IN THE FLORIDA SUPREME COURT

CARL PUIATTI,

Appellant,

v.

CASE NO. 65,321

STATE OF FLORIDA,

Appellee.



APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

# BRIEF OF APPELLEE

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## SUMMARY OF THE ARGUMENT

I.

The appellant has failed to demonstrate an abuse of discretion in the trial court's denial of a motion for severance. Severance is not required merely because it is anticipated one defendant ay attempt to shift the blame to another defendant. The right to confrontation has not been abridged because appellant and his co-defendant provided interlocking confessions. Parker v. Randolph, 442 US. 62, 60 L.Ed.2d 713 (1979). Any error in this regard must be harmless on the facts of the case. Similarly, a severance was not required at the penalty phase as the jury was able to consider the evidence presented by each defendant and apply the law without being unduly confused by the evidence.

II.

The lower court did not err in denying appellant's motion to suppress post-arrest statements. The arresting officer properly stopped the victim's automobile occupied by the two defendants and effectuated their arrest for possession of a gun under New Jersey law. Thereafter, appellant gave voluntary statements after complete warning of his rights.

III.

The trial court correctly denied a mistrial request because of the prosecutor's alleged inflammatory remarks to the jury. The comments were supported by the evidence and therefore fair comment, were not as prejudicial as remarks sustained previously by this Court and did not require the extraordinary remedy of mistrial. No abuse of discretion is demonstrated.

IV.

The lower court did not commit reversible error in handling appellant's complaint about the prosecutor's reference to felony-murder as an alternative to premeditated murder. Appellant made no request for specific relief below and cannot be heard now.

Also, the prosecutor's comment is a restateent from language of prior decisions. Since no complaint is advanced concerning the correctness of the instructions given, appellant's contention must fail.

V.

The lower court did not err in refusing to instruct the jury concerning specific non-statutory mitigating factors. The case law permits the trial court to allow the defendant to proffer any relevant evidence of mitigation, to allow counsel to argue such evidence (even if it is non-statutory) and to instruct the jury they may consider any aspect of the defendant's character or record or circumstances of the offense. The Constitution and state law was satisfied by the jury's consideration of the evidence presented and the instructions given.

VI.

The lower court did not err by utilizing inapplicable aggravating factors and failing to consider applicable mitigating circumstances. The trial court correctly decided that the homicide was committed in a cold, calculated and premeditated manner. The trial court permissibly considered and found insufficient the mitigating factors Appellant now argues should have been found; Appellant's mere disagreement with the weight attached by the trial judge to the

evidence does not suffice for a finding of reversible error.

VII.

Appellant was not denied his right to a fairly selected jury. Appellant's reliance on Grigsby v. Mabry, __ F.2d __ is unavailing. See Wainwright v. Witt, __ U.S. __, 83 L.Ed.2d 841; Witt v. Wainwright, __ U.S. __, 36 Cr.L. 4227; Caruthers v. State, __ So.2d __, 10 F.L.W. 148; McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985).

VIII.

While imposition of the judgment on a Sunday may be impermissible - Higginbotham v. State, 101 So. 233 (1924) - the law permits the giving of instructions and the receipt of a verdict on a Sunday. Rule 3.570 Rules of Criminal Procedure; Hodge v. State, 10 So. 556 (1892). No judgment and sentence was imposed on a Sunday in this case. Furthermore, Appellant's failure to object below precludes initial raising of the claim on appeal.

## STATEMENT OF THE CASE AND FACTS

Appellant Carl Puiatti and a co-defendant Robert Glock were charged by indictment with the first degree murder of Sharilyn Richie, with her kidnapping and robbery of Mrs. Richie. (R 13) Appellant filed a motion to suppress statement (R 159 - 162) and a motion to suppress tangible evidence. (R 175 - 176) Appellant also filed a motion seeking a severance of his trial from that of co-defendant Glock; he contended that there were material differences in the statements of the two defendants and a great likelihood of antagonistic defenses between them. (R 203 - 205) The motions to suppress and for severance were denied. (R 216 - 217)

At the hearing on severance held on March 2, 1984, co defendant Glock argued that Puiatti had given statements implicating Glock, that there were conflicts in the statements and that he didn't know Puiatti's theory of defense. (R 420 - 423) The state argued that possible antagonistic defenses did not suffice to require a severance and that there were only minor differences in the accounts. (R 429 - 432) At that time, Puiatti had decided not to file a motion for severance. (R 433) Ten days later, Appellant apparently changed his mind and filed a written motion for severance (R 203 - 205) and after further argument the court denied the motion. (R 840 - 846)

At the motion to suppress hearing, Trooper Moore testified that on August 20, 1983 he stopped a Toyota on the New Jersey highway. The license plate was not legible and New Jersey law requires a proper display of tags. (R 478 - 479) Glock was driving the vehicle and Appellant Puiatti was slouched over on the passenger seat. (R

479) Glock and Puiatti both informed the officer they had only suspended licenses and when he looked in the glove compartment to get the vehicle registration, Moore observed the presence of a gun in the glove box. Glock said the car belonged to his brother-in-law Mr. Ritchie. (R 481 - 483) Glock said he did not mind if the officer looked in the car and informed Moore there was a gun in the car. Moore retrieved a .38 revolver and a .22 Derringer in the glove box. It is against the law in New Jersey to carry a handgun without a permit. (R 483 - 485) Moore arrested the two defendants for possession of the guns. (R 486) Under that state law a firearm found in a vehicle occupied by more than one person is presumed to be in the possession of all. (R 191) Glock claimed the guns belonged to his brother-in-law. (R 485) The two defendants were handcuffed and placed in the police car. A search of the Toyota revealed a wallet with identification from South Carolina which appeared to be someone other than Glock and Puiatti. Also some pawn tickets were discovered. (R 486 - 487) Moore gave the two men Miranda warnings but did not question them. Glock asked the trooper to charge only himself. (R 488 - 489) At the station the two defendants were again advised of their rights and signed the forms. An NCIC check of the vehicle lead to the discovery that the vehicle was stolen and the owner a homicide victim. (R 490 - 492) No promises or threats were made and neither man requested a lawyer. (R 493 - 496) When Moore asked what was the story concerning the car, Puiatti told Glock, "You better tell him." Glock then stated they had stolen the car.

Detective Sergeant John Quinlan participated in the homicide

investigation in New Jersey. He observed the papers showing the vehicle registered to the Ritchie family and the wallet with an ID from a Mr. Nelson from South Carolina along with the two guns and pawn shop tickets. (R 529 - 531) Quinlan interviewed Glock and the latter admitted abducting the woman at knifepoint from a shopping center and stealing her car. Quinlan then interviewed Appellant and asked him about the car. Appellant responded that Glock picked him up and asked if he wanted to go to New York. Puiatti said he wasn't sure but thought the car might be stolen. (R 535 - 538)

Complaints against the two defendants were typed charging them with possession of stolen weapons and a stolen vehicle. (R 539) The municipal court remanded them to the county jail with no bond because of the possible homicide involved. (R 539 - 540) Detectives Stahl and Wiggins of Pasco County subsequently arrived, the defendants were readvised of their rights and no promises or threats were made. Appellant repeated his initial story of being picked up by Glock but when told that Glock had given a statement regarding the Ritchie murder, Appellant conceded that he might as well tell them and discussed the murder. (R 542 - 549) Thereafter, Appellant also signed a consent form to search the car. (R 552 - 553)

Detective Stahl testified that after Puiatti was given his rights he agreed to tell the truth. (R 598) Upon arrival in Florida Stahl went to the Townsend Road grove with the defendants to look for expended cartridges. Glock and Puiatti also agreed to give a joint statement with a court reporter present. (R 604 - 606) They didn't want to see a Public Defender. (R 620)

Detective James Wiggins testiifed that on August 24, 1983,

Assistant Public Defender Norgard wanted to talk to the defendants and Wiggins told him that neither had requested a lawyer. (R 650) Wiggins told Glock that Norgard was a lawyer and they could talk to him. Glock and Puiatti told Wiggins they did not wish a lawyer and if they wanted one, they'd call one tomorrow. (R 651)

Assistant Public Defender Norgard testified and admitted that Puiatti and Glock didn't want to talk to him that evening. (R 689)

Appellant testified at the suppression hearing; he admitted that no one told him his statements would keep him out of the electric chair (R 716) and he conceded that he did not ask any of the detectives to see a lawyer. (R 719 - 72) He understood his rights at each warning and agreed that he declined the opportunity to talk to lawyer Norgard. (R 720 - 721)

The trial court denied the motion to suppress finding Appellant had no standing to challenge the search of the stolen vehicle, finding the stop by the New Jersey officer to be reasonable and the confessions to be voluntary. The court commented that Appellant had not presented to law enforcement authorities or any court a request for an attorney. There were not improper inducements. (R 783 - 787)

At trial, the prosecution presented evidence describing the discovery of the victim's body in an orange grove. (R 1741 - 1781) A pocketbook was discovered about sixty feet away from the victim and a baseball mitt was clutched in her arms. (R 1765, 1767) Medical Examiner Joan Wood performed the autopsy which revealed multiple gunshot wounds. (R 1795) There was a bullet entering the left front chest (R 1797 - 1798), a bullet wound to the right breast (R

1798) and other bullet wounds to the extremities. (R 1798 - 1799) The victim was alive when all the bullets were fired into her. (R 1801) A firearms examiner opined that the gun was fired more than two feet from the victim's blouse. (R 1828) The victm's husband identified rings belonging to his wife. (R 1837) The rings were recovered at the Ocala pawn shop. (R 1844) Tom Profont who knew the Ritchies identified a C.B. radio he loaned to them and installed on their car. (R 1844)

Trooper Moore reiterated his suppression hearing testimony. (R 1848 - 1871).[1] Detective Sergeant Quinlan reiterated his suppression hearing testimony. (R 1872 - 1893)

Detective Stahl testified concerning his observations at the murder scene. (R 1897 - 1907) Additionally, after advising Appellant of his rights on August 21, Glock gave a taped statement. (R 1909 - 1910) This tape (Exhibit 41) was played to the jury and the court instructed the jury to consider its admissibility only as to Glock, not as to Puiatti. (R 1913 - 1914) Similarly, Puiatti's tape recorded confession, Exhibit 42, was played to the jury with an instruction that the jury not consider the tape as evidence against Glock. (R 1917 - 1920) Glock's and Puiatti's written statements (Exhibits 43 and 44) were introduced. (R 1923 - 1928)

The two defendants identified the .38 gun (R 1929), Glock identified the checkbook he had observed in the Ritchie pocketbook and the victim's shopping list (R 1930), both identified her purse. (R

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[1] Appellant renewed his motion to suppress but had no objection to the admissibility of the evidence. (R 1855)

1931) Another statement was taken from Glock and Puiatti on August 24, in the presence of court reporter Sharon Baumgartner. (R 1932)

Stahl further testified that from the statements taken in New Jersey, Puiatti was driving the car at the time of the shooting and that Puiatti fired the first shot in the chest area. (R 1937 - 1940) Glock said it was Puiatti's idea to kill Ritchie. (R 1944) Puiatti said it was Glock's idea to kill the victim. (R 1945) In the statement to the court reporter Glock agreed that it was his idea and Puiatti went along with it afer he kicked it around. (R 1946) According to Glock, Puiatti shot the first and third times and Glock fired the second time. Puiatti asserted that he shot the first two times and Glock finished her off with a third shot. (R 1947)

Pawnshop owner Nathaniel Russ identified a pawn ticket issued August 19, 1983 to Glock for a C.B. and antenna. (R 1966 - 1967)

Deputy court reporter Sharon Baumgartner on August 24, 1983 by tape recording and stenograph machine recorded statements of Glock and Puiatti. (R 1977) In that August 24 statement, Appellant acknowledged he was cognizant of his rights (R 1986), did not mind giving the statement (R 1989), admitted looking for someone to steal their car (R 1990), and assisted Glock in the kidnapping of the victim. (R 1991) Appellant explained that she offered to make a blank withdrawal (R 1992) and that afterwards they drove to an orange grove, let her out of the car after taking her rings (R 1993) and the two men started to drive off. (R 1994) Glock suggested that they shoot her, and after going back and forth a little bit Puiatti agreed and turned the car around. (R 1994) They drove up next to

her and Appellant shot her in the right shoulder and drove off. (R 1994) As they drove off Glock noticed she was still standing. (R 1995) Appellant maintained he shot her twice, once in the shoulder and once in the chest. (R 1996) They returned a second and third time and after Glock's final shot the victim fell. (R 1997) Puiatti added that they pawned the rings in Ocala (R 1998), pawned the C.B. in South Carolina (R 2000) and were stopped in New Jersey. (R 2001) Appellant noted that no promises were made to him (R 2006) - no deal was made. (R 2007) Puiatti confirmed that he didn't want to see the public defender in Florida. (R 2008) No one refused to let him see a lawyer. (R 2009)

The jury returned guilty verdicts on all three counts. (R 2185)

At the penalty phase, the defendant offered the testimony of psychologist Dr. Donald Delbeato who opined that although Appellant's memory was normal, a dysfunction to the right hemisphere of the brain could explain Appellant's impatience. (R 2238 - 2242) The witness did not see this dysfunction in an EEG. (R 2247) He believed anyone committing a crime would be under stress (R 2249, 2251) and most people are easily influenced when under stress. (R 22547) He thought the facts of the crime were irrelevant to his judgment and he didn't have the written report (it was given to the Public Defender)(R 2259, 2263). Facts were furnished him from the defense team. (R 2278 - 228) Appellant's state of mind was such that it was <u>possible</u> he could have been influenced. (R 22954)

Appellant also called members of his family to testify. (R 2363 - 2402)

Appellant also called a psychiatrist. Dr. Meadows who opined that Puiatti had an avoidance or inadequate personality and may have brain damage. (R 2409)

The jury recommended a sentence of death (R 2531) and the trial judge concurred as explained in greater detail in his written findOngs. (R 342 - 352)

## POINT I

WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEVER HIS TRIAL FROM THAT OF THE CO-DEFENDANT.

## ARGUMENT

The record reflects no abuse of discretion by the trial court; consequently, this point must be rejected.

### A.

The failure to grant a severance and the alleged denial of the right to confrontation.

Appellant presents a contention, repeatedly rejected by this Court, that a severance is required if two codefendants blame each other for the crime.

> "The object of the [severance] rule is not to provide defendants with an absolute right, upon request to separate trials when they blame each other for the crime. Rather, the rule is designed to assure a fair determination of each defendant's guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements; and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence which applys to only one of several defendants."

McCray v. State, 416 So.2d 804, at 806 (Fla. 1982); O'Callaghan v. State, 429 So.2d 691, at 695 (Fla. 1983).

Appellant's claim that the introduction of the confessions violated his confrontation right sunder Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476 (1968) is mistaken. In Parker v. Randolph, 442 U.S. 62, 60 L.Ed.2d 713 (1979) the court held that the

confrontation clause was not violated by admission of non-testifying codefendants' interlocking confessions at a joint trial. Justice Rehnquist reasoned that Bruton involved devastating consequences presented when a non-testifying codefendant accuses his non-confessing partner who has maintained his innocence which do not arise when the defendant's own confession is properly introduced at trial.

> "Thus, the incriminating statements of a codefendant will seldom, if ever, be of the devastating character referred to in Bruton when the incriminated defendant has admitted his own guilt. . . .
> . . . . Successfully impeaching a codefendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged."

(60 L.Ed.2d 723)

The instant case presents the situation permitted by Parker v. Randolph. In the joint statement, Appellant admitted that Glock suggested the victim be shot and after going back and forth a bit Appellant agreed, turned the car around and participated in the multiple shooting of Mrs. Ritchie. (R 1994 - 1997) Appellant seems to have no complaint about the admissibility of the joint statement but urges reversible error in the admission of co-defendant Glock's initial confession. Since the jury was instructed to consider Glock's statement only as to him, not to Puiatti (R 1913 - 1914) and since Appellant gave his own individual confession (R 1917 - 1920, Exhibit 42) along with his joint confession admitting his agreement to participate in the Ritchie killing it is difficult to see how any error, if there is error, can be anything other than harmless. See Harrington v. California, 395 U.S. 250, 23 L.Ed.2d 284 (1969);

Schmeble v. Florida, 405 U.S. 427, 31 L.Ed.2d 340 (1972); Brown v. United States, 411 U.S. 223, 36 L.Ed.2d 208 (1973); see also Adams v. State, 445 So.2d 1132 (Fla. 2 DCA 1984). The jury could clearly consider the evidence presented and follow the trial court's instructions in deciding the case.

Appellant seeks to fortify his argument by turning to the penalty phase of the trial. He argues that the testimony of Dr. Delbeato and Dr. Meadows regarding the statutory mitigating factors of extreme mental or emotional disturbance or substantial domination of another was discredited by Glock's claim that the idea for the murder originated with Appellant. Psychologist Delbeato was discredited by his own testimony. Delbeato believed anyone committing this crime would be stressed (R 2249, 2251) and most people are more easily influenced when under stress. (R 2257) He thought the facts of the case were irrelevant to his judgment. (R 2259) He relied on facts furnished from the Public Defender's office (R 2278 - 2280) and he could only say it was possible Puiatti could have been influenced. He couldn't answer yes or no that Appellant was under extreme duress or under the substantial domination of another person. (R 2295) Dr. Meadows thought Appellant may have brain damage. (R 2409) Such extraordinarily weak testimony and Glock's subsequent admission that he had the idea to kill the victim which Puiatti agreed to (R 1946, 1994) renders nugatory any serious contention that the trial court abused its discretion in denying the severance motion.[2]

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[2] Additionally, at the suppression hearing there was testimony Appellant told Glock to tell the police what happened. (R 4917)

B.

The failure to grant a severance and the alleged antagonistic penalty phase defenses.

Appellant argues that at the penalty phase of the trial he presented psychiatric evidence indicating he was under the substantial domination of another. Dr. Delbeato had mentioned it was possible Puiatti could have been influenced but couldn't answer yes or no that Appellant was under extreme duress or under substantial domination of another person. (R 2295) Appellant apparently did not argue to the jury the presence of this mitigating factor. (R 2501 - 2520)

The truth of the matter is that Glock and Puiatti provided mutually supportive rather than antagonistic, defenses during the penalty phases. Psychologist Delbeato for Puiatti and Dr. Mussenden for Glock each described the view that each individual would not normally do such a crime alone, but more likely to do so acting in concert. (R 2251; 2343) That attitude of course is reflected in the other evidence such as the joint decision by Glock and Puiatti to drive back and shoot the defenseless woman after she had been let out of the car. Denial of the severance did not substantially lessen the ability of the jury to consider the facts as to each.

C.

The failure to grant a severance and the jury's instructions and prosecutorial argument regarding the nonapplicability of the mitigating factor of no significant criminal activity.

Appellant does not argue that the prosecutor presented extensive evidence of his prior criminal record, which was the vice condemned in Maggard v. State, 399 So.2d 973, 977 (Fla. 1981). Rather,

he focuses on the prosecutor's single remark in closing argument (which was not objected to below):

> "The judge will tell you about mitigating circumstances are not limited. The State is limited to these aggravating circumstances. We cannot go outside them. Mitigating circumstances in this particular case - number one is that the defendant has no significant history of prior criminal activity. I believe you heard the evidence. You know who has a prior significant history and who doesn't and I don't have any problem with that particular mitigating circumstances."

(R 2473 - 2474)

Appellant acknowledges (Brief, P. 16 fn. 3) that one of his penalty phase witnesses mentioned Puiatti's burglary conviction. (R 2382)

Not every comment or piece of evidence introduced after a defense waiver of reliance on a mitigating factor constitutes reversible error. In Jennings v. State, 453 So.2d 1109 (Fla. 1984), a state witness responded to a prosecutor's question by referring to the defendant's crimes while committed in the military. This Court ruled that a mistrial was unnecessary; the witness' statement was not intentionally elicited by the prosecution and the level of prejudice found in Maggard, supra, was not reached considering the matters placed in evidence by Jennings of his background. Id. at 1114. Similarly, in the instant case, since the evidence was introduced by Appellant, the single remark fo the prosecutor that he didn't have any problem with that particular mitigating factor, the absence of a specific objection to it in the trial court require the conclusion that Appellant has failed to demonstrate an abuse of discretion by

the trial court.[3]

[3] Appellant apparently does not challenge the trial judge's finding that Puiatti's two felony convictions precluded a finding of the presence of this mitigating factor. (R 345)

## POINT II

WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS POST-ARREST STATEMENTS ALLEGEDLY BECAUSE THE STATEMENTS WERE THE FRUIT OF AN ARREST MADE WITHOUT PROBABLE CAUSE.

## ARGUMENT

The lower court did not err. After a lengthy pre-trial hearing on a motion to suppress (R 476 - 742), the trial court denied the motion finding:

1. There was no standing to contest the search of the automobile as Glock and Puiatti had stolen it from the murder victim. (R 783);

2. that there had been a reasonable stop by the New Jersey trooper. (R 783) Testimony was adduced as to the improper display of the license tag (R 478 - 481);

3. that it was reasonable to arrest the defendants for possession of a handgun without a permit (R 783 - 784);

4. and the that the statements were voluntary (R 784 - 786)

Appellant complains on appeal that his statements were the product of an illegal detention because even though Trooper Moore observed a gun in the glove compartment (R 482) and removed a .38 caliber gun and a .22 caliber Derringer from the glove compartment (R 485) and placed the two men under arrest at that time, (R 486) thereafter, Glock's statement to the officer in the police car that Puiatti knew nothing about the guns and Glock wanted to be charged "by himself" renders the arrest unlawful. Puiatti's claim must be rejected. Under New Jersey law when a firearm is found in a vehicle,

> " . . . it is presumed to be in the possession of the occupant if there is but one. If there is more than one occupant in the vehicle, it shall be presumed to be in the possession of all" (except under circumstances not here presented)
>
> (N.J.S. 2C; 39 - 2; R 191)

subsection "b" further provides:

> "b. Licenses and permits. When the legality of a person's conduct under this chapter depends on his possession of a license or permit or on his having registered with or given notice to a particular person or agency, it shall be presumed that he does not possess such a license or permit or has it registered or given the required notice, until he establishes the contrary"
>
> (R 192)

Appellant concedes that probable cause to effectuate an arrest is not to be equated with proof beyond a reasonable doubt. State v. Outten, 206 So.2d 392 (Fla. 1962) Brief, p. 21. He cites State v. Humphreys, 255 A.2d. 273 (N.J. 1969). While Appellee cannot discover in that opinion the exact quote mentioned at pages 20 and 21 of the brief, suffice it to say that Humphreys does not compel reversal here. In that case the court found that a jury could infer that a front seat passenger was in possession of a gun protruding from the cushion of a rear seat but that a jury instruction which may have compelled the jury to find such possession of the gun as a matter of law was improper.

As a matter of New Jersey law, the trooper validly arrested Puiatti and Glock for their posesssion of firearms in a vehicle without asserting their having a permit. Appellant cannot turn this valid arrest into an invalid one merely by Glock post-arrest

expressed desire that Puiatti also not be held accountable under the law. Contrary to Appellant's assertion it does not violate common sense to believe that when there is lawful, probable cause for an officer to effectuate an arrest and he does so, subsequent post-arrest conduct by one of the arrestees is not sufficient to a warrant immediate release of a second arrestee.

## POINT III

WHETHER APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL BY THE PROSECUTOR'S ALLEGED INFLAMMATORY AND PREJUDICIAL REMARKS TO THE JURY.

## ARGUMENT

In his opening statement the prosecutor referred to Glock's and Puiatti's admissions to Detective Stahl and stated they:

> " . . . told Detective Stahl the story of what is probably most any woman's nightmare, about how Mrs. Richie had gone to the DeSoto Mall and that Glock and Puiatti were there looking for a car."

(R 1727)

The prosecutor then described that the evidence would show that the victim was forced into her car at gunpoint, they had her write a check which they cashed and drove from Manatee to Pasco County, drove to an orange grove, took here wedding ring, let her out of the car and then returned to kill her. (R 1727 - 1728) A mistrial request was denied. (R 1734)

This comment did not impermissibly ask the jurors to place themselves in the position of the victim, but merely permissibly described the obvious concern a victim would have at the sudden removal of her contact with family and friends. Obviously, it is a fair comment on the proposed evidence that a victim kidnapped and taken to a desolate area anticipates some act of violence will be forthcoming. See Knight v. State, 338 So.2d 201 (Fla. 1976); Copeland v. State, 457 So.2d 1012 (Fla. 1984); Jackson v. State, 366 So.2d 752 (Fla. 1978); Preston v. State, 444 So.2d 939 (Fla. 1984). The lower court did not abuse its discretion in failing to grant a mistrial. Salvatore v. State, 366 So.2d 745 (Fla. 1978).

In closing argument the prosecutor focused on the premeditated nature of the crimes:

> "They go to this mall. Why? Looking for a victim. They are looking for a car. Who did they pick on? Some strapping young teenager? Sharilyn Richie. It's like the hungry wolves circling around a rabbit someplace who has no idea what's about to happen, and when the time is right they pounce upon their prey."

(R 2122)

Defense counsel objected as improper comment, but requested no particular relief. (R 2122) Cf. Blunt v. State, 397 So.2d 1047 (Fla. 4 DCA 1981).

The prosecutor's comments constituted a fair comment on the deliberate, premeditated nature of the Appellant's conduct. This court affirmed the judgment and sentence in a capital case when the prosecutor referred to the perpetrator of the crime as a vicious animal. Darden v. State, 329 So.2d 287 (Fla. 1976); see also Breedlove v. State, 413 So.2d 1 (Fla. 19820. The comment certainly is not as harsh as that sustained in Cronnon v. Alabama, 587 F.2d 246, 251 (5th Cir. 1979) wherein the prosecutor referred to the "fiendish ghoul'" who could have committed this crime and the assailant's desire to hear "the squish of her blood." See also Collins v. State, 180 So.2d 340 (Fla. 1965) upholding the prosecutor's reference to the accused as a vulture, a vile creature and a beast.

Since the comment was a fair one upon the evidence and did not improperly influence the jury to reach a more severe verdict than warranted, this court must affirm.

## POINT IV

WHETHER THE LOWER COURT ERRED IN OVERRULING A DEFENSE OBJECTION TO THE PROSECUTOR'S ARGUMENT THAT THE JURY COULD PRESUME PREMEDITATION FROM PUIATTI'S INVOLVEMENT IN THE FELONY-MURDER.

## ARGUMENT

In his closing argument, the prosecutor referred to a felony-murder as an alternative to premeditated murder:

> "The other type of first-degree murder -- and both of these theories are available to you -- is a thing called felony murder. And under a theory of felony murder, it is not necessary to prove premeditation because the law presumes premeditation. The judge is going to instruct you again that the elements of a felony murder are that the victim is dead, secondly, that the death occurred as a consequence of and while the defendant was engaged in the commission of a robbery or a kidnapping, or that the death occurred as a consequence of and while the defendant or an accomplice was escaping the immediate scene of the crime of a kidnapping or a robbery.
>
> If you find that this occurred under either one of those circumstances, the law does not require proof of premeditation. Premeditation is presumed. And, if every element is met, the verdict should be that of guilty of first-degree murder without proof of premeditation because the law presumes it. Those are the two theories."

(R 2110 - 2111)

Appellant objected, arguing that the law does not presume premeditation in felony murder, just that you don't have to prove it. The court responded that it didn't see anything inappropriate. (R 2111) Again, while Appellant objected to the prosecutor's remarks he sought no specific relief and thus should not be heard to complain now of judicial error below. Cf. Castor v. State, 365 So.2d 701 (Fla. 1978); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Moreover, the lower court correctly ruled that there was nothing inappropiate. As pointed out by Justice Adkins in his dissenting opinion in State v. Jones, 377 So.2d 1163, at 1165 - 116:

> Two theories of intent will support a first-degree murder conviction: premeditation and felony murder. §782.04, Fla. Stat. (1977). Initially courts spoke of the two as "legal equivalents", the one provable "in lieu of" the other. Sloan v. State, 70 Fla. 163, 69 So. 871 (1915). The two are related because each provides the element of intent necessary for murder in the first degree. Premeditation is more easily seen as a species of intent than felony murder and is designated most frequently as the crucial distinction between murder in the first degree. This is probably what spawned the language seen in innumerable cases, i.e., premeditation is presumed as a matter of law by proof of felony murder. Ables v. State, 338 So.2d 1095 (Fla. 1 DCA 1976); Larry v. State, 104 So.2d 352 (Fla. 1958); Leiby v. State, 50 So.2d 529 (Fla. 19510. It would be more accurate to say the requisite intent is presumed from proof of felony murder. Hampton v. State, 336 So.2d 378 (Fla. 1 DCA 1976); 1 Warren on Homicide §74 (1914). Either premeditation or felony murder should suffice to convict of murder in the first degree.

The prosecutor thus hardly committed reversible error by alluding to the language in Larry v. State, 104 So.2d 352, at 354 that in a felony-murder context premeditation is presumed as a matter of law. Accord, Lieby v. State, 50 So.2d 529 (Fla. 1951).

Significantly, Appellant does not complain that the trial court's instructions to the jury at the guilt phase (R 2151 - 2179) or the penalty phase (R 2521 - 2528) were erroneous. Puiatti does attempt to explain that the rejection of his proposed instruction at the penalty phase regarding heightened premeditation for the cold and calculated statutory aggravating factor (R 305, 2447) was error. He cites Cannady v. State, 427 So.2d 723 (Fla. 1983) but

that case did not require the giving of any specific jury instuction on Florida Statute 921.141(5)(i); rather, the Court held the state had failed to prove beyond a reasonable doubt that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. 427 So.2d at 730. In the instant case, the trial judge's given instrution on premeditation, felony-murder and at penalty phade were not erroneous or incomplete and, therefore, no judicial error is present.

## POINT V

WHETHER THE LOWER COURT ERRED REVERSIBLY BY REFUSING TO INSTRUCT THE ADVISORY JURY CONCERNING SPECIFIC NON-STATUTORY MITIGATNG CIRCUMSTANCES.

## ARGUMENT

The lower court did not commit error. In the penalty phase Appellant was not inhibited from submitting relevant evidence in mitigation. (R 2222 - 2429) At the penalty phase argument to the jury, Appellant was permitted to argue whatever he deemed appropriate. (R 2501 - 2520) Appellant was permitted to argue his alleged remorse (R 2514) and that he had a supportive family (R 2575), his lack of prior violent history (R 2515), the possibility of his rehabilitation. (R 2517) Counsel was permitted to argue that the statutory list of mitigating factors was not exclusive. (R 2517)

The trial court instructed the jury that among the mitigating circumstances they might consider would be first, that the defendant has no significant history of prior criminal activity; second, that the crime was committed under the influence of extreme mental or emotional disturbance; third, that the defendant was under extreme duress or under the substantial domination of another; fourth, 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; fifth, the age of the defendant; and sixth, any other aspect of the defendant's character on record and any other circumstances of the offense. (R 2523 - 2524)

Appellant was permitted to submit all he desired in mitigation and the judge and jury were permitted to consider it. Neither state law nor the Constitution require more. Appellant has cited no case

out of this court requiring the giving of Apellant's desired instruction (R 306 - 309) or in their absence a reversal. Appellant cites Delop v. State, 440 So.2d 1242 (Fla. 1983) a case in which the trial judge's sentencing order referred to the possibility of remorse; this trial judge did too. (R 319) In Lightbourne v. State, 438 So.2d 380 (Fla. 1983) this Court held that the trial court did not overlook the defendant's lack of prior violent history, just that it wasn't proved. In McCampbell v. State, 421 So.2d 1072 (Fla. 1982) the court looked to evidence of the potential for rehabilitation and family background to sustain the life recommendation of the jury.

In the instant case the jury considered all and recommended death. (R 2531) The trial judge considered all and imposed death. (R 342 - 349).[4]

The instant instruction was not deficient in the way the instruction was in Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982) wherein the jury was not instucted what a mitigating circumstance was nor was there an explanation of its function in the jury deliberation process. Here certainly, the jury was adequately apprised of its options, including the alternative to death. Cf. Collins v. Francis, 728 F.2d 132, at 1342 - 1343 (11th Cir. 1984)

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[4] Moreover, the Eleventh Circuit Court of Appeals has held that a trial judge is not required to enumerate possible mitigating factors. Tucker v. Zant, 724 F.2d 882, at 892 (11th Cir. 1984); see also Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984)(upholding instruction which did not preclude consideration of relevant mitigating circumstances.)

This court should hold as did the Supreme Court of Tennessee that it is unnecessary to provide specific instruction on non-statutory mitigating evidence and that such matters are evidence to be argued to the jury. State v Teague, 680 So.2d 785 (Tenn. 1984).

Finally, the lower court's action on this point afforded Appellant an advantage to which he was not entitlted. Appellant, for example, was allowed to argue as mitigation certain non-statutory matters which were not relevant under Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978). It does not pertain to the defendant's character or the circumstances of the offense that Appellant had a supportive family, although it does speak to the character of the family members who are supportive of Appellant. With the extremely broad instruction given by the court, the jury might have accepted counsel's argument that this non-relevant non-statutory factor was mitigating in its deliberations. That Appellant did not receive the benefit of a life recommendation does not detract from the fact that a beneficial tactic was made available.

This Court has previously held that it is adequate to instruct the jury according to the standard instruction under the statute. Peek v. State, 395 So.2d 492 (Fla. 1981); Mason v. State, 438 So.2d 374 (Fla. 1983); Johnson v. State, 438 So.2d 774 (Fla. 1983); Armstrong v. State, 429 So.2d 287 (Fla. 1983); Straight v. Wainwright, 422 So.2d 827 (Fla. 1982); Lara v. State, __ So.2d __ 10 F.L.W. 79.

Appellant's claim is meritless and must be rejected.

## POINT VI

WHETHER THE LOWER COURT ERRED REVERSIBLY BY SENTENCING APPELLANT TO DEATH BECAUSE ALLEGEDLY UNAPPLICABLE AGGRAVATING CIRCUMSTANCES WERE CONSIDERED AND APPLICABLE MITIGATING CIRCUMSTANCES WERE EXCLUDED.

## ARGUMENT

The lower court correctly concluded that death was the appropriate penalty since the aggravating factors outweighed the mitigating. (R 342 - 352)

> A. The aggravating factor that the homicide was committed in a cold, calculated and premeditated manner. Florida Statutes 921.141(5)(i).

The lower court supported this finding with the observation that according to their statements the two defendants calmly discussed killing Mrs. Richie; that after determining that killing was appropriate, Puiatti turned the car around, drove up to victim Richie, shot her and drove on. The defendants watched her carefully; when she did not fall down Puiatti turned the car around and again drove by the victim, shooting her and driving by. They again watched Mrs. Richie carefully and when she again did not fall down Appellant again turned the car around and again drove by Mrs. Richie. This time co-defendant Glock took the firearm from Puiatti and shot Mrs. Richie. The victim fell and the two defendants, satisfied she was dead, drove north in her stolen automobile. Not only was there a cold and premeditated decision to murder, but they kept returning to shoot her again when initial efforts appeared to have failed. The defendants did not attempt to rationalize that the victim had wronged them, failed to accede to their demands or for any reason deserved to be killed. There was no pretense of moral or legal

justification; they simply reasoned she could not identify them if she died, but could if she lived. (R 344)

Appellant does not challenge these findings by the trial court; instead he argues that the statutory factor of cold, calculated and premeditated murder without moral jusfification is not demonstrated because the homicide was not planned long in advance. But Appellant's interpretation is too limited. While the length of time of initially planning the homicide is significant, so also is the length and breadth of the conduct in effectuating it. As stated in Preston v. State, 444 So.2d 939 at 946 (Fla. 1984):

> "This aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator.
>
> (emphasis supplied)

This Court has upheld this aggravating factor where the killer has stalked his victim pursuing him into underbrushes to accomplish his mission. See Mills v. State, __ So.2d __, 10 F.L.W. 45.

The instant case is no different. When Appellant and his companion decided to kill their kidnap victim, they drove back and shot her; they watched and when she did not collapse they turned the car around, returned and shot her again; and yet on a third occasion, Puiatti returned to have Glock fire the third volley into the victim. Such a cold, calculated, ruthless homicide far exceeded the "normal" premeditation. See also Middleton v. State, 426 So.2d 548 (Fla. 19820 (defendant confessed he sat with a shotgun in his hands for an hour looking at the victim as she slept and thinking about killing her); Davis v. State, __ So.2d __, 9 F.L.W. 430 (defendant

entered home armed with a pistol and rope used to bind one of the victims); Stano v. State, __ So.2d __, 9 F.L.W. 475 (cold and calculating finding upheld where defendant drove to isolated areas and after ordering victims to leave the car strangled one and shot the other); Troedel v. State, __ So.2d __, 9 F.L.W. 511 (cold and calculated finding upheld where the defendant wielded one of the murder weapons and shared in the premeditated intent to kill two victims according to a pre-arranged plan); Johnson v. State, __ So.2d __, 10 F.L.W. 123 (when victim escaped from car, defendant chased her, caught her again and had to resume strangulation three times to make sure she was dead); Burr v. State, __ So.2d __, 10 F.L.W. 126 (defendant shot victim at a convenience store); Smith v. State, 424 So.d 726 (factor found in a rape-murder); Clark v. State, 973 (5(i) found in the shooting of a defenseless elderly woman); Card v. State, 453 So.2d 17 (ample time for reflection as to the consequences found in the murder of the victim at the secluded area); Kennedy v. State, 455 So.d 351 (5(i) found in a killing following a brief gun battle); Thomas v. State, 456 So2.d 454 (factor found when victim brutally beaten to death).

Appellee notes that the trial judge found the existence of aggravating factors 921.141(5)(e) - a murder to avoid or prevent a lawful arrest (see Fitzpatrick v. State, 437 So.2d 1072; Lightbourne v. State, 438 So.2d 380), 5(f) capital felony committed for pecuniary gain, neither of which Appellant challenges. Additionally, the trial judge declined to find aggravating factors 5(a) homicide committed in the commission of a robbery or kidnapping and 5(b) the murder was especially heinous, atrocious or cruel only because it

perceived the facts supporting these factors were used to determine the other found factors in aggravation (R 345 - 346)

In light of the multiple factors in aggravation and the non-existence of mitigating factors, this court should affirm.

Appellant next argues several errors of the trial court in its disposition of several alleged mitigating factors. Puiatti claims:

> B. The trial court ignored substantial expert testimony in concluding that Puiatti was not under the influence of mental or emotional distress;
>
> C. The trial court misconstrued the evidence in concluding that Puiatti had not acted under extreme duress or under the substantial domination of another person;
>
> D. The trial court misconstrued the evidence and relied upon improper criterion in rejecting psychological and psychiatric testimony relating to Puiatti's inability to conform his conduct to the requirements of law;
>
> E. The trial court overlooked relevant evidence in rejecting appellant's age as a mitigating circumstance;
>
> F. The trial court erred in refusing to characterize certain evidence as nonstatutory mitigating factors.

Appellant's real complaint is that the sentencing authority did not give the same weight to the proffered evidence in mitigation that Appellant would desire. This argument is unavailing. See Smith v. State, 407 So.2d 894 (Fla. 1981); Hargrave v. State, 366 So.2d 1 (Fla. 1979); Lucas v. State, 376 So.d 1149 (Fla. 1979); Hitchcock v. State, 413 So.d 741 (Fla. 1982); Michael v. State, 437 So.2d 138 (Fla. 1983); Johnson v. State, 442 So.2d 185 (Fla. 1983); Daugherty v. State, 419 So.2d 1067 (Fla. 1982); Lusk v. State, 446 So.2d 1038 (Fla. 1984); White v. State, 446 So.2d 1031 (Fla. 1984);

Pope v. State, 441 So.2d 1073 (Fla. 1983); Wilson v. State, 436 So.2d 908 (Fla. 1983); Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). The lower court did consider and found non-persuasive that which was submitted by Appellant; since no palpable abuse of discretion has been established, affirmance is required.

Turning to Point B, Appellant recognizes that the trial court has discretion to weigh the testimony, but "is not free to ignore it altogether as was done in this case" (Brief, p. 34). The lower court did not ignore it altogether, referring to the testimony of the defense psychologist and psychiatrist at paragraphs 5, 6, 7. (R 3316 - 318) With respect to Dr. Delbeato, he found that all areas dealing with Appellant's memory (remote, recent and information recall) were normal but that Puiatti was impatient. (R 2238, 2242) He didn't see any dysfunction in an EEG. (R 2247) This witness thought that anyone committing this crime would be "stressed in some way." (R 2249; 2251) On cross-examination Dr. Delbeato agreed that most people are more easily influenced when under stress, opined that the facts of the case were irrelevant to his judgment (R 2257, 2259) and did not have his written report available. (R 2263) He relied on some facts furnished by the Public Defender's office (R 2278) and only admitted it was possible Appellant could have been influenced. (R 2295) He could not answer yes or no that Appellant was under extreme duress or under substantial domination of another person. (R 2295) Under the alleged dysfunction one would be either aggressive or tame. (R 2250)

Judge and jury accorded Delbeato's testimony the value it was worth.

As to Dr. Meadows, he testified there was a possibliity of brain damage (R 2411) and that Appellant had an avoidance personality. (R 2410 - 2411) He did not think it fit within Puiatti's peronality profile to be a violent person. (R 2421) Meadows opined that Appellant was easily influenced. (R 2425) Obviously Puiatti was violent enough to participate in substantial fashion in the Richie murder. The lower court could correctly reject the testimony of Meadows and Delbeato concerning Puiatti's mental or emotional distress since their opinion was predicated in part on information received from the defense team or contradicted by the facts of the case and common sense. (R 346 - 347)

In Section C, Appellant argues that the trial court misconstrued the evidence by believing each psychologist said each defendant was dominated by the other. Dr. Mussenden did testify, for co-defendant Glock, that Glock was easily led, somewhat easily influenced by someone who would want to be friendly but could be exploited (R 2329); he added that Glock joined up with Appellant partly because the latter would pay attention to him and give him support, the core characteristics for a good parent (assertive and helpful). (R 2334) Glock would not have thought of the crime, he opined. (R 2335) Glock felt others are more powerful than he (R 2339) and might follow anyone fairly assertive who gave a minimal amount of attention. His partner gave Glock what he was craving for. (R 2340) He thought Glock would not likely have committed the crime alone. (R 2342 - 43) Glock could have been turning to his dependence with Puiatti when the idea of a homicide arose. (R 2347) The clear inference of this testimony is the suggestion that Glock

was dominated by Puiatti.

Interestingly, Appellant did not deem his claim that he was dominated by Glock, significant enough even to argue below. (R 2501 - 2520, 2668 - 2679) The lower court correctly determined that only the rationalized opinions of the psychologists would suggest domination by one over the other and that was not credible.[5]

In Secton D, Appellant criticizes aspects of the trial judge's findings at R 317. Puiatti criticizes the trial judge's rejection of some of Dr. Delbeato and Dr. Meadows' opinons as speculations. In front of the jury Dr. Meadows referred to the possibility of brain damage. (R 2411) The lower court was correct that the defense experts' subjective evaluations included no corroboration. For example, they referred to Appellant's use of alcohol when there was no supporting evidence Appellant was under the influence of alcohol. (R 2685)

Appellant makes no attempt to explain away the trial court's finding that the defendants knew the criminality of their conduct - they were able to kidnap and rob people without killing them:

> "They had kidnapped a man in Sarasota the day before they kidnapped Mrs. Richie, robbed him of his money and his car and threw him out in the woods without killing him. And a few days after they killed Mrs. Richie, they robbed a couple in a motel in North or South Carolina without killing them. They used the same firearm in both other instances that they used to kill Mrs. Richie."
>
> (R 347)

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[5] Glock's attorney argued to the court that Glock was dominated by another. (R 2684)

In Section E of his brief, Appellant complains of the trial judge' failure to find age as a mitigating factor. Puiatti's chronological age was twenty. Cf. Simmons v. State, 419 So.2d 316 (Fla. 1982); Quince v. State, 414 So.2d 185 (Fla. 1982); Peek v. State, 395 So.2d 492 (Fla 1980); Songer v. State, 322 So.2d 481 (Fla. 1975); Fitzpatrick v. State, 437 So.2d 1077 (Fla. 1983).

The lower court explained that it was discrediting the testimony of a defense psychologist and psychiatrist that emotionally Appellant was at a ten to twelve year age because inconsistent with other evidence and therefore lacking credibility. (R 348) As the court pointed out, Appellant and his companion were reasonably mature as indicated by the planning and execution of the series of crimes. (R 348) The court did not fail to consider Appellant's claim and did not abuse its discretion in failing to abandon its judicial function to so-called psychological experts. See decisions cited at pages 32 - 33, infra.

In his final argument, Section F, Appellant contends that although the trial court found that Appellant presented favorable evidence in mitigation with respect to several factors, the trial court erred by refusing to characterize these factors as nonstatutory mitigating circumstances. Appellant is mistaken either if he is saying that the court failed to characterize some evidence as nonstatutory mitigating or that the court failed to consider it as nonstatutory mitigating evidence.

The trial court's order clearly reflects that the court considered but found insufficient to merit a finding of mitigation (1) the fact of Appellant's confession (2) the prospects of rehabilitation

(3) Appellant's alleged remorse and (4) his family background. (R 348 - 349) Appellant cites McCampbell v. State, 421 So.2d 1072 (Fla. 1982). That case is not applicable here because that case was a jury override and pursuant to Tedder v. State, 322 So.2d 908 (Fla. 1975) the court was looking to factors presented which may have motivated the life recommendation. The trial court sub judice considered and rejected on the weight the evidence of possible rehabilitation. (R 349) The court acknowledged that Appellant came from a fine family (R 349) but little weight can be attached to a factor which is relevant to Appellant's family's character but not to his personal character. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978). As to Appellant's confession, it was not delivered until after his apprehension by police - i.e., he did not immediately surrender to authorities and tell all he knew. Thus, Appellant is in the same position as the defendant in Washington v. State, 362 So.2d 658 (Fla. 1978) who surrendered when accomplices were apprehended and he knew he was sought.

As to Appellant's alleged remorse, the trial court correctly determined that the proffered evidence of it was too insubstantial to merit a finding. Note that Appellant expressed a concern about the electric chair to deputies (R 603) and in the P.S.I. report, Appellant apparently continued to maintain his innocence. (R 2688) The court properly rejected other self-serving statements.

No reversible error appears.

## ISSUE VII

WHETHER THE EXCLUSION OF PROSPECTIVE JURORS OPPOSED TO THE DEATH PENALTY IMPROPERLY DENIED APPELLANT'S RIGHTS TO A JURY DRAWN FROM A FAIR SECTION OF THE COMMUNITY.

## ARGUMENT

The lower court did not err in refusing to impanel two juries. Appellant's reliance Grigsby v. Mabry, __ F.2d __ is to no avail as Grigsby has been rejected. See Wainwright v. Witt, __ U.S. __, __ L.Ed.2d 841 Witt v. Wainwright, __ U.S. __, 36 Cr.L. 4227; Caruthers v. State, __ So.2d __, 10 F.L.W. 114; Copeland v. State, 457 So.2d 1012 (Fla. 1984) Gafford v. State, 387 So2d 333 (Fla. 1980); Witt v. State, __ So.2d __, 10 F.L.W. 148. See also, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985); Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1980); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984); Witt v. Wainwright, __ F.2d __ (11th Cir. 1985)

## ISSUE VIII

WHETHER REVERSILE ERROR APPEARS IN THE TRIAL COURT'S INSTRUCTING THE JURY ON THE PENALTY PHASE AND RECEIVING THEIR RECOMMENDATION ON A SUNDAY.

## ARGUMENT

First of all, Appellant cannot complain of this issue initially on appeal since there was no objection below to the proceedings on Sunday. (R 2464 - 2538) The issue has not been preserved for appellate review. See Rule 3.570 Rules of Criminal Procedure.

Secondly, even if properly preserved, the point is meritless. While a judgment and sentence entered on a Sunday may be void - Higginbotham v. State, 101 So. 233 (1924) - a verdict may be rendered by a jury and additional or corrective instructions may be given on any day including Sunday or any legal holiday. Rule 3.540, Rules of Criminal Procedure; Hodge v. State, 10 So. 556 (1892); 49 Fla. Jur. 2d, Sundays and Holidays, §10.

Since the judgment and sentence was not imposed on a Sunday (R 324 - 329) no reversible error appears in the court's penalty phase instructions and receipt of the jury's penalty recommendatn on that date.

## CONCLUSION

The judgments and sentences should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular mail to Gary T. Peterson, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830, this 18th day of April, 1985.

Robert J. Landry

OF COUNSEL FOR APPELLEE.