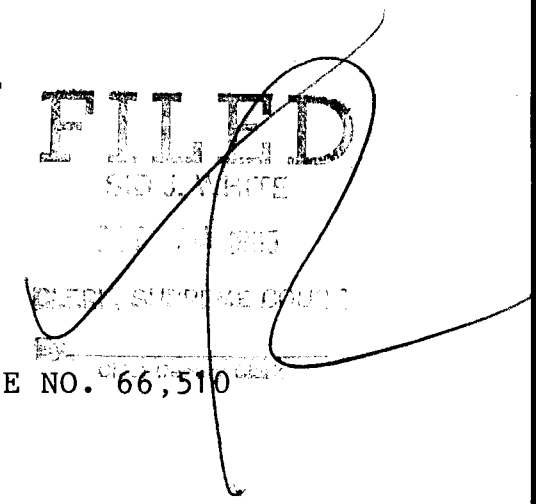
IN THE FLORIDA SUPREME COURT



CLINTON LAMAR JACKSON,

Appellant,

v.

CASE NO. 66,510

STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

CLINTON LAMAR JACKSON will be referred to as the "Appellant" in this brief. The STATE OF FLORIDA will be referred to as the "Appellee". The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE FACTS

Appellee accepts Appellant's Statement of Facts, supplemented as follows:

Prosecution witness Melvin James also testified:

At approximately 5:10 to 5:15 p.m. he saw Clinton and Nathaniel Jackson going east on 18th Avenue, coming away from the directon of the hardware store. (R 906) They were traveling in excess of the thirty-five mile per hour speed limit. (R 906 - 907)

On cross-examination, defense witness David Shorey, acknowledged his deposition testimony to the effect that:

He could not positively say whether state witness Freddie Williams "filled in the blanks" as to his testimony against another inmate (Toby); that Williams was going to try to get the information from Toby (R 1319); that Williams asked Shorey for help to do so (R 1319 - 1320); and that he didn't know when Williams discussed "filling in the blanks" whether he was talking about getting truthful information from Toby or not. (R 1320)

Shorey also testified: He told prosecution witness Freddie Williams about the facts underlying a first degree murder charge he faced (R 1304 - 1305); that some of what he said was a lie (R 1305 - 1306); more specifically: that he had stabbed his victim (R 1306); but that he pled guilty on the morning of his trial immediately after his attorney deposed Williams (R 1305); and that the state relied upon his confession to Williams as a factual basis for the plea. (R 1304 - 1305) His attorney would

have known if Williams' testimony was not true. (R 1306).

Shorey later acknowledged that Williams had previously beaten him up while they were in the same jail cell. (R 1311).

State witness Benny Philips went with Marsha Jackson when Detective Kappel interviewed her about her jail visit with Clinton Jackson. (R 1114) Jackson subsequently told Philips that she had to tell Kappel that Clint shot the man, and that they made her say it. (R 1114)

During the penalty phase, on cross-examination, defense witness Marsha Jackson testified she was unaware that at age thirteen Clinton was charged with a residential burglary in which he stole a gun (R 1565 - 1566); that at age fourteen he was also charged with petit theft, battery and residential burglary (R 1566); that at age sixteen he was charged with petit theft and auto theft; and that at age seventeen there were two more petit theft charges. (R 1567)

ARGUMENT SUMMARY

ISSUE I

This is not a case, as Appellant attempts to characterize it, of the state attempting an end run around the entry of impeachment evidence for the purpose of the truth of its content.

The state proceeded in good faith under the apprehension that Marsha Jackson might attempt to conceal facts bearing upon Appellant's guilt. It was well within the discretion of the trial court to call her as a court witness.

Her testimony contradicted and impeached state witness Freddie Williams' testimony. The state properly introduced her prior inconsistent statement(s) so that the jury might otherwise evaluate her credibility.

ISSUE II

This is not a simple question of impeachment through the use of a prior conviction.

Defense witness Shorey's testimony impeached prosecution witness Freddie Williams.

The nature and circumstances of defense witness Shory's offense and guilty plea were relevant to Shorey's credibility because Freddie Williams provided key evidence against Shorey in that same case.

ISSUE III

Appellant's cross-examination of Freddie Williams suggested that Williams might receive some favoritism from the state for his testimony.

The trial court recognized this charge against Williams of improper influence and consequently admitted his prior consistent statements.

ISSUE IV

A.

The trial court's finding that this homicide was heinous, atrocious and cruel properly focussed on the time it took the victim to die, his mental anguish and his helpless anticipation of impending death. A finding of "heinous, atrocious or cruel" need not rest upon the actual method of killing.

B.

This Honorable Court has found in prior highly similar cases that the homicide was cold, calculated and premeditated. Appellee respectfully submits it should do so here.

C.

The trial court properly found as an aggravating circumstance that Appellant killed the victim, Mr. Philibert, to avoid arrest.

The crux of Appellant's attempt to prevent lawful arrest lay not in his fear of future identification, but in his fear of immediate apprehension stemming from Philibert's attempt to physically restrain his brother.

Appellee also argues that fear of future identification was another reason Appellant murdered Philibert.

D.

Appellant tries to fault the trial court for not finding

mitigating factors that the Appellant thought it should find. There was no error here because the Court considered all the evidence it had before it. That is the only requirement. A court need not find a mitigating factor just because someone thinks that there was evidence that would justify such a finding.

Neither did the trial court make any improper considerations.

Even if this court rejects Appellee's argument, death is the presumptively correct sentence. There are four aggravating factors. There are no mitigating factors.

ISSUE V

The trial court did not consider evidence from Nathaniel Jackson's trial in sentencing Clinton Jackson to death.

ISSUE VI

Rule 3.220, Florida Rule of Criminal Procedure does not encompass rebuttal witnesses at the penalty phase of a capital trial.

Assuming without conceding Appellant had this right to discovery: He failed at trial to cite any authority in support of his position; and he failed to file a separate penalty phase discovery demand. Finally, error, if any, is harmless.

ISSUE VII

The trial court properly admitted the testimony of state rebuttal witness C.D. Willingham during the penalty phase.

In effect, Appellant now complains that the trial court has

denied him an opportunity to litigate his guilt in a case in which he has long since plead guilty. Appellant, by his guilty plea to the charges stemming from the incident that was the subject of Willingham's report, has tested and acknowledged the sources of information in it he now seeks to attack. He has already had a fair opportunity to rebut them.

ISSUE VIII

This Honorable Court has previously upheld a finding that a murder is heinous, atrocious, or cruel, notwithstanding a trial court's consideration of factors which Appellant now attacks as improper.

The evidence on the record otherwise suffices to prove beyond a reasonable doubt that this murder was heinous, atrocious or cruel. If in fact the trial court improperly considered the victim's background, this court may therefore disregard such as improper consideration.

ISSUE IX

State v. Enmund, __ So.2d __, (Fla. Case No. 66,264, August 29, 1985) [10 F.L.W. 441] is on point, dispositive and adverse to Appellant.

ISSUE X

If the trial court prepared a sentencing guideline sheet, the primary offense would be Appellant's homicide conviction. However, the Guidelines do not encompass his homicide conviction. Hence, they do not encompass any additional offenses.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO CALL MARSHA JACKSON AS A COURT'S WITNESS WHICH ALLOWED THE STATE TO INTRODUCE EVIDENCE OF JACKSON'S ALLEGED ADMISSIONS UNDER THE GUISE OF IMPEACHMENT WHICH WOULD NOT HAVE BEEN ADMISSIBLE IN ANY OTHER MANNER.

The record is devoid of any indication that the state did not proceed in good faith on this question.

State witness Freddie Williams testified that he overheard Appellant confess to Marsha Jackson, his mother, during her visit to the jail to see the Appellant. (R 944 - 946, 948 - 951, 954, 1040 - 1043, 1093, 1113)

Marsha Jackson acknowledged this confession previously when Detective Kappel interviewed her. (R 1199 - 1203)

However, she subsequently denied it on deposition. (R 1096 - 1101)

The state was uncertain what she would say and was thus unable to vouch for her credibility on the stand. (R 1052 - 1053, 1059, 1085)

It anticipated she might deny her prior incriminating statements. (R 1057 - 1059)

The state proferred her testimony and confirmed it's suspicions. (R 1065 - 1069)

Appellee respectfully submits that where, as here, there was a reasonable belief that Marsha Jackson might attempt to conceal facts bearing upon Appellant's guilt to the detriment of

the state, it was well within the discretion of the trial court to call her as a court witness; Tillman v. State, 44 So.2d 644 (Fla. 1950); Brown v. State, 108 So. 842 (1926); Endress v. State, 462 So.2d 872 (Fla. 2 DCA 1985); Scheel v. State, 350 So.2d 1120 (Fla. 3 DCA 1977); Olive v. State, 179 So. 811 (Fla. 1938); Chapman v. State, 302 So.2d 138 (Fla. 2 DCA 1974).

Appellant demonstrates no abuse of that discretion. The trial court's decision was neither arbitrary, fanciful or unreasonable. Reasonable men might differ as to its propriety. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

Once Jackson became a court witness, she was subject to cross-examination by all parties. Section 90.615(1), Florida Statutes, (1983). It is well established that a wide range of cross-examination is permitted to impeach the credibility of a witness. Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982). Williams v. State, 443 So.2d 1053 (Fla. 1 DCA 1984).

Her testimony was that neither did her son confess to her, nor did she say he confessed during questioning by Detective Kappel. (R 1092 - 1102)

Her testimony thus contradicted witness Freddie Williams' testimony that Appellant confessed. It impeached his credibility and was thus highly adverse to the state.

The state then introduced her prior inconsistent statement(s) so that the jury might otherwise evaluate her

credibility in making this statement.[1]

Finally: this is not a case, as Appellant attempts to characterize it, of the State attempting an end run around the prohibition against entry of this evidence for the purpose of establishing the truth of its content; and the line of cases Appellant cites[2] in support of his position is simply inapposite to the facts of the case at hand.

Marsha Jackson did not merely fail to testify to beneficial facts. Gibbs v. State, 193 So.2d 460 (Fla. 2 DCA 1967). Neither was this a mere lapse of memory. Jackson v. State, 451 So.2d 458, 462 (Fla. 1984).

The fatal flaw in Appellant's argument is that he ignores the fact that Marsha Jackson's testimony was most certainly adverse to the state in that it contradicted Freddie Lee Williams' testimony and thus impeached his credibility. Brumbley v. State, 453 so.2d 381, 384 (Fla. 1984).

Finally, Appellant attacks the state's use of Sergeant Kappel's testimony in closing during the penalty phase. (R 1597) Appellee respectfully disagrees. This was Freddie Williams' testimony. Compare: R 949 - 951.

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[1] Appellant did not request a limiting instruction on the use of these statements.

[2] Jackson v. State, 451 So.2d 458 (Fla. 1984); Hernandez v. State, 22 So.2d 781 (1945); Gibbs v. State, 193 So.2d 460 (Fla. 2 DCA 1967); Johnson v. State, 178 So.2 d724 (Fla. 2 DCA 1965); Perry v. State, 356 So.2d 342 (Fla. 1 DCA 1978); Erp v. Carroll, 438 So.2d 31 (Fla. 5 DCA 1983).

In any event, he ignores §921.141, Florida Statutes, which provides in part:

> Any such evidence which the court deems to have probative value may be received, regardless of its admissibliity under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.
>
> (emphasis added)

Thus, the prosecutor fairly commented on the evidence before the court.

ISSUE II

THE TRIAL COURT ERRED IN PERMITTNG THE PROSECUTOR TO IMPEACH DEFENSE WITNESS DAVID SHOREY BY ELICITING THE FACTS OF HIS PRIOR CONVICTION FOR MURDER.

Appellant attempts to characterize this as a simple question of impeachment through the use of a prior conviction; and the attendant prohibition against delving into the factual circumstances of the crime. It is not.

The nature and circumstances of Shorey's offense and guilty plea were relevant to Shorey's credibility because Freddie Williams provided key evidence against Shorey in that same case. Goodman v. State, 336 So.2d 1264, 1267 (Fla. 4 DCA 1976).

The trial court correctly noted that under these circumstances, the [jurors] "can get the facts by which they can evaluate whether or not he's [Shorey] saying he has no bad blood now, is a valid statement on his part." (R 1300)

That's exactly what happened.

Shorey denied that Williams' readiness to testify against him bothered him. (R 1305)

Shorey testified that he lied to Freddie Williams, so that Freddie Williams could not have provided the key evidence against him. (R 1305)

His admission that he lied in what he told Williams; in and of itself, went to his credibility. (R 1305 - 1306)

However, the question goes beyond whether or not witness Shorey lied in what he told Freddie Williams.

What the state wanted to demonstrate was that the facts and circumstances of Shorey's plea make it plain that Williams had the goods on Shorey; and that Shorey's plea was a consequence of Williams' willingness to testify; notwithstanding Shorey's attempt to make it appear otherwise and in the face of Shorey's assertion that there was no bad blood between them.

Finally, Appellee notes that the witness in question was the defendant in every case Appellant cites[3] in support of his argument that the state could ask no more once Shorey acknowledged his prior conviction. They are thus inapposite to the case at hand.

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[3] Goodman v. State, 336 So.2d 1264 (Fla. 4 DCA); Mead v. State, 86 So.2d 773 (Fla. 1956); McArthur v. Cook, 99 So.2d 565 (Fla. 1957); Whitehead v. State, 279 So.2d 99 (Fla. 2 DCA 1973).

ISSUE III

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF PRIOR CONSISTENT STATEMENTS MADE BY A KEY PROSECUTION WITNESS, FREDDIE WILLIAMS.

On cross-examination, state witness Freddie Williams denied that the state or anyone else promised him any benefit in return for his testimony. (R 992, 1005) He acknowledged that he was possibly aware that other people who have given evidence such as he had given had gotten some pretty good deals. (R 1005 - 1006)

The trial court recognized that this was a charge against Williams of improper influence and/or motive:

> . . . by your questioning, you suggested that he [Williams] might receive some favoritism from the state for his testimony.

(R 1191)

This was the ground upon which the trial court properly admitted Williams prior consistent statement. Section 90.801(2)(b), Florida Statutes (1983);[4] McElveen v. State, 415 So.2d 746 (Fla. 1 DCA 1982).

Appellant's argument that Williams lied from the very beginning is at best self serving, but in any event irrelevant.

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[4] §90.801(2)(b), Florida Statutes, (1983): A statement is not hearsay if a declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is: Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive or recent fabrication. (emphasis added)

ISSUE IV

THE TRIAL COURT ERRED IN SENTENCING CLINTON JACKSON TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

A finding that a murder was heinous, atrocious or cruel need not rest on the actual method of killing. Copeland v. State, 457 So.2d 1012 (Fla. 1984).

The mental anguish of the victim is an important factor in determining whether the aggravating circumstance of heinous, atrocious and cruel applies. Jennings v. State, 453 So.2d 1109 (Fla. 1984).

The helpless anticipation of impending death may serve as a basis for the aggravating factor that a capital felony is especially heinous, atrocious or cruel. Clark v. State, 443 So.2d 973 (Fla. 1983).

This court has taken into account the amount of time it took for the victim to die in considering the pain and suffering involved; and a matter of mere minutes may suffice to establish a death was heinous, atrocious or cruel. Washington v. State, 362 So.2d 658 (Fla. 1978).

Mason v. State, 438 So.2d 374 (Fla. 1983) addressed the stabbing murder of Linda Chapman:

> Mrs. Chapman's son, Westley, testified that when he went to check on his mother she was first looking at the ceiling and then turned to look at him, all the while making choking and gurgling sounds. A medical examiner testified that the victim probably lived from one to ten minutes after being stabbed, that the sounds that Westley heard were of Mrs. Chapman choking on her own blood, and that she was probably aware of her impending death.
>
> The manner in which Mrs. Chapman died, sets this crime apart from the norm of capital felonies. See State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). She was not killed quickly and painlessly, but instead lingered, unable to breathe and aware of what was happending to her. The killing was certainly "unnecessarily torturous to the victim," Dixon, at 9, and, in view of other cases addressing this point, heinous, atrocious, and cruel.

Mason, supra at 379

That's no different than what happened here. The trial court's order finds:

> Mr. Philibert was alive for at least five minutes after he was shot. He bled to death internally. When his longtime friends discovered him, he was on the floor of the store had had worked so hard for. He was groaning in pain. He certainly knew he was going to die. His friends called out his name and Herbert Philibert was able to look up at them with his eyes, but the noises he made did not form the words he was trying to say. The defendant and his brother left him as they found him, alone. He was left to die, helpless, unable to move or talk, left only with his realization that his life was over and his pain.

(R 162 - 163)

Finally, Vaught v. State, 410 So.2d 147 (Fla. 1982) was a gas station stick-up. Five shots caused the victims near instantaneous death.

This Court stated:

> Appellant contends that the trial court erred in finding that the killing was especially heinous, atrocious, and cruel. He argues that since the shooting was spontaneous and caused nearly instantaneous death, it cannot come within the meaning of this aggravating circumstance, which under the interpretations given by this Court, focuses on the infliction of physical pain or mental anguish. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); White v. State, 403 So.2d 331 (Fla. 1981). In response the state correctly points out that the factor heinous, atrocious, or cruel has also been approved based on the fact that a killing was inflicted in a "cold and calculating" or "execution-style" fashion. See, e.g., Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981); Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).
>
> Vaught, supra at 151. (emphasis added)

Where, as here, appellant murdered Mr. Philibert in a "cold and calculated" fashion[5] the factor of heinous, atrocious or cruel thus applies.

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[5] See Issue IV-B, infra.

B.

THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In Herring v. State, 446 So.2d 1049 (Fla. 1984), the evidence reflected that Appellant first shot the store clerk in response to what Appellant believed was a threatening movement by the clerk; and then shot him a second time after the clerk had fallen to the floor.

There was also testimony from a detective that Appellant stated that he "shot a second time to prevent him [the clerk] from being a witness against him." Herring, supra at 1057.

Appellant argued that the trial judge improperly found the aggravating circumstance that this murder was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification.

This court disagreed.

> We have previously stated that this aggravating circumstance is not to be utilized in every premeditated murder prosecution. Rather, this aggravating circumstance applies in those murders which are characterized as execution or contract murders or witness-elimination murders. We have also held, however, that this description is not intended to be all inclusive. See Menendez; McCray v. State, 416 So.2d 804 (Fla. 1982); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). . . The facts of the case are sufficient to show the heightened premeditation required for the application of this aggravating circumstance as it has been defined in McCray; Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457

U.S. 1111, 1102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); and Combs.

Herring, supra at 1057.

Accord: Cannady v. State, 427 So.2d 723, 730 (Fla. 1983).

This case provides a close analogy: Victim Philibert's resistance threatened Appellant. Appellant then shot Philibert because, by his own admission, Philibert "had" Appellant's brother, Nate.

This was, in his own estimation, the only thing to do; notwithstanding the fact there were any other number of choices he could have exercised.

Appellee respectfully submits his decision was thus cold, calculated and premeditated.

C.

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED TO AVOID ARREST.

Section 921.141(5)(e), Florida Statutes, encompasses the murder of a witness to a crime as well as a law enforcement personnel. Riley v. State, 366 So.2d 19 (Fla. 1979).

The proof of Appellant's intent to avoid arrest must be very strong. Riley, supra at 22. It is.

However, there need be no direct statements of a defendant indicating his purpose to insure there are no witnesses. Griffen v. State, 414 So.2d 1025 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982).

As the trial court noted:

> Had the victim continued to hold onto the defendant's brother, the capture, arrest and identification of either or both would have been inevitable.

(R 161)

Appellee respectfully submits that the crux of Appellant's attempt to prevent lawful arrest lay not in his fear of future identification by Mr. Philibert; but in his fear of immediate apprehension stemming from his brother's physical restraint.

That's why he subsequently stated that he had to do it because Philibert "had" his brother, Nate.

Appellant's assertion the evidence "only establishes that the shooting occurred to free Nathaniel at that moment to insure that no immediate harm came to him." is patently without merit.

Appellant would have this court believe that an unarmed, middle aged man in his fifties was a threat to two young men in their twenties, one of whom had a gun on him. This is simply not a reasonable hypothesis.

Appellant conveniently suggests that the shooting was spontaneous and then attempts to place himself within the purview of Armstrong v. State, 399 So.2d 953, 963 (Fla. 1981).

Whether or not spontaneous, Appellee respectfully submits: Appellant's "I had to do it" statement distinguishes this shooting from Armstrong. There, this court noted that the shooting was a response to the victim's own armed resistance.

As the trial court noted:

> The two of them could have easily overpowered the victim by less drastic means and made their escape.

(R 161)

There is no such indication in Armstrong.

Alternatively: Appellee argues the "identification" aspects of Appellant's attempt to avoid or prevent his own lawful arrest.

The ability to identify is a major consideration in this aggravating factor and also in the defendant's decision to eliminate a witness. Routly v. State, 440 So.2d 1257 (Fla. 1983); Welty v. State, 402 So.2d 1159 (Fla 1981).

The trial court's order notes: The victim confronted Nate Jackson face to face. Appellant had been in the store before.

He lived one mile away. The victim thus had ample opportunity to be able to identify both of them. (R 161)

D.

THE TRIAL COURT ERRED IN FAILING TO FIND EXISTING NONSTATUTORY MITIGATING CIRCUMSTANCES.

Appellant tries to fault the trial court for not finding mitigating factors that the Appellant thought it should find. There was no error here because the Court considered all the evidence it had before it. That is the only requirement. A court need not find a mitigating factor just because someone thinks that there was evidence that would justify such a finding.

He contends that the trial court failed to find mitigating circumstance that the evidence might arguably support. The contentions are without merit.

In Porter v. State, 429 So.2d 293 (Fla. 1983), this Court had occasion to address a very similar argument. This Court's analysis is just as apposite here. In addressing the contention, this Court said:

> There is no requirement that a court must find anything in mitigation. The only requirement is that the consideration of mitigating circumstances must not be limited to those listed in Section 921.141(6), Florida Statutes (1981). What Porter really complains about here is the weight the trial court accorded the evidence Porter presented in mitigation. However, "mere disagreement with the force to be given (mitigation evidence) is an insufficient basis for challenging a sentence." Quince v. State, 414 So.2d 185, 187 (Fla 1982).

Porter, supra at 296.

This Court recently affirmed this principle in its

decisions in Lusk v. State, 446 So.2d 1038 (Fla. 1984); White v. State, 446 So.2d 1031 (Fla. 1984); Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, 103 S.Ct. 1236 (1983); Riley v. State, 413 So.2d 1173 (Fla.) cert. denied, 103 S.Ct. 317 (1982).

Appellant argues that the trial court improperly considered three facts: his lack of remorse; his subornation of perjury; and his enlistment of his brother to commit the crime.

Appellee respectfully submits that on the lack of remorse question, Appellant does not distinguish this case from Agan v. State, 445 So.2d 326 (Fla. 1983):

> . . . the trial mentioned lack of remorse not in connection with aggravating factors, but rather in connection with the finding there were no mitigating circumstances . . . there was no error in this limited consideration of the absence of remorse for his crime on the part of Appellant.

Agan, supra at 328

In any event, that the trial court noted a lack of remorse does not mean that it considered it in the weighing process. The trial court can express its opinions and philosophies about why the weighing process produced the correct result without risking reversal. Goode v. State, 410 So.2d 506, 508 - 509 (Fla. 1982); Vaught v. State, 410 So.2d 147, 151 (Fla. 1982).

On the "enlistment" question:

There was adequate independent evidence of this fact from which the judge could make such a finding.

Four days prior to the homicide Appellant went to the victim's hardware store. Afterwards, he told Melvin Jones, "I'm

going to knock him over." Jones testified that he understood this to mean Appellant was going to commit a robbery. (R 909, 911 - 912)

Additionally: Appellant was the gunman. He drove the vehicle to and from the crime scene. (R 904 - 908, 1111 1113)

On the perjury question:

Appellee notes only that the defense listed Marsha Jackson as a witness (R 41); and that she visited him in jail. (R 1700)

Appellee respectfully submits that under these circumstances, the trial court believed that she lied for him and that he enlisted or condoned her perjury.

Even if this court rejects Appellee's argument, death is the presumptively correct sentence.

There are four properly found aggravating factors.[6] There are no mitigating factors. (R 164 - 165) Sireci v. State, 399 So.2d 964, 968 (Fla. 1981)(cert. denied, 102 S.Ct. 2257, reh. den. 102 S.Ct. 3500); Clark v. State, 379 So.2d 97 (Fla. 1980); King v. State, 436 So.2d 50, 55 (Fla. 1983); White v. State, 403 So.2d 331, 340 (Fla. 1981); Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983).

6
(1) Appellant committed the homicide during a robbery. (R 160)
(2) Appellant committed the homicide to avoid arrest. (R 161)
(3) The homicide was heinous, atrocious or cruel. (R 162)
(4) The homicide was cold, calculated and premeditated. (R 163)

ISSUE V

THE TRIAL COURT ERRED IN CONSIDERING EVIDENCE FROM NATHANIEL JACKSON'S TRIAL IN SENTENCING CLINTON JACKSON TO DEATH, WHERE SUCH EVIDENCE WAS INADMISSIBLE IN CLINTON JACKSON'S CASE AND WHERE THE DEFENSE WAS NOT GIVEN NOTICE OF THE COURT'S USE OF THE EVIDENCE OR AN OPPORTUNITY TO CONFRONT IT.

The linch pin of Appellant's argument is that there was no evidence in Clinton's trial concerning who initiated the robbery, and that the only source of the judge's finding was Nathaniel Jackson's inadmissible confession.

However, as Appellee has already pointed out, there was adequate independent evidence from which the trial court could make such a finding. See Issue IV-D, infra.

As to the remaining two alleged factual errors: Appellant acknowledges he engages in mere speculation.

See: Appellee's Brief, Issue IV-D, infra.

Furthermore: The trial court filed the sentencing order on January 29, 1985. (R 160) The record is devoid of any indication that Appellant has asked the trial court to clarify it's order. He now raises this point for the first time.

As to the "mask" reference:

Assuming for argument only that the court made either an improper inference or relied on evidence from Nathaniel Jackson's trial, there is every indication that the trial court would nonetheless have found this aggravating circumstance. See Issue IV-6, infra.

As to the perjury reference:

The state suggested in it's sentencing memorandum that Appellant asked his mother to commit perjury for him. (R 142) The defense had a copy of this memorandum well before sentencing and filed a responsive memo of it's own. (R 1657 - 1658, 145 - 158) It did not address the perjury allegation.

In any event, Appellee respectfully submits: There is adequate support in the record for the trial court to make this observation even if it erred as to who called her to testify. Appellant confessed to his mother. She acknowledged his confession when the police questioned her about it. Yet she denied he made it and denied acknowledging it when she testified. Appellee iterates and emphasizes its earlier argument: there is no indication that either of these two considerations would otherwise affect the trial court's bottom line determination(s).

ISSUE VI

THE TRIAL COURT ERRED IN PERMITTING A STATE WITNESS WHO WAS NOT LISTED ON DISCOVERY TO TESTIFY IN REBUTTAL DURING PENALTY PHASE WITHOUT FIRST CONDUCTING A HEARING REGARDING THE DISCOVERY VIOLATION AND THE PROCEDURAL PREJUDICE SUFFERED BY THE DEFENSE.

Appellant cites no authority for the proposition that Florida Rule of Criminal Procedure 3.220 encompasses rebuttal witnesses at the penalty phase of a capital trial.

The penalty phase of a capital trial is by definition "a separate proceeding." Section 921.141(1), Florida Statutes (1983).

Florida Rule of Criminal Procedure 3.220(1)(i), addresses "the offense charged". It does not address the penalty for the offense.

Appellant's own Demand(s) for Discovery (R 7 - 11, 27 - 29), by their own terms, address the guilt phase of his trial. Conversely, they do not address the penalty phase.

Appellee notes that Appellant first objected to this purported discovery violation, and then pursued a hearsay objection. (R 1576 - 1577)

Assuming without conceding he had a right to discovery, he failed to cite any authority in support of his position.

> This court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law. Under the circumstances, the trial judge was not required to make further inquiry.
>
> Lucas v. State, 376 So.2d 1149 (Fla. 1979) (emphasis added)

Furthermore, once again assuming without conceding his right to discovery, Appellant failed to file a separate (penalty phase) discovery demand. Maxwell v. State, 443 So.2d 967, 970 (Fla. 1983).

Finally, assuming without conceding there was error, it was harmless.

The crux of Appellant's complaint is that witness Willingham's testimony consisted of hearsay; and that with notice, the defense could have more effectively challenged his testimony.

However, as the state pointed out at trial, hearsay is clearly admissible during the guilt phase. Section 921.141(1), Florida Statutes (1983). (R 1572 - 1578)

Furthermore, if Appellant needed more time to investigate sources, nothing prevented him from asking the court for a continuance so that he might do so. He chose not to. His decision belies his representations here.

The record reveals that the trial court restricted the state's examination of Willingham to what Willingham knew of his own personal knowledge and that Appellant exercised an unrestricted opportunity to cross-examine Willingham. (R 1578, 1583 - 1588)

"The claim that one is surprised when an unlisted witness is called to testify, by itself, is inadequate to constitute prejudice. Patterson v. State, 419 So.2d 1120 (Fla. 4 DCA 1982), petition for review denied, 430 So.2d 452 (Fla. 1983)." Keen v. State, 456 So.2d 571 (Fla. 2 DCA 1984).

This court has previously found discovery violations harmless in death penalty cases. Maxwell, supra; Antone v. State, 410 So.2d 157 (Fla. 1982). Lower appellate courts have applied a harmless error analysis in non-capital cases. Butler v. State, 238 So.2d 313 (Fla. 3 DCA 1970); Lopez v. State, 264 So.2d 69 (Fla. 3 DCA 1972). See also: Jones v. State, 332 So.2d 615 (Fla. 1976)(jury selection rule violation held harmless error).

Appellee respectfully submits that this court may properly apply it here.

ISSUE VII

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF STATE REBUTTAL WITNESS C.D. WILLINGHAM DURING PENALTY PHASE, SINCE HIS TESTIMONY CONSISTED OF HEARSAY FROM AN UNNAMED SOURCE WHICH COULD NOT BE CONFRONTED OR REBUTTED.

During the penalty phase, the state sought to rebut Appellant's mitigating evidence.

It placed Appellant's juvenile criminal record in evidence. (R 1588 - 1589; 1592, 1708 - 1724) This record included his guilty plea to an aggravated assault he committed on June 5, 1975. (R 1712, 1715)

C.D. Willingham was the investigating officer in that case. (R 1575 - 1576) The state introduced his testimony to amplify the facts underlying this guilty plea, viz., that Appellant committed a violent act.

Willingham used his report to refresh his memory about the incident. (R 1576) The state then asked him what his investigation revealed. (R 1576)

He testified that two un-named individuals described to him the beating Appellant gave another boy. (R 1582)

In effect, Appellant now complains that the trial court has denied him an opportunity to litigate his guilt in a case in which he has long since pled guilty.

Appellee respectfully submits that the Appellant, by his guilty plea, has tested and acknowledged the police report and the sources of information in it which he now seeks to attack; and that he has in fact had a fair opportunity to rebut them.

ISSUE VIII

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE OF THE HOMICIDE VICTIM'S CHARACTER AND FAMILY BACKGROUND DURING THE PENALTY PHASE OF THE TRIAL.

This Honorable Court has upheld a finding that a murder is heinous, atrocious, or cruel notwithstanding a trial court's consideration that

> The victim was retired, a widower, who devoted his retirement years to community service. He lived at home alone. Upon returning home one Sunday evening, after working at the hospital followed by dinner with friends he was assaulted with a firearm in the sanctity of his home in his own bedroom . . .

Routly v. State, 440 So.2d 1257, 1264 (Fla. 1983)

So too, in Booker v. State, 397 So.2d 910, 917 (Fla. 1981), the court considered:

> Lorinne Demoss Hasman was 94 years of age at the time of her death. She was active, alert, spry, enjoyed playing bridge on a regular basis with her friends, participated in church and other activities, preferred to take care of herself in her own apartment, to come and go in her pursuit of happiness and looked forward as most others do, to the enjoyment of life.

Similarly, in Ruffin v. State, 397 So.2d 277 (Fla. 1981), this court considered, among other things, that the victim was seven months pregnant and married less than one year in it's decision to uphold a finding that her death was heinous, atrocious or cruel.

Appellee respectfully submits that the trial court properly exercised the very broad discretion it has to admit evidence

during the sentencing portion of the jury's deliberaton. Messer v. State, 330 So.2d 137 (Fla. 1976).

This court has previously disregarded improper considerations by the trial court in finding that a death was heinous, atrocious or cruel, where it otherwise finds the evidence on the record suffices to prove this factor beyond a reasonable doubt. Doyle v. State, 460 So.2d 353 (Fla. 1984).

Appellee respectfully submits that the evidence on the record otherwise suffices to prove beyond a reasonable doubt that this murder was heinous, atrocious or cruel. If in fact the trial court improperly considered the victim's background, this Honorable Court may therefore disregard such an improper consideration.

ISSUE IX

THE TRIAL COURT ERRED IN ADJUDICATING AND SENTENCING JACKSON ON THE ROBBERY COUNT SINCE THERE WAS NO EVIDENCE OF A PREMEDITATED MURDER AND THE ROBBERY WAS THE UNDERLYING FELONY FOR FIRST DEGREE FELONY MURDER.

State v. Enmund, ___ So.2d ___, (Fla. Case No. 66, 264, August 29, 1985)[10 F.L.W. 441] is on point, dispositive and adverse to Appellant.

ISSUE X

THE TRIAL COURT ERRED IN IMPOSING A CONSECUTIVE SENTENCE OF NINETY-NINE YEARS ON THE ROBBERY COUNT WITHOUT CONSIDERING THE GUIDELINES RECOMMENDED SENTENCE AND IN RETAINING JURISDICTION OVER ONE-THIRD OF THE SENTENCE.

Appellant assumes his sentence for robbery is pursuant to the Sentencing Guidelines. Appellee respectfully submits it is not.

If the trial court prepared a sentencing guideline sheet, the primary offense would be Appellant's homicide conviction. However, the Guidelines do not encompass his homicide conviction. Hence, they do not encompass any additional offenses.

Appellee argues by analogy to this court's decision that trial courts may dispense with pre-sentence investigation reports in capital cases where there are additional convictions. Harich v. State, 437 So.2d 1082 (Fla. 1983).

CONCLUSION

Based on the foregoing facts, arguments and case authorities, Appellee would request this Honorable Court affirm the judgment and sentence of the trial court.

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 W. C. McLain, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830, this 18th day of October, 1985.

OF COUNSEL FOR APPELLEE.