IN THE FLORIDA SUPREME COURT

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MILO A. ROSE,

Appellant,

v. Case No. 64,484

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

GARY O. WELCH
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

/gs

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES		PAGE
FLORIDA STATUTES	§90.608 (1983)	6
	90.609	6
	90.610	6
	90.612 (1979)	7
	921.141	21,22
	921.141 (5)	10
	924.33 (1983)	11

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY DENYING HIS MOTION TO SUPPRESS, ADMITTING EVIDENCE OF AN IMPERMISSIBLY SUGGESTIVE PRETRIAL IDENTIFICATION, AND ALLOWING IDENTIFICATION IN COURT TAINTED BY THE PRETRIAL IDENTIFICATION.

The trial court's threshold inquiry on the Appellant's Motion to Suppress pretrial photographic identification was to decide whether the identification procedure was unnecessarily suggestive. Neil v. Biggers, 409 U.S. 188 (1948). The Appellant cites M.J.S. v. State, 386 So.2d 323 (Fla. 2d DCA 1980) and Dell v. State, 309 So.2d 52 (Fla. 2d DCA 1975), for the proposition that a photographic line-up which contains no photographs matching the description of the accused is impermissibly suggestive. (Appellant's brief page 20) In M.J.S. the photo line-up consisted of only three (3) photographs, only one of which vaguely resembled the description the witness had given the police. In Dell the victim described the robber as having a black mustache. When the victim was shown a five photographic line-up, only one of the other subjects had a mustache and the defendant's picture indicated that he was the only one charged with armed robbery. Accordingly, M.J.S. and Dell are factually distinguishable and are not applicable to the case sub judice.

Detective Tucker testified that he took the photograph of the Appellant and prepared the photopack used for pretrial identification. (R 782-783) Detective Tucker construed the photopack after he had

taken the photograph of the Appellant (R 784) and he based the construction of the photopack on the Appellant's picture. (R 785) In doing so, Detective Tucker attempted to utilize all the attributes of the Appellant. (R 787) During the photographic line-up Detective Tucker did not suggest any photo to the witness. (R 494) Furthermore, the record reveils that the photopack used consisted entirely of white males with long hair, beards and mustaches. (R 368-372) Therefore, the Appellants argument that the pretrial identification was suggestive is without merit. However, assuming for arguments sake that the pretrial identification was conducted in an unnecessarily suggestive manner, the United States Supreme Court has held where a showup procedure was unnecessarily suggestive, evidence of identification did not have to be excluded unless under the totality of the circumstances there was a substantial likelihood of misidentification. Neil v. Biggers at 199. The United States Supreme Court pointed to five factors which should be considered in evaluating the likelihood of a witness misidentifying a suspect: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Applying the criteria set forth in Neil to the case presently before this Court, there is little likelihood of the witnesses misidentifying the Appellant. (R 482-483)

ISSUE II

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO CONFRONTATION BY RESTRICTING CROSS-EXAMINATION OF DETECTIVE LUCHAN ON MATTERS AFFECTING HIS CREDIBILITY.

On direct examination, Detective Tucker testified that he made up the photo-pak used for pretrial identification. (R 783) The photo-pak was based on the Appellant's photo and Detective Tucker had attempted to use people of the same general age and feature in developing the photo-pak. (R 789) The photo-pak consisted of five photographs and was shown to the witnesses of the crime. (R 789-790) The Detective explained that he isolated himself with the individual witness, with no one else present, and presented an envelop containing the five photographs. (R 790) Detective Tucker did not suggest any of the photographs in the photo-pak to the witnesses. (R 791) Thereafter, Detective Tucker testified as to the authenticity of photographs of the Appellant (R 792-793) and a cement block found at the crime scene. (R 794) On cross-examination the following line of questioning and evidentiary rulings occurred which Appellant claims as error:

> Q How many murder cases have you had the opportunity to investigate or be the detective on?
>
> MR. YOUNG: Judge, for the record, I fail to see the relevancy of this question.
>
> THE COURT: Mr. Rouson?
>
> MR. ROUSON: Judge, I will connect it up or come back.

THE COURT: All right, overruled for now, You may ask it, sir.

MR. ROUSON: Thank you, your Honor.

A Three.

Q And of the three, which one was this?

A This would have been the third.

Q Do you feel these are fairly important cases?

A Yes, I do.

Q Did you have the opportunity to review any police report that you may have made prior to testifying today?

A Yes.

Q What are your duties?

A My current duties?

Q Yes.

A Right now, my category assignment is grand theft. I investigate theft complaints, fraudulent credit card complaints, forgery complaints, any type of con scheme or game.

Q What were your assigned duties at the time of this case?

A They would be the same.

Q Do you recall interviewing Maryann Hutton?

A Yes, I do.

MR. YOUNG: Your Honor, may we approach the bench, please?

THE COURT: You may.

BENCH CONFERENCE

MR. YOUNG: Judge, I still have an objection as to what the detective--I submit to the Court there has been no effort to tie this up, the fact the detective worked three prior or three other murder cases is totally irrelevant. I see nothing to tie it up.

MR. ROUSON: Judge, don't I have the full extent of my cross examination to tie it up? I mean, do I have to do it right now? I can't use my own trial strategy and ask him a few questions and come back - -

THE COURT: I suppose. He stated these were real important cases, and I assume, for whatever, that may affect credibility.

I'll allow it.

MR. YOUNG: I also have objection, at no time did the State, in its direct, get into intervies this detective took. We have gone now far beyond the scope of direct.

THE COURT: Mr. Rouson?

MR. ROUSON: Judge, it is important that the jury understands and be aware of the professionalism of this detective in working this case. There are many inconsistencies, there are statements he made yesterday under oath that are not supported in his deposition. There are statements in his police report that directly contradict statements made in his deposition. And if I can't be allowed to bring out the job, the investigation, his interview technique in this case, then I'm being limited to having the jury appreciate his level of professionalism, his credibility, and his experience when they weigh that in their decision in the jury room.

MR. YOUNG: Judge, I submit to the Court that is all well and good as to Mr. Rouson's case, but contained within the scope of cross examination, he is going way beyond the scope of direct.

THE COURT: I'll let you go into anything that affects the photo-pak or anything that affects the concrete block, or anything that affects the pictures he took, but beyond that, I think

-- in other words, the full scope of cross, but as far as I recall, he didn't get into descriptions or what have you. They didn't even ask. I wondered why they didn't ask the detective --

MR. ROUSON: Because of that problem, Judge, real problem.

THE COURT: I guess they have to use their strategy, too, don't they?

MR. ROUSON: Yes, ma'am.

THE COURT: All right.

Appellant argues that the trial courts limitation of his cross examination of Detective Tucker prevented him from impeaching Tucker's credibility. (Appellant's brief page 22) At trial, counsel for the Appellant stated that he wanted to bring out the level of professionalism of Detective Tucker for the purpose determining his credibility. (R 798-799) However, Section 90,608, Florida Statutes (1983) provides:

90.608 Who may impeach

(1) Any party, except the party calling the witness, may attack the credibility of a witness by:

(a) Introducing statements of the witness which are inconsistent with his present testimony.

(b) Showing that the witness is biased.

(c) Attacking the character of the witness in accordance with the provisions of s.90.609 or s. 90.610.

(d) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which he testified.

(e) Proof by other witnesses that material facts are not as testified to by the witness being impeached.

Accordingly, the Appellants attack on Detective Tucker's professionalism was not a proper method of attacking credibility.

The scope of cross-examination is provided for in the Evidence Code. Section 90.612, Florida Statutes (1979). Subsection (2) provides:

> "Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court may, in its discretion, permit inquiry into additional matters.

The "extent of cross-examination with respect to appropriate subject of inquiry is within the sound discretion of the trial court, Smith v. Illinois, 390 U.S. 129, 19 L.Ed. 2d 956, 88 S.Ct. 748 (1968), and this discretion is not subject to appellate review except in cases of a clear abuse. Matera v. State, 218 So.2d 180 (Fla. 3d DCA 1969). However, a defendant's Sixth Amendment rights to cross examination must be reviewed before the standard for review is abuse of discretion by the trial court in limiting cross examination. U.S. v. Bulman, 667 F.2d 1374 (11th Cir. 1982). As such, Appellee submits that since the Appellant was allowed to fully probe into the areas that Detective Tucker testified to on direct and since the number of prior murder cases the witnesses direct testimony and credibility, the Appellant was not denied his confrontational right by the trial restricting cross-examination.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY ADMITTING THE TESTIMONY OF MICHAEL CRAFT WITHOUT CONDUCTING A PROPER INQUIRY UPON DEFENSE COUNSEL'S OBJECTION TO A DISCOVERY VIOLATION.

The Appellant claims that the trial court's failure to "conduct any inquiry into the State's late disclosure of Michael Craft", a witness in the sentencing phase, is reversible error requiring remand for a new sentencing trial. (Appellant's brief page 25-27) However, it is not clearly apparent that Rule 3.220 (1)(i), Florida Rules of Criminal Procedure, is applicable to the sentencing portion of a trial because the Rule provides that the state is only obligated to provide discovery of witnesses that may have relevant information "to the offense charge, and to any defense with respect thereto." However, assuming that the discovery rules and the Richardson v. State, 246 So.2d 771 (Fla. 1971) requirements are applicable to the penalty portion of a first degree murder case, the appellee submits that state adequately complied with the discovery rule; that there was a sufficient inquiry under the circumstances by the trial court to make an adequate Richardson determination and provide an adequate record for review; and that the Appellant was not unjustly prejudiced by the states disclosure four (4) days prior to the sentencing proceedings.

Counsel for the Appellant was notified by the State that they had discovered that the Appellant was on parole at the time the crime was committed. (R 1220, 1247) The Appellant was notified

that Mr. Craft would be available on July 4, 1983, the night prior to the penalty portion of the trial, and in the morning prior to the resumption of the trial. (R 1248-1249) Prior to the penalty portion of the trial, counsel for the Appellant had a chance to discuss Mr. Wade's testimony with the Appellant. (R 1248) As such, the Appellant was fully provided with discovery according to Rule 3.220 (1)(i), Florida Rules of Criminal Procedure, and the trial judge was sufficiently informed by the statements of counsel at the bench hearing to satisfy the Richardson requirements. McGee v. State, 435 So.2d 854 at 859 (Fla. 1st DCA 1983) and King v. State, 355 So.2d 831 (Fla. 3d DCA 1978). The trial court's representation that the Appellant was in the best position to know whether or not he was on parole at the time of the offense (R 1248) was confirmed by the Appellant's admission that he was on parole for a 1979 burglary and aggravated assault and that he had absconded. (R 1316) Assuming for arguments sake that there was a discovery violation, there is an adequate record for this Court to determine that the Appellant was not prejudiced. Since there was an adequate opportunity to depose the witness and since the Appellant failed to demonstrate any prejudice, the trial court did not abuse his discretion by allowing Mr. Craft to testify. King, at 834-835.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES INCLUDING PRIOR OFFENSES FOR WHICH APPELLANT HAD NOT BEEN CONVICTED AND A PENDING ALLEGATION OF PAROLE VIOLATION.

Appellant states that since he was convicted of Aggravated assault of Tommy walker and not the battery of Mr. Walker and another person; and since the charge parole violation was pending at the time of trial, it was improper to consider the evidence of these crimes because the statute exclude the consideration of this evidence. Appellant cites Odom v. State, 403 So.2d 936 (Fla. 1981) and Provence v. State, 337 So.2d 783 (Fla. 1976), for support. However, in Odom this Court stated that evidence of past criminality, offered by the state for the purpose of aggravating the crime, is inadmissible unless it tends to establish one of the aggravating circumstances listed in Section 921.141(5)." Accordingly, the testimony of Tommy Walker was admissible because this testimony was about the same criminal transaction which provided the evidentiary basis for the prior aggravated assault conviction.

The evidence of a warrant being issued for the Appellant's violation of parole was given by Mr. Craft on direct examination without a timely objection by the Appellant. Therefore, the Appellant has waived this aspect of this issue for review. Castor v. State, 365 So.2d 701 (Fla. 1978). Assuming for arguments sake that the issue was ripe, the evidence of the murder in the case

sub judice would provide sufficient proof that the Appellant had violated any existing parole and any error as a result of Mr. Craft representation that a warrant had been issued would amount to harmless error at best. Section 924.33, Florida Statute (1983).

When the trial judge independently weighed the evidence, she enumerated the aggravating circumstances that she found were proven beyond a reasonable doubt and the evidence that substantiated these aggravating circumstances without mentioning the battery or the violation of parole. As such, it is evident that the evidence complained of by the Appellant was not considered in determining the propriety of the death penalty.

ISSUE V

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS TO TESTIFY IN HIS OWN BEHALF, TO PRESENT EVIDENCE IN MITIGATION, AND TO RESPOND TO THE STATE'S EVIDENCE BY DENYING HIS REQUEST TO RE-TAKE THE STAND TO CLARIFY AND SUPPLEMENT HIS TESTIMONY PRIOR TO CLOSING ARGUMENTS.

During the penalty phase of the trial, the Appellant testified on direct examination that; (1) he was the same person that had been convicted or robbing and aggravated assault (R 1307-1308); (2) he was an alcoholic and was receiving treatment (R 1308); (3) he was active in churgh and had been taking a Bible Study course (R 1308-1309); (4) he loved Butch Richardson, the victim (R 1309); (5) he had suffered previous alcohol black-outs (R 1309); (6) he was not a killer or a selfish person and that he would not intentionally hurt anybody (R 1309); (7) that he was not the person that killed Butch Richardson (R 1310); (8) that he wanted to live and that he didn't deserve to die (R 1310); and (9) that he was telling the truth (R 1311). After the Appellant testified the State presented rebuttal. Thereafter, the trial court recessed for forty minutes for lunch. (R 1328) Upon returning from the lunch recess, the court began a penalty phase charge conference. (R 1329) At the close of the charge confernece, counsel for the Appellant notified the court that the Appellant wanted to take the stand again. (R 1330) Specifically counsel stated:

> MR. ROUSON: He would like to be able to take the stand again. He states at the time that he was on the stand that he was unable to fully answer questions that I propounded to him and he had difficulty

> framing his answers to questions and he didn't say some of the things he wanted to say because he was emotionally still thinking about Mrs. Richardson, when she was on the stand, and he felt that impaired his ability to be clear and to fully explain and express himself. And he has asked me to request of the Court that he take the stand and be allowed to do that and I am doing that now for the record.
>
> (R 1330-1331)

The transcript of Appellant's testimony reveals that he completely responsive to the questions asked him by his attorney. (R 1307-1311) As far as the Appellant's representation that he didn't "say some of the things he wanted to say," there wasn't a proffer by the appellant that suggested that there was any additional information about the Appellant's character or record. The Appellant was given a full opportunity to fully present all his evidence of mitigation. To find that the trial court's refusal to allow the Appellant to reopen his case, after the state has released their witnesses and when the Appellant has failed to specifically state why he needs to reopen his case, is reversible error would encourage sandbagging ploys by defendants and frustrate the purpose behind the rules of procedure and substantive law. Appellee concedes that the Appellant is correct in stating that a defendant is entitled to present mitigating evidence, that the trial court must consider all the mitigating evidence and that a sentencer may not refuse to consider relevant mitigating evidence. However, the burden was on the Appellant to bring forth the mitigating evidence in a timely manner and/or provide the trial court with sufficient specific reasons as to

why the appellant should have been allowed to reopen. Whereas the Appellant did neither, there was not an abuse of discretion by the trial court in denying the Appellants request to reopen.

Appellants reliance on Gardner v. Florida, 430 U.S. 349, 51 L.Ed. 2d 343, 97 S.Ct. 1197 (1976), for the proposition that he was denied due process by the trial court's denial of his request to take the stand to clarify and supplement his testimony is inappropriate. In Gardner the trial judge relied, in part, on a presentence investigation report; a portion which was not disclosed to the defendant. In the case sub judice, there wasn't any evidence used to aggravate the appellant's sentence for which he didn't have an opportunity to deny or explain.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY FAILING TO CONSIDER EVIDENCE OF MITIGATING CIRCUMSTANCES INCLUDING APPELLANT'S POTENTIAL FOR REHABILITATION, HIS FAMILY BACKGROUND, AND APPELLANT'S RELATIONSHIP WITH THE DECEASED.

After finding that there were no statutory mitigating circumstances, the trial court stated:

> I am mindful, however, that I am not limited to the statutory mitigating circumstances. Any mitigating circumstances can be considered in determining the fairness of a life or death sentence.
>
> I have spent days, Mr. Rose, going over both the trial and sentencing testimony in my mind and from my notes, looking for statutuory or non-statutory mitigating circumstances to outweigh or even offset the aggravating circumstances.
>
> There are none, except the bare assertion by Barbara Richardson, the mother of the victim and your lover, that you are a good person; you should not be sentenced to die because you didn't or couldn't do this.
>
> (R 1394)

This is not a situation in which the trial court entirely failed to take the defendant's non-statutory mitigating factors in account. Rather, the trial court found that the lack mitigating evidence was overwhelmed by the weight of the aggravating circumstance. Mere disagreement with the force to be given such evidence is not a sufficient basis for challenging a death sentence. See Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed. 2d 176 (1979); Quince v. State, 414

So.2d 185 (Fla. 1982). The non-statutory mitigating factors that the Appellant contends the trial court failed to consider were known to the court. As such the trial court did not err by not "expressly addressing each non-statutory factor in rejecting the same." Mason v. State, 438 So.2d 374 at 380. (Fla. 1983).

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE JURY UPON AND FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COLD, CALCULATED, AND PREMEDITATED BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH THAT CIRCUMSTANCE.

Appellant claims that the State has failed to prove beyond a reasonable doubt that he killed Butch Richardson in a cold, calculated and premeditated manner. (Appellant's brief page 38) Prior to imposing the death sentence, the trial judge discussed her independent evaluation of aggravating and mitigating circumstance in detail. (R 1384-1395) In arriving at the finding that there was ample evidence to prove beyond a reasonable doubt that Butch Richardson was murdered in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, the trial court confronted each element individually. Appellee will discuss the trial courts findings and the evidence as to each element below:

COLD

The trial court stated: "to heave a thirty-five pound block six to eight times onto the head of a helpless, defenseless man is a cold-blooded act. (R 1388-1389) The evidence in uncontradicted that the victim was lying on the ground (R 704-707, 738-739, and 757-759) and that the victim had a blood alcohol level of .19 percent. (R 857)

CALCULATED

The court considered the evidence and stated that the murder was a calculated act. The evidence that the court determined established this was: (1) that the Appellant shopped around looking for some sort of object before he found the thirty-five pound concrete block used to kill Butch Richardson: (2) that the Appellant lifted the concrete block over his head, paused, and asked Mr. Richardson to get up and then struck Mr. Richardson repeatedly until he was spotted; and (3) that he knew what his acts were calculated to produced because he had stated to his friends a few minutes after the crime that he had either killed Butch Richardson or made a vegetable of him. (R 1390-1391) Again, the record is overwhelming as to these events. (R 704-707, 738-739, 757-759, 865-866 and 888-889)

PREMEDITATION

The Florida Standard Jury Instruction for first degree murder defines a premeditated killing as follows:

> "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

The Appellants search for an object in an accompanying lot which

resulted in his finding a large concrete block, the Appellants efforts in carrying the block back over to where Butch Richardson was, the pause prior to hurling the block down upon Mr. Richardson and the repeated stricking of Mr. Richardson with the block reveils an overwhelming amount of evidence of the Appellant's conscious decision to kill Butch Richardson substantially before performing any deadly acts.

WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

The Appellant stated to Mark Poole and Rebecca Burton that he had killed Butch Richardson because he was mad. (R 883-892) As such, the Appellant's Acts were unjustifiable.

The Appellant further argues that the consideration of the alleged improper aggravating circumstance requires reversal of the death sentence because there were mitigating circumstances. (Appellant's brief page 40) Perry v. State, 395 So.2d 170, 174-175 (Fla. 1980) and Elledge v. State, 346 So.2d at 1002-1003 (Fla. 1977). However, these cases stand for the position that a new sentencing proceeding is required when an improper aggravating circumstance is considered at the trial level and there were mitigating circumstances considered in the weighing process. See also Riley v. State, 366 So.2d 19 (Fla. 1978). The trial court stated that there were no statutory mitigating factors and rejected the sole evidence offered by the Appellant of non statutory because the evidence was "overwhelmingly to the contrary." (R 1394)

As such, the trial court's finding of no mitigating factors along with the existence of other aggravating factors would substantiate the propriety of the death penalty.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY FINDING THAT THE LAW REQUIRED IMPOSITION OF THE DEATH PENALTY IN THIS CASE.

The Appellant argues that the trial court improperly found that section 921.141, Florida Statutes, required a sentence of death. As support, the Appellant takes one statement by the trial judge at the closing of her analysis of the propriety of the jury's recommendation of death. (Appellant's brief page 41) Prior to the statement stressed as error by the Appellant, the trial court noted that in contrast to the law that required the trial court to give great weight to a jury's recommendation of life, the trial court was "not to impose a tact stamp of approval" to the juries recommendation of death, but rather, the trial court was to make an independent judgment of whether or not the death penalty should be imposed. (R 1383) The trial court also stated that the jury's recommendation was not to be completely ignored. (R 1384) Thereafter, the trial court stated what her thought process was in evalating factors to be considered in determining the appropriate sentence. In doing so, the court determined that the death penalty could be lawfully applied and imposed the penalty recommended by the jury. As such, the record as a whole does not support the Appellants representation that the trial court believed that it was bound by the statute to impose the death penalty, but that the trial judge was figuratively speaking when she said that the law required the Appellant to forfeit his life.

ISSUE IX

WHETHER THE DEATH SENTENCE IN THIS CASE IS DISPROPORTIONATE IN COMPARISON WITH PRIOR CASES IN WHICH THIS COURT HAS REVERSED DEATH SENTENCES AND ORDERED IMPOSITION OF LIFE SENTENCES.

The Appellant's position that since his crime is less offense than other homicides this court must reverse the death penalty is contrary to Pully v. Harris, __U.S.__ 34 Crim.L.Reporter (BNA) 3027 (decided January 23, 1984), and it is assumed that the Appellant's argument is couched as a matter of state law.

The State established the following three (3) statutory aggravating circumstances: (1) the capital felony was committed while the Appellant was under sentence of imprisonment; (2) Appellant was previously convicted of felonies involving the use of threat of violence; and (3) the murder was committed in a cold, calculated, premeditated manner. (R 1384-1386, 1388-1391) Thereafter, the trial court determined that there were no statutory or non statutory mitigating factors. As such, the application of the death penalty was neither arbitrary or capricious. The Appellant's actions were particularly brutal, without conscience and fully warrant the death penalty. Since, the State has established (3) aggravating factors provided by Section 921.141, Florida Statutes (1983), the Appellant's crime for sentencing purposes has been distinguished from other homicides as a matter of state law. Alternatively, the Florida statutory scheme does not provide for a proportionality review by this court and since the United States

Supreme Court has directly rule on this proportionality issue, Appellee submits that this court reconsider the Booker v. State, 441 So.2d 609 (Fla. 1983), language concerning proportionality review.

CONCLUSION

Based on the previously stated facts, arguments and authorities, Appellee prays that this Court affirm the judgment and sentences of the lower court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

GARY O. WELCH
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Paul C. Helm, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830-3798, on this 14th, day of June, 1984.

OF COUNSEL FOR APPELLEE