vaught v. State, 410 So.2d 147, 150 (Fla. 1982). Since there was absolutely no evidence of mitigation either during the guilt phase or the sentencing phase, the trial court was not required to instruct on the statutory mitigating circumstances. This was especially true in light of defense counsel's acquiescence to the instructions as given. See Cooper v. State, 336 So.2d 1133 (Fla. 1976). Finally, it should be pointed out that what the trial court did when it cautioned the jury that it could look to the guilt phase for factors in mitigation was for the benefit of Appellant. How then can a different lawyer now be complaining?

The issue was clearly not preserved for appeal, and this Court should not consider it. Appellant's argument is without merit.

ISSUE V

THE ISSUE OF WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL AS APPLIED BECAUSE OF THE TRIAL COURT'S AUTHORITY TO OVERRIDE A JURY'S RECOMMENDATION WAS NOT PRESENTED TO THE TRIAL COURT AND IS THUS NOT COGNIZABLE ON APPEAL.

Counsel for Appellant has once again raised an issue which was not presented to the trial court. Consequently, since this issue could have been raised prior to trial, the issue has been waived and is not properly before the Court. Steinhorst, supra; Castor, supra; Williams, supra; and State v. Barber, supra. This issue does not involve "fundamental error" and Appellant has not offered any "cause and prejudice" to excuse his procedural defaults in the trial court. It should be noted that trial counsel filed numerous pre-trial motions challenging the death penalty statute and procedures (R 345-373)--the reason this issue was not raised was probably because, as appellate counsel has recognized, the issue has been decisively repudiated by both this Court and the United States Supreme Court. See, e.g., Proffitt v. Florida, supra; Cannady, supra.

The undersigned wishes to make it clear to the Court that by asking for a finding of procedural default whenever such a finding is applicable, the State is not "playing games" in order to frustrate federal habeas review--this was a concern expressed by one of the members of this Court during oral argument of a recent capital case in which the undersigned participated. The Court must certainly be aware of the growing abuse of the writ of federal habeas corpus,

especially in capital cases. See Sullivan v. Wainwright, ___ U.S. ___, 78 L.Ed.2d 210, 213 (1983). In such cases, the scenario usually consists of an issue which was not raised at trial at all, or was raised only cursorily, a state court's ruling on the merits and rejecting the claim, and then a federal court's taking the claim and either reversing the state court's decision or holding the case for a number of years. Although the defendant usually loses in the end, justice has been delayed when it should not have been. The United States Supreme Court has recognized that the federal writ of habeas corpus was not designed to allow a state prisoner to maintain perpetual litigation, and a growing body of case law on procedural default is evident. Wainwright v. Sykes, supra; Engle v. Isaac, supra. However, this law is applicable only if the issue is not considered by the state courts because of procedural default.

Accordingly, since Appellant is in clear procedural default on this issue, the State of Florida respectfully requests that such procedural default be explicitly found. While the undersigned is of the opinion that counsel who routinely raise issues on appeal which were not first preserved at trial should be excoriated, such defense counsel can hardly be blamed for their conduct when it more often than not results in a ruling on the merits. This Court should not have to tolerate sifting through a multitude of claims in order to find the claims which were first properly raised in the trial court--such abuse of the system is not fair to the trial judge or the people of the State of Florida or the members of this Court.

CONCLUSION

Because there were three valid aggravating circumstances and nothing in mitigation, the trial court properly overrode the jury's recommendation of life imprisonment. The State of Florida respectfully requests the Court to affirm Appellant's judgment and sentence of death.

Respectfully submitted,

JIM SMITH
Attorney General

Lawrence A. Kaden
LAWRENCE A. KADEN
Assistant Attorney General

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 17th day of January, 1984.

Lawrence A. Kaden
LAWRENCE A. KADEN

OF COUNSEL