IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,919

JESUS SCULL

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

* *

BRIEF OF APPELLEE

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INTRODUCTION

This is a direct appeal of two convictions of first degree murder and sentences of death. Appellant was the defendant below and appellee was the prosecution. The symbols "R", "Tr", and "S.R." will designate the Record, Transcripts, and Supplemental Record respectively.

STATEMENT OF THE CASE

Appellant was charged with two counts of first degree murder, one count of arson, robbery with a deadly weapon, armed burglary with intent to commit murder, possession of a weapon while committing a felony, possession of cocaine, leaving the scene of an accident, and reckless driving. (R. 44-47; R. 1; R. 25).

Appellant was convicted of all but the reckless driving charge. The trial court sentenced appellant to death on the two murder convictions. (R. 294). This appeal follows.

STATEMENT OF THE FACTS

Appellant's factual rendition is fairly complete. However, appellee will submit its own narrative of the

principal facts. Other facts, generally those not mentioned by appellant, will be found in the corresponding "Argument" sections of this brief where necessary to a proper understanding of each issue.

Appellant bludgeoned two women to death with a baseball bat sometime in the early morning hours of November 24, 1983. This is what happened:

Appellant came upon the duplex in which the two victims were living. He cut the padlock which secured the front gate of the property (Tr. 804, 805; 849-852), and entered. It appears that he then went to the second story apartment and entered or at least tried to enter. The deadbolt to the upstairs apartment (which was unoccupied) was found lying on the ground (Tr. 782-784). Appellant then gained entry to the victims' downstairs apartment, probably through a sliding glass door. (Tr. 673).

The exact sequence of events inside the house is not known. What is known is that two young women were murdered with a baseball bat. Their skulls were smashed. Lourdes Villegas received four hard blows to different parts of the head. According to the medical examiner, she was resisting the attack, in motion as the blows were being struck. (Tr. 1068). She was also strangled during the beating. (Tr. 1065). Miriam Mejides died of one blow to the head, a blow

that caused massive brain and skull damage. (Tr. 1074, 1077, 1078). Miss Mejides had a defensive wound on one of her hands, showing that she had tried to ward off a blow. (Tr. 1084). Both killings took place in the bedroom.

Appellant then ransacked the room. The bodies of the two victims were placed under a dresser in a head to toe position. (Tr. 698). The baseball bat was placed under the bed. A plastic phallus was jammed into the rectum of Lourdes Villegas. (Tr. 1067).

Appellant then set out (unsuccessfully) to burn the building. He poured some unidentified accellerant on the bed and set it ablaze. (Tr. 730-732). He then stole Lourdes Villegas' Mustang and fled the scene.

Appellant was soon involved in a serious automobile accident on I-95 in Miami. The Mustang and another vehicle were overturned. A Florida Highway Patrolman responded to that accident at 5:45 a.m. (Tr. 762, 763). Appellant had fled. His fingerprint was found on the driver's side window of the Mustang. (Tr. 1013-1014). Appellant also left the keys in the car's ignition. Blood found on those keys was consistent with that of Miriam Mejides. (Tr. 968-972).

The trooper tracked down the car's owner by looking at an envelope he found in the car. He proceeded to that

address. When he got there he saw that the fire department had responded to the scene. (Tr. 771).

Officer Nelson Andreau was assigned to investigate the murders. By mid-afternoon he and another officer proceeded to the home of one Lazaro Hernandez looking for Appellant. Hernandez opened the door and invited the officers in. (Tr. 863-864). Hernandez told the officers that appellant was in the bathroom taking a shower. When they looked he was not there. He was found hiding in a closet wearing a pair of Hernandez' jeans. (Tr. 865-866). A shirt, pair of pants, and sneakers were nearby. When Andreau asked him who they belonged to appellant stated that they were his. (Tr. 867). Appellant was asked to accompany the police to the station for questioning and he complied. (Tr. 871-872).

Appellant told Andreau that he knew the victims (Tr. 885); that he had been given permission to use the Mustang several days earlier (Tr. 886); that he had entered the apartment ten days before the killings (Tr. 888); that on the morning of the killings he went to their apartment but did not enter (Tr. 886); that he then went to his place of employment (Tr. 886); and that he got in the accident en route to his job. (Tr. 887). Appellant denied having touched a baseball bat in the victim's apartment. (Tr. 888).

At trial it was revealed that the baseball bat bore the fingerprint of appellant. That print was made by appellant's blood soaked hand. (Tr. 978-983; 1027-1030).

The appellant's clothes (seized in the Hernandez apartment) had blood stains on them. (Tr. 870). The cuff of one of the trouser legs had a shoe lace tip fused to it. The sneakers were flecked with blood and were charred. (Tr. 870-874; 931).

Appellant emptied his pockets at the police station. He had cocaine and a bracelet which resembled one owned by Lourdes Villegas. (Tr. 956).

Appellant's version of how he came into possession of the car was disputed by Lourdes Villegas' sister. She had seen the car in the driveway the night before the murder and stated that her sister would never lend the car to anyone. (Tr. 948; 953).

Appellant presented no evidence at trial. He was found guilty of all crimes except the reckless driving charge.

ISSUES ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISCHARGE HIS ATTORNEY?

II

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISCHARGE THE ENTIRE SENTENCING JURY?

III

WHETHER THE SENTENCES HANDED DOWN VIOLATE ANY CONSTITUTIONAL PROVISIONS?

SUMMARY OF THE ARGUMENT

Appellant made it clear at the end of the trial that he was very pleased with his attorney and that he was glad he was not removed from the case. His earlier statements to the contrary must be analyzed in light of those later statements in favor of his attorney.

In any event, a defendant cannot obtain a new attorney simply because he does not get some undefined level of cooperation from his present attorney. Appellant stated no valid reason for substitution of counsel. The trial court's pre-trial inquiry bore this out. There was no error.

The sentencing jury was free of any taint. The particular juror that perhaps disobeyed a court order was removed from the panel. Every other juror stated that he or she had not been influenced by that one juror's "misbehavior" in any way. There was no error here.

This was a gruesome double murder carried out principally for pecuniary gain and to avoid capture. Appellant savagely bludgeoned two women who knew that death was imminent. He then set fire to a house in a crowded neighborhood, endangering many lives. The trial court's Order was correct in all respects. This was not just a "normal" capital felony.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISCHARGE HIS ATTORNEY.

The appellant was given ample opportunity to tell the trial court about his dissatisfaction with Mr. Von Zamft, his attorney. That colloquy can be found on pages 305-312 of the transcript.

Appellee disagrees with appellant's assertion to the effect that the trial court did not allow him to expound on his reasons for wishing to fire Mr. Von Zamft (See brief of appellant, page 30, middle paragraph). After listening to appellant complain for a few minutes about how long he had been awaiting trial (Tr. 309), and about Mr. Von Zamft's letter to him (Tr. 310), the trial court specifically asked appellant <u>why</u> he wanted to fire his attorney.

> "THE DEFENDANT: I don't want this lawyer. I don't want him; take him off the case.
>
> THE COURT: Why?
>
> THE DEFENDANT: Because I understand that he is not going to defend me. I have a year with him already.
>
> He said that the judge has denied all the motions. Why, why deny all the motions? I have been here for two years and three days waiting. So he is going to tell me something else now." (Tr. 311).

It is rather clear that appellant believed that his attorney was simply not doing a good enough job. In two years Mr. Von Zamft had not managed to get any motions granted, and appellant interpreted that as grounds for firing him. That is not sufficient cause.

Case law has established that an indigent defendant does not have the right to choose his attorney. In Morris v. Slappy, 461 U.S. 1 (1983) the Supreme Court stated that a criminal defendant need not enjoy any heightened degree of rapport between himself and his attorney. They do not have to agree on all matters. This Court has stated that a trial judge's decision to substitute counsel is discretionary. Bundy v. State, 455 So.2d 330 (Fla. 1984). In a case such as this where the accused was waiting in jail over two years for a trial date, it cannot be deemed an abuse of discretion to deny a motion to discharge one's attorney. The trial court wanted to begin the trial. Two years was enough delay.

Appellant cannot point to any evidence of a breakdown in either communication or cooperation between himself and his attorney. The only "evidence" of friction is found in the letter Mr. Von Zamft wrote to his client (see Supplemental Record). That letter is nothing more than a warning to appellant not to behave in a boorish manner. It is not evidence of a breakdown of the lawyer-client relationship.

Appellee would like to point out that the claims of dissatisfaction made at the beginning of the proceedings were shown to have been rather ingenuous by the end of the proceedings. Appellant spoke in glowing terms about Mr. Von Zamft on pages 1265-1274 of the transcript:

> "And I have nothing against my attorney, absolutely nothing against him, because the defense that he has done in my case, it could not have been done better." (Tr. 1265).
>
> * * * *
>
> "I have always wanted [Mr. Von Zamft] as an attorney" (Tr. 1269).
>
> * * * *
>
> "Yes, I want Mr. Von Zamft to represent me as many times as possible in front of the court." (Tr. 1271).
>
> * * * *
>
> "You can see that I am expressing myself that I am proud of this attorney because the way that he has defended me here, I am very happy about the way he defended me here. Even though it's my skin (appellant believed he was unfairly tried because of his race) that is involved in this problem. I have nothing against Mr. Von Zamft." (Tr. 1274).

Appellee believes that Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985) and Johnston v. State, 497 So.2d 863 (Fla. 1986) should be dispositive. The trial court did conduct an inquiry into the grounds for appellee's motion. No good cause was shown for firing Mr. Von Zamft. Appel-

lant's subjective belief that his attorney was not "up to par" is not grounds for substitution of counsel. See Thomas, at 742; Johnston, at 867-868.

It should also be noted that neither Mr. Von Zamft nor his client ever brought this "issue" to the court's attention in the four-month period between the November 26 hearing and the March 3 commencement of trial. If there ever was a problem, the parties apparently resolved it.

There was no error here.

II

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISCHARGE THE ENTIRE SENTENCING JURY.

Appellant's second point deals with the trial court's failure to discharge the entire sentencing jury when it was pointed out that one member of the panel had had unauthorized contact with the mother of one of the victims. This was not error. Behold the following analysis:

The foreman of the jury did have some unauthorized contact with the mother of one of the victims. Said contact took place in the hallway of the courthouse immediately following the conclusion of the guilt phase. It is not clear from the record exactly what happened. The trial court could not determine with any degree of precision the extent of the contact. (Tr. 1331-1333). In fact, after conducting an investigation and talking to each juror, the court was so convinced that no harm had resulted from said contact that it was going to retain every juror. (Tr. 1333). The prosecution recommended that the one juror who had the contact be excused as a precautionary measure. (Tr. 1334). The court then discharged Mr. Carcases, the juror in question. (Tr. 1335, 1337).

The next order of business was the selection of the alternate to take Mr. Carcases' place. The prosecution

allowed appellant to select either one. (Tr. 1336). Appellant chose the first alternate. (Tr. 1337).

Appellee can see no error in these proceedings. Each and every juror was questioned about this incident, and each one stated that they were either unaware of it or that it would not affect them in any way. (Tr. 1304 (Mr. Davidson); Tr. 1307 (Mr. Carcases); Tr. 1311 (Ms. Paris); Tr. 1316 (Mr. Sanchez); Tr. 1319 (Mrs. Brown); Tr. 1320 (Mr. Villalobos); Tr. 1322 (Mrs. Blum); Tr. 1323 (Mr. Horigan); Tr. 1324 (Mr. Smith); Tr. 1325 (Mr. Venton); Tr. 1326 (Ms. Eber); Tr. 1328 (Ms. Finneran); Tr. 1330 (Ms. Burdick). The juror who took Mr. Carcases' place was a duly qualified alternate. The trial court has a duty to remove unqualified jurors and replace them with qualified alternates. Orosz v. State, 389 So.2d 1199 (Fla. 1st DCA 1980). That is exactly what happened. To say that the entire panel must be replaced is simply not true.

It must be pointed out that these jurors had not begun their penalty deliberations when this incident arose. It cannot be said, therefore, that this "error" tainted those deliberations. It was excised before they began. This is important to our analysis because it makes the possibility of reversible error even less remote than it would be in a case where a juror was replaced after deliberations had begun. See: United States v. Phillips, 664 F.2d 971 (11th Cir.

1981), where replacement of a juror after deliberations began was held not to be reversible error, where the trial judge fully inquired into possible prejudice and ordered jurors to begin deliberations anew.

Capital trials in this State are broken down into three distinct stages: guilt phase, penalty phase (jury advisory sentence), and sentencing phase by the trial court. A capital case cannot be compared easily with the normal criminal case which does not call for a jury advisory sentence. There are additional considerations in cases such as ours. The jurors are told to put aside thoughts about the possible penalty until they receive specific penalty instructions. Jurors are concerned first with guilt or innocence and later, after a new set of instructions, with the proper penalty. One must assume that jurors listen to and obey the law as read to them by judges. Jurors in capital cases must be presumed to have not formed any opinion about the proper sentence until they are first instructed on the applicable law. In this case the panel had not begun the penalty phase when its offending member was stricken. They had never met as a group with that unfit member present. Any taint which may have attended that member never reached the panel as a whole. There was no error in removing that one juror. The court properly denied the motion to strike the entire panel. Orosz, supra.

Appellant's argument that the trial judge should have given some "special instructions" before continuing is not meritorious. First of all, the jurors were all examined and found not to be in need of any special admonitions or instructions. The need to instruct presupposes some improper taint. That was not the case here. Secondly, the separation and individual voir dire of each juror impressed upon those jurors the need to be impartial and to follow all instructions. Thirdly, the jury received the standard instructions on the applicable penalty. (Tr. 1375-1380). Those instructions were detailed. They properly defined the jury's role. Fourthly, the case law cited by appellant for the proposition that special instructions are required is inapposite to this case. Those cases dealt with the substitution of a juror after deliberations had begun. The primary concern in those cases was to see to it that deliberations would start anew once the alternate juror was impanelled. That is not a consideration here because our penalty deliberations had not begun when the alternate was brought in.

The trial court committed no error. It merely followed the procedure of R.Cr.P. 3.280 for the use of alternate jurors in capital cases. That rule was followed in all respects.

Even if somehow erroneous, the overwhelming evidence that the proper sentence was reached indicates that reversal

for a new sentencing phase is not required. See following issue for a detailed analysis.

III

THE SENTENCES HANDED DOWN DO NOT VIOLATE CONSTITUTIONAL PROVISIONS.

The trial court's "Order Imposing Death Penalty" is found on pages 294 and 295 of the record. It imposed death on each murder conviction, finding that six aggravating factors applied, and that "two mitigating circumstances may apply" (emphasis supplied).

Appellee has filed a Notice of Cross Appeal and a Motion for Leave to File Cross Appeal. Appellee challenges the validity of the mitigating factors cited by the trial court.

THE CROSS APPEAL

The two mitigating factors cited-- that there was no history of prior criminal activity and that the appellant's age was a mitigating circumstance-- are both statutory. F.S. §§ 921.141 (6)(a); 921.141 (6)(g). The trial court stated that they "may" have applied. An examination of the decisions of this Court makes it plain that they do not apply. They should be stricken.

1. Lack of prior criminal history

This is not only a double murder case, but also a case where appellant was adjudicated guilty of various felonies committed during the commission of those murders. The word "prior" has been construed to mean prior to sentencing and not prior to commission of the murder for which one is being sentenced. Ruffin v. State, 397 So.2d 277 (Fla. 1981); Daugherty v. State, 419 So.2d 1067 (Fla. 1982); Teffeteller v. State, 439 So.2d 840 (Fla. 1983). The trial court plainly erred here. It could have found an additional aggravating circumstance. Instead it ignored this Court's decisions and found (perhaps) a mitigating factor. That was error.

2. Age of Appellant

Appellant was 24 when he committed these murders and 27 when sentenced. This Court has repeatedly held that a person of this age-- mid twenties--cannot claim this mitigating factor. Peek v. State, 395 So.2d 492 (Fla. 1981), defendant 20 years old; Mason v. State, 438 So.2d 374 (Fla. 1983), defendant 20 years old; Mills v. State, 462 So.2d 1075 (Fla. 1985), defendant 26 years old; Mills v. State, 476 So.2d 172 (Fla. 1985), defendant 22 years old; Garcia v. State, 492 So.2d 360 (Fla. 1986), defendant 20 years old; Johnston v. State, 11 F.L.W. 585 (Fla. Nov. 13, 1986), defendant 23 years

old. The trial court again erroneously cited an invalid mitigating factor.

Both factors should be excluded from the proportionality review of these sentences. They are inapplicable to this case and they skewer the analysis. They are not statutory mitigating factors.

Given the absence of any mitigating factors, the sentences of death are presumed to be valid. Jackson v. State, 12 F.L.W. 53 (Fla. Dec. 24, 1986); White v. State, 446 So.2d 1031 (Fla. 1984). All appellee would have to show would be the validity of one or more aggravating factors. That can be done:

THE VILLEGAS SENTENCE

a. The murder of Lourdes Villegas was heinous, atrocious, and cruel.

Appellant does not challenge this aspect of the sentence for Villegas' murder in his brief. He only challenges Mejides' sentence.

Villegas was struck four times in the head with a base-ball bat. The medical examiner stated that she was moving her head during the struggle, and that she was being strangled as well. (Tr. 1068; 1065). She died of blunt

trauma. This Court upheld this factor as applied to bludgeoning deaths in Scott v. State, 411 So.2d 866 (Fla. 1982). Villegas obviously was aware that appellant was trying to kill her. She fought back and tried to get away. She was being strangled. One cannot imagine the terror she must have experienced. This factor was correctly applied.

b. The murder of Lourdes Villegas was committed for pecuniary gain.

Appellant stole Villegas' automobile after killing her. In an absolutely identical situation, this Court upheld this factor. See Lambrix v. State, 11 F.L.W. 503 (Fla. Sept. 25, 1986). There was no error here.

Appellant's reliance on Peek v. State, 395 So.2d 492 (Fla. 1981) is misplaced. There is sufficient evidence in this case to find that appellant set out to commit economic crimes when he entered the victims' home. The drawers were ransacked. There was evidence that appellant had stolen Villegas' bracelet. (Tr. 956). Contrary to Peek, there was no sexual battery in this case which could have motivated appellant to enter the home. Peek was motivated by sexual battery. The car theft was an afterthought. Appellant in this case was looking for property, not sex. Lambrix, and not Peek, controls this issue.

> c. Appellant created a great risk of harm to others--setting fire to the house.

After killing Villegas, appellant set fire to the house. There was extensive damage, and appellant used an accellerant to accomplish this crime. There can be no doubt that setting fire to a house in a crowded urban neighborhood creates a risk to many people. Neighbors are endangered (this fire was set late at night when people were asleep), as were firefighters responding to the call. This Court's holding in King v. State, 390 So.2d 315 (Fla. 1980) is dispositive:

> "Appellant contends that the statutory aggravating circumstance of knowingly creating a great risk of death to many persons, based upon the arson offense, was not justified because no person other than the murder victim was in the house at the time of the arson. We reject this contention and find that when the appellant intentionally set fire to the house, he should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call." 390 So.2d at 320.

It does not matter that there were no other persons inhabiting this house. The safety of neighbors was threatened. It does matter that the fire damage was limited to the room where the murders took place. The statute provides that knowingly creating a risk of death to others is suffi-

cient. F.S. §921.141 (5)(c). One reading of King makes it clear that the fire damage in that case was not extensive. The body of the victim was intact after the arson. There was no error here.

d. Murders committed during commission of other crimes -- burglary.

Appellant committed a burglary and followed that with two murders inside the burgled house. This aggravating factor is not challenged in appellant's brief. There can be no doubt about the validity of this matter. Appellant was found guilty of burglary and the evidence indicates a burglary. The padlock on the front gate was severed and found in the getaway car. (Tr. 803). The drawers of the dresser had been ransacked. (Tr. 926). The upstairs unit of the duplex had signs of a forced entry as well. (Tr. 782-784). There was sufficient evidence upon which to base a burglary conviction.

Up to this point there are four valid aggravating factors and no mitigating factors. The Villegas sentence was proper. White, supra.

e. Witness elimination

It is important to remember that the house where the murders took place showed no signs of any resistance. These murders were not committed in appellant's attempt to protect himself, for example, or to make the burglary easier to carry out. It appears from the way that these killings took place that appellant rapidly and effectively eliminated witnesses. The record even contains a statement by appellant himself that he knew the victims. (Tr. 885). The fact that the jury might have disbelieved other statements made by appellant does not mean that everything uttered by appellant was false. There was evidence that the victims knew their attacker. Riley v. State, 366 So.2d 19 (Fla. 1978) supports this aggravating factor. See also: Clark v. State, 443 So.2d 973 (Fla. 1983), where defendant admitted to knowing the victim, and no other motive for killing was discernable. Here, no other motive for killing is apparent from this record. There was no struggle. There was an admission that the victims were familiar with appellant. The record is sufficient for this factor.

f. Cold and Calculated

Appellant's choice of a weapon is a strong indication

that these murders were very well planned. The victims lived in a crowded urban neighborhood. There were two of them. A baseball bat is both deadly (few blows are required to render a victim incapacitated, thus making a double murder easy to carry out) and silent (neighbors would not be awakened). Furthermore, a baseball bat can easily be destroyed at the scene by setting it on fire. Even more telling regarding this factor is the fact that appellant knew his victims. He knew that he was going to kill them when he went up to their house.

One should also look to appellant's own statement to the police as grounds for support of this factor. There was evidence that there was some cocaine transaction being formulated. (Tr. 885-888). The presence of cocaine is a very strong indication that murder was foremost in appellant's mind.

> The federal courts have for years recognized the inextricable link between guns, use of the tools of violence and the drug trade. Whether for their own protection, for the protection of their property or for their use in stealing from others, individuals engaged in buying or selling narcotics are reasonably assumed to be armed. See e.g., United States v. Perez, 648 F.2d 219, 224 (5th Cir.) reh. denied, 655 F.2d 235 (5th Cir.), cert. denied, 454 U.S. 1055, 102 S.Ct. 602, 70 L.Ed.2d 592 (1981); United States v. Pentado, 463 F.2d 355, 360 (5th Cir.), cert. denied, 409 U.S. 1079, 93 S.Ct. 698, 34 L.Ed. 668 (1972). As the United States Court of Appeals for the

> Second Circuit noted in United States v. Wiener, 534 F.2d 15, 18 (2nd Cir.), cert. denied, 429 U.S. 820, 97 S.Ct. 66, 50 L.Ed.2d 80 (1976): "Experience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment." In short, given the large sums of money and quantities of narcotics involved, and the high risk of loss at the point of exchange, it is often reasonable to infer that those present at such an exchange, especially an exchange which might involve the armed robbery of a narcotics dealer, will have occasion to use deadly force. Sadly in South Florida the use of lethal force in the context of a narcotics transaction has been repeatedly and amply demonstrated. See e.g., United States v. Alvarez, 755 F.2d 830, 848-49 (11th Cir. 1985), cert. denied, Hernandez v. United States, U.S. _____, 106 S.Ct. 274, 88 L.Ed.2d 235 (1985); Royer v. State, 389 So.2d 1007 at 1023-1024 (3rd DCA 1980)(en banc)(Hubbart J. concurring), ("unprecedented degree of violence and murder"); affirmed Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); State v. Sayers, 459 So.2d 352, 353 (3rd DCA 1984), reh. denied, 471 So.2d 44; Martinez v. State, 413 So.2d 429, 430 (3rd DCA 1982).

White v. Wainwright, 632 F.Supp. 1140 (S.D. Fla. 1986) affirmed, White v. Wainwright, Eleventh Circuit Court of Appeals, January 20, 1987.

What we are left with is a case of heightened premeditation. Appellant knew he would kill his victims. He employed

the ideal weapon to carry out the task. There was no error here.

The Villegas sentence was based on six valid aggravating factors. As shown by the foregoing analysis, there are no statutory mitigating factors. That sentence should be affirmed.

THE MEJIDES SENTENCE

Appellee's foregoing argument regarding the invalidity of the mitigating factors applies to the Mejides sentence as well.

Appellee also believes that the same reasoning applies here as applied to the Villegas sentence regarding the creation of risk to others, witness elimination, cold and calculated, and commission of a burglary factors. Appellee concedes that pecuniary gain would not apply here. Lambrix, supra. Appellee also concedes that the record does not support a finding that the Mejides murder was heinous, atrocious, and cruel.

There are four valid aggravating factors here and no mitigating ones. The Mejides sentence should be affirmed. White, supra.

OTHER CONSIDERATIONS

The trial court's written sentencing Order does not contain any of the language appellant points to in his brief (see pages 42 through 44). The trial court's oral manifestations are not controlling in reviewing a sentence, as those oral statements were never made part of the court's Order.

This case is distinguishable from Miller v. State, 373 So.2d 882 (Fla. 1979). In Miller the trial court included an improper aggravating factor in its written order, and that factor was crucial to the imposition of the death penalty. That was not the case here. The trial court was simply expressing its opinion about appellant's character. In fact, the trial judge was looking at appellant's character to try and find a possible mitigating factor which would work to his advantage. He did not find any. Had the appellant expressed remorse, had he admitted his guilt, etc, the trial judge certainly would have considered that as mitigating. The record does not indicate that the absence of those possible non-statutory mitigating factors was crucial in tipping the scale against appellant. The sentencing order does not mention them.

This case is controlled by Goode v. Wainwright, 410 So.2d 506 (Fla. 1982). That case distinguishes Miller, and is nearly identical to our case. The trial judge did not

consider improper aggravating factors. The trial judge simply looked for mitigating factors and stated that they did not exist. That was not error.

THE WEIGHING PROCESS

Should this Court reject appellee's cross appeal and retain those two "possible" mitigating factors, reversal for re-sentencing would not be proper. The trial judge certainly attached little weight to these factors in its Order. The same situation was present in Brown v. State, 381 So.2d 690 (Fla. 1980), where this Court held that the presence of mitigating factors given only slight significance by the trial judge will not cause reversal for resentencing when up to two aggravating factors are invalidated. That is the exact case here. Under Brown, the Villegas and Mejides sentences stand.

> Although improper aggravating circumstances (factors enumerated 1 and 2) went into the calculus of the trial judge's sentence decision and there was identified a mitigating circumstance (appellant's age), nevertheless, Elledge v. State, 346 So.2d 998 (Fla. 1977) does not compel a reversal of the sentence judgment in this case. This is so because unlike Elledge, here "we can know" that the result of the weighing process would not have been different had the impermissible factors not been present. 346 So.2d at 1003. The trial judge has told us in his order that the appellant's age, 22 years at the time

> of the offense and 23 years at the time of the trial, had only "some minor significance." When this tenuous factor is juxtaposed against at least two well-founded aggravating circumstances it is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstances. This case then is dissimilar to Elledge, but like Hargrave v. State, 366 So.2d 1 (Fla. 1978), where the doubling up of aggravating circumstances was not fatal to the imposition of a death sentence even in light of the existence of two mitigating circumstances. Here, as there, ample other statutory aggravating circumstances exist to convince us that the weighing process has not been compromised. Given the imprecision of the criteria set forth in our capital punishment statute we must test for reasoned judgment in the sentencing process rather than a mechanical tabulation to arrive at a net sum. Hargrave v. State, supra; State v. Dixon, 283 So.2d 1 (Fla. 1973).
>
> Brown, at 696.

Bassett v. State, 449 So.2d 803 (Fla. 1984) also has a similar holding.

It is quite clear that the weighing process was not upset by the inclusion of one or two improper aggravating circumstances. The trial court only stated that two mitigating factors "may" have applied. Brown controls this issue. The sentences should be upheld.

CONCLUSION

Based on the foregoing, the convictions 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 **BRIEF OF APPELLEE** was furnished by mail to ROBIN GREENE, 2655 LeJeune Road, Suite 1109, Coral Gables, Florida 33134 on this 11 day of June, 1987.

Steven T. Scott

STEVEN T. SCOTT
Assistant Attorney General

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