IN THE SUPREME COURT OF FLORIDA

DANIEL E. REMETA,

Appellant,

vs. CASE NO. 69,040

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

CITATIONS CONTINUED

CASES PAGE

CITATIONS CONTINUED

CASES PAGE

CITATIONS CONTINUED

CASES PAGE

CITATIONS CONTINUED

CASES PAGE

CITATIONS CONTINUED

CASES PAGE

STATUTES

STATUTES CONTINUED

PAGE

PRELIMINARY STATEMENT

Daniel E. Remeta, hereinafter referred to as the appellant, was tried by jury before the Circuit Court of the Fifth Judicial Circuit, In and For Marion County, Florida, Circuit Court Judge Carven D. Angel presiding, on the charge of first degree murder. Having been found guilty on that charge, adjudicated guilty thereof and sentenced to death therefor, the appellant appeals to this Court. The State of Florida will be referred to herein as "the appellee" or "the state". The Marion County Circuit Court will be referred to as "the trial court". Witnesses will be referred to as their names appear in brackets [ ]. References to the record on appeal will be denoted parenthetically inclusive of the volume and page number, e.g. (I 1). Critical portions of the record will be appended to this brief. Subsequent citations which do not affect the proposition for which the case is cited are included only in the table of citations.

STATEMENT OF THE CASE

On July 1, 1985, an indictment was filed against the appellant charging him with first degree murder, a violation of section 782.04(1)(a), Florida Statutes (1985) (XIII 2259).

On September 25, 1985, the appellant filed a series of motions attacking the sufficiency of the indictment and the constitutionality of sections 775.082(1) and 921.141, Florida Statutes (1985). The appellant's four motions are attached hereto as Appendices 1A-1D. These motions were heard by the trial court on May 16, 1986 and denied at that time (XIII 2242-2258).

On May 5, 1986, the state filed a notice of intent to offer evidence of other crimes, wrongs or acts pursuant to section 90.404(2), Florida Statutes (1985) (XIII 2378-2379). On May 8, 1986, the appellant filed a motion to strike, seeking to prohibit the introduction of the evidence described in the state's notice (XII 2373-2375). At trial, the evidence in question was proffered and was admitted over the appellant's objection (IX 1656-1700).

On May 19, 1986, the appellant's trial commenced. The trial court began by introducing the case and court personnel (I 4). Prior to the general qualification of the venire, appellant's attorney affirmatively waived his client's presence for that stage of the proceedings.

> MR. SPRINGSTEAD: Your Honor, I went back and advised my client what it was. He's in the holding cell right now and I told him that these were just general questions that the

> Court asked with respect to the age of the prospective jurors and family status, and if they had any illness and had nothing to do with the specific questions we asked. He agreed to waive his presence at that proceeding. (I 10-11).

Thereafter, the trial court proceeded to inquire as to the venire's qualifications (I 11-13). Then, the trial court inquired as to whether any of the prospective jurors were exempt from jury service or whether jury service for the appellant's three week trial would constitute an extreme hardship (I 13-75). No other matters were discussed. A short recess was taken and, afterward, the appellant was present during voir dire by the court and both parties (I 75-76).

During the penalty phase proceedings, the appellant presented his mother as a witness. Prior to her testimony, appellant's trial counsel represented to the trial court that the appellant desired to leave the courtroom during his mother's testimony; the stated reason was to avoid both the appellant and the witness from becoming too emotional (XI 2117-2118). The trial court inquired of the appellant if he wished to absent himself temporarily (XI 2118). The appellant replied affirmatively and the trial court granted the appellant's request (XI 2118-2119). The jury was instructed that the appellant's absence was temporary and at his own request (XI 2119).

On June 2, 1986, the appellant's trial concluded, the jury having found the appellant guilty as charged (XI 2019) (XIV 2535). Following the penalty phase proceedings, the jury, by a unanimous 12-0 vote, recommended a sentence of death (XII 2220)

(XIV 2536). Thereafter, upon the appellant's request to be sentenced immediately, the trial court adjudicated the appellant guilty of first degree murder, imposed a sentence of death by electrocution and set forth its findings regarding the facts of the case and regarding aggravating and mitigating circumstances (XIV 2548-2551, 2552-2554, 2557-2560). The trial court found the appellant indigent for purposes of appeal; the trial court, however, imposed $200 in court costs pursuant to section 27.3455, Florida Statutes (1985) (XII 2240) (XIV 2552).

STATEMENT OF THE FACTS

In addition to or in contravention of the appellant's statement of the facts, the appellee states the following with regard to specific phases of the proceedings below:

STATE'S CASE-IN-CHIEF

Upon being notified of the crimes at the Tenneco gas station/convenience store by Robert Gulick [Gulick], the Ocala Police Department dispatched officers to the scene (VII 1274,1280). Officer Guy Howie [Howie] was the first officer to arrive at the Tenneco station on Highway 200 near Interstate 75 in Ocala, Florida (VII 1285). Howie testified that he observed the victim of the murder, Mehrle Reeder [Reeder], "laying behind the counter"; the cash register drawer was open and all of the currency was gone (VII 1287). Howie observed a package of bubble gum on the counter, a sale of seventy-three cents ($.73) rung up on the cash register and a single bill of currency laying on Reeder's chest (VII 1289, 1293, 1296). When Reeder's body was removed from its position behind the counter, Howie observed two bullet holes in separate cabinets behind the deceased; a bullet was visible in one of them (VII 1294).

The testimony of a former employee and a former manager of the Tenneco station indicated that approximately fifty-two dollars ($52.00) had been stolen from the store on February 8, 1985, the day of the robbery and murder (VIII 1375-1379, 1401-1404). Randy Holes [Holes], the former manager, further testified that the victim, Reeder, had a problem remembering the price of the brand of bubble gum found on the counter; instead of

charging forty cents ($.40), Reeder would mistakenly charge sixty-nine cents ($.69) plus tax (VIII 1408-1409). The seventy-three cents ($.73) sale rung up on the register was consistent with such an erroneous sale (VIII 1409).

Officer G.E. Stewart [Stewart], a field evidence officer for the Ocala Police Department, was dispatched to the scene of the murder to collect evidence (VII 1315-1316). Stewart testified that after he videotaped the scene he collected the following pieces of evidence (VII 1318-1320):

> A dollar bill from the floor beside the deceased (VII 1327-1328);
> Sixteen latent fingerprints (VII 1330);
> One package of bubble gum from the counter (VII 1332);
> The cash drawer from the store's cash register (VII 1333);
> A copper jacket of a bullet found underneath the deceased (VII 1334-1335);
> A bullet from a cabinet behind the head of the deceased (VII 1335-1336);
> A copper jacket and a bullet found inside a cabinet behind the deceased (VII 1336-1337).

Using a laser, Stewart also found gunpowder residue on the front counter, rear counter, cabinets under the counters, the body of the victim and the floor behind the counter (VII 1343-1344, 1352-1353). Stewart also described numerous methods he employed to detect latent fingerprints (VII 1338-1343, 1354-1356). Some of the prints were unreadable; none of the identifiable prints were from the appellant or his companion, one Mark Walter (VII 1357) (VIII 1372). Stewart stated that based on his vast experience in processing robbery crime scenes for fingerprints that the absence

of a suspect's fingerprints from the crime scene is not unusual due to numerous variables (VII 1357-1359).

Dr. Thomas Techman [Dr. Techman], a licensed medical doctor and an expert in forensic pathology, testified regarding his autopsy on the body of the deceased, Reeder (VIII 1432-1435). Dr. Techman stated he found four gunshot wounds on the deceased and described them thusly:

> 1. a wound caused by a bullet entering the upper stomach/lower chest, traveling horizontally and exiting through Reeder's back (VIII 1436, 1448);
> 2. a wound caused by a bullet entering slightly below the left collarbone, traveling downward and reaching just under the skin in the lower right back (VIII 1436, 1448-1449);
> 3. a wound caused by a bullet entering the left facial cheek, "smashing" Reeder's dentures and exiting on the right side of the face (VIII 1436, 1450, 1453-1454);
> 4. a wound caused by a bullet entering the upper neck left side and exiting on the right side (VIII 1436, 1450);

Dr. Techman recovered two bullets from Reeder's body; the bullet causing wound 1 above was found trapped inside the deceased's shirt next to the body and the bullet causing wound 2 above was still under the skin (VIII 1453). Wounds 3 and 4 above corresponded to the bullets found in the cabinet against which the deceased's head had rested when the body was found (VIII 1450). Dr. Techman also observed gunpowder tattooing on Reeder's hands (VIII 1439). Based upon the height of the deceased, the trajectory and ultimate resting place of the four bullets, the wounds suffered by the deceased and the geography of the crime

scene, Dr. Techman surmised that the wounds were caused in the order described above under the following circumstances: while standing behind the counter, Reeder was shot in the stomach by a person in front of the counter; reacting to the first shot, Reeder bent or fell forward, grabbing at his chest; Reeder was then shot in the upper chest, causing the fatal wounds to the aorta and pulmonary artery and the tattooing to the hands; the second gunshot blast knocked Reeder backward, where he fell to a sitting position on the floor with his head resting against a cabinet; the final two shots were inflicted from a person shooting the gun while standing behind the counter (VIII 1436-1450, 1455-1463). Dr. Techman stated that although the second wound was fatal, there was slight bleeding associated with Reeder's head wounds, indicating that Reeder was probably alive when the wounds to Reeder's head were inflicted (VIII 1451, 1463, 1464). Reeder would have remained conscious for a few seconds, possibly long enough for the gunman to have walked around the counter and shot Reeder in the face and neck (VIII 1459-1460).

Considerable evidence was adduced relevant to the murder weapon, related items and the appellant's possession thereof. Gerard King [King], the Chief Investigator for the State Attorney's Office, Fifth Judicial Circuit, testified as part of the chain of custody regarding various items of evidence received from a Deputy Scott Ekberg [Ekberg] while King was in Thomas County, Kansas (VIII 1543, 1545-1546). Those items included a Smith and Wesson .357 magnum revolver, serial number 1K21389, six (6) spent cartridges, fifteen (15) unfired .22 caliber bullets,

two (2) unfired .38 special caliber bullets and another ten (10) unfired .38 special caliber bullets (VIII 1541-1546, 1583). King did not testify as to how or under what circumstances Deputy Ekberg acquired possession of those items. Also, King testified based on his experience in firearms that the unfired .38 special bullets that he identified could have been fired from the .357 revolver that he also identified (VII 1546).

Greg Scala [Scala], a forensic firearm and tool mark examiner for the Florida Department of Law Enforcement testified as an expert in the field of firearms examination and tool and die markings (IX 1625-1630). Scala stated he examined the gun in question, the Smith and Wesson .357 magnum revolver, and compared it to the bullets and jackets retrieved from the body of Mehrle Reeder and from the Tenneco Station. Scala concluded that the gun in question was the gun used to murder Reeder on February 8, 1985 (IX 1633-1634).

Larry Jones [L. Jones], the Sheriff of Rawlins County, Kansas also testified regarding the murder weapon, the spent cartridges and the appellant's possession thereof (IX 1592). L. Jones identified the gun previously identified by King and stated he recovered the gun at the Bud Roesch Farm in Rawlins County, Kansas, on February 14, 1985 (IX 1592-1593). L. Jones stated that he recovered the gun eighteen to twenty feet south of where he had observed the appellant the day before; at that time, the appellant was the closest person to the spot where the gun was found (IX 1593). L. Jones also acquired possession of the six spent cartridges that were in the gun, those cartridges having

previously been identified by King (IX 1594). While on direct examination, L. Jones never discussed the circumstances during which he saw the appellant at the Bud Roesch Farm.

In cross-examining L. Jones, however, the appellant tried to demonstrate that a companion of his, one Mark Walter [Walter], had possession of the murder weapon on February 13, 1985. To that end, it was the appellant who interrogated L. Jones as to the facts and circumstances of February 13, 1985, i.e. that the appellant, Walter and Lisa Dunn engaged Kansas law enforcement authorities in a shoot-out and that Walter was killed in said shoot-out (IX 1594-1601, 1608-1612).

Officer Stephen Harvey [Harvey] of the City of Colby, Kansas police department, testified and identified the unfired bullets previously identified by King, stating they were originally taken from the appellant (IX 1621-1623). While he was being questioned by the state on direct examination, Harvey did not elucidate on the circumstances under which he acquired possession of those items; again, it was the appellant who interrogated Harvey as to collateral events in Kansas (IX 1623-1624).

It was also proven that when Walter's body was searched on February 14, 1985, no ammunition for the .357 magnum revolver, the murder weapon, was found (IX 1752-1754).

Finally, as it pertains to the possession of the murder weapon by the appellant, William Dunn [W. Dunn], the father of Lisa Dunn, testified he was the owner of the gun in question (IX 1583-1584). W. Dunn stated he did not give the gun to the appellant or his daughter, but that it was discovered missing on

February 4, 1985 (IX 1586-1588).

As to certain material issues, the state also sought to introduce the testimony of Camillia Carroll [Carroll] under section 90.404(2), Florida Statutes (1985). Carroll's testimony was proffered (IX 1656-1657). She stated that on February 10, 1985, she was working at a Mobil gas station/convenience store just off Interstate 20 in Wascom, Texas; that the appellant and Walter came into the store at approximately 4:18 p.m.; that the appellant drew a gun on her; that the appellant had a gun similar to the Reeder murder weapon; that Walter took the money from the cash register; that there were two houses directly behind the Mobile station; that the appellant and Walter kidnapped her and put her in a car; that Lisa Dunn was in that car; that Carroll was driven to a location 200-300 feet away and shot five times in the body (IX 1657-1669). The state also presented the court with a stipulation of fact stating that one of the bullets recovered from Carroll's body was fired by the gun that killed Reeder two days earlier and that was found three days later in the proximity of the appellant (IX 1662-1663).

The appellant objected to the proffer on several bases: that the evidence was not relevant to any material fact in issue; that the evidence was relevant soley to prove bad character or propensity; that the evidence was not necessary to the state's case; and that the evidence was not sufficiently similar to prove modus operandi and identity (IX 1671-1695). The trial court overruled the appellant's objection and permitted the introduction of Carroll's testimony and the stipulations of fact;

first, however, the jury was instructed as to how to properly consider such evidence (IX 1695-1701). Before the jury, Carroll testified to substantially the same facts, except that she added that Walter bought two pieces of candy and ate them in the store prior to the robbery (IX 1701-1734).

The second aspect of the state's case-in-chief which is relevant to the issues presented in this appeal is the several statements of the appellant. Those statements, which are attached hereto as Appendices 2A-2E, were all found to be freely and voluntarily made by the trial court. The appellant's statements are summarized herein in chronological order.

On February 16, 1985, Robert Blecha [Blecha], Special Agent for the Kansas Bureau of Investigation, interviewed the appellant at the appellant's request. The appellant admitted involvement in both the Carroll shooting/robbery and the Reeder murder/robbery; the appellant, however, implicated Walter as the triggerman in both incidents. The appellant claimed Walter shot Reeder, then pointed the gun at Remeta, causing him to drop some beer, when Remeta would not open the till. The appellant also stated they took less than fifty dollars ($50.00); he did not account for the bubble gum on the counter (IX 1734-1740). [See Appendix 2A].

On April 25, 1985, Robin McDonald [McDonald], a reporter from the Witchita Eagle Beacon newspaper, interviewed the appellant at the appellant's request. The appellant stated that on February 8, 1985, he and his companions robbed a service station/convenience store in Ocala, Florida. The appellant

stated they needed money and that he was the only person who planned the robbery. The appellant also admitted sole possession of a .357 magnum revolver at the time of the Reeder murder, a gun he obtained from Lisa Dunn's father by falsely misrepresenting to Lisa Dunn that he would pawn it. When questioned as to why he killed Reeder, the appellant offered several alternative explanations, all of which he specifically related as his reasons for killing Reeder; those explanations included that Remeta "just liked to kill people" and that he "just didn't care" (VIII 1384-1392). [See Appendix 2B].

On April 26, 1985, Julia Rockler Tillery [Tillery], a television news reporter in Witchita, Kansas, interviewed the appellant upon the appellant's consent. The appellant stated that he was aware that the clerk in the Ocala robbery had died. When asked who killed the clerk, the appellant stated that if Lisa Dunn was not involved, he could confess to whatever he did; the appellant further stated

> . . .like Florida, they ain't got no witnesses. Anytime I seen a witness, I took him out, or at least shot him.

The appellant, speaking of the Carroll shooting/robbery, then admitted he did not succeed in killing Carroll. The appellant again stated his intent to eliminate witnesses (X 1779-1792). [See Appendix 2C].

On May 29, 1985, State Attorney's Office Investigator King interviewed the appellant after an advice of rights and waiver thereof. King stated that at first the appellant said he murdered Reeder; King then stated that sometime later the

appellant changed his story and implicated Walter as the triggerman and that Walter acted at the appellant's direction. A tape of that interview was made which indicated that the appellant was motivated by his need for money; that he shot Reeder; that the appellant expressed reluctance to say who dropped the beer; that thereafter the appellant changed his story (VIII 1494-1539). [See Appendix 2D].

Lastly, videotaped portions of the appellant's testimony in another court proceeding were presented. In that other proceeding, the appellant testified that he was the person with the gun and shooting it while at the Bud Roesch Farm in Kansas and that he originally told Lisa Dunn to get the gun for him so that he could pawn it (IX 1654-1656). [On rebuttal, additional portions of the appellant's videotaped testimony were presented; therein, the appellant stated Walter did not have the gun while at the Bud Roesch Farm and he recanted earlier statements that Walter was responsible therefor (X 1884-1888)]. [See Appendix 2E].

DEFENSE CASE

As part of his defense, the appellant called three Kansas law enforcement officers in an attempt to prove that Walter possessed the Reeder murder weapon while in Kansas (X 1808-1865). To that end, it was the appellant who interrogated these witnesses as to the shoot-out at the Bud Roesch Farm that resulted from a pursuit of the appellant and his companions as suspects in "a couple of homicides" (X 1851).

On surrebuttal, the appellant recalled one officer to

restate that Walter did the shooting at the Bud Roesch Farm (X 1892-1894).

PENALTY PHASE - STATE'S CASE

Through the testimony of Kansas law enforcement officials and the introduction of court records into evidence, the appellant's prior convictions for other capital felonies or felonies involving the use or threat of violence were established. On May 13, 1985, the appellant was convicted and sentenced in Thomas County, Kansas, in connection with his pleas of guilty to two counts of first degree murder, two counts of aggravated kidnapping, one count of aggravated robbery, one count of aggravated battery on a police officer and one count of aggravated battery. These convictions related to a February 13, 1985 incident wherein Thomas County Sheriff Ben Albright was shot twice by the appellant - once in the chest, once in the arm - when Albright tried to stop the appellant and his companions in connection with certain crimes committed in Gove County, Kansas, earlier that day. The appellant and his companions fled to nearby Levant, Kansas, where the appellant robbed Glen Moore of his truck, shot a civilian, Maurice Christie, then kidnapped Moore and Rick Schroeder from a grain elevator to use as hostages. Upon running into a police roadblock, the appellant turned in a different direction, forced his two hostages out of the stolen truck, told them to lay face down in the road and shot them both point blank in the back of the head and in the back, killing both Moore and Schroeder. Soon thereafter, the appellant and his companions were chased down, which lead to the shoot-out

at the Bud Roesch Farm (XI 2076-2082, 2092-2103).

On July 3, 1985, the appellant was convicted and sentenced in Gove County, Kansas, in connection with his pleas of guilty to the crimes of first degree murder and aggravated robbery. These convictions related to the February 13, 1985 robbery and murder of Larry McFarland, a twenty-seven year old store clerk, at a Stuckey's restaurant off Interstate 70 in Grainfield, Kansas (XI 2070-2075, 2083-2091).

Also, it was stipulated that the bullet that killed Larry McFarland and a bullet injuring Sheriff Ben Albright were fired from the same Smith and Wesson .357 revolver which killed Mehrle Reeder (XI 2082-2083).

Finally, additional portions of the videotaped interview of the appellant by reporter Tillery were presented. Therein, the appellant admitted shooting Sheriff Albright; he also admitted "execut[ing]" his two hostages so that they would not cause "trouble" if a shoot-out occurred, killing them by ordering them to lay on the ground, going up to them, aiming the gun and shooting them (XI 2105-2111).

PENALTY PHASE - DEFENSE CASE

The appellant presented several witnesses, inter alia, Dr. Harry Krop, a licensed clinical psychologist and an expert in his field, to testify regarding various statutory and non-statutory mitigating factors. Dr. Krop described his investigation into this case and listed, several mitigating circumstances which, in his opinion, applied to the appellant, e.g., brain damage resulting from a forceps delivery as a child, an impaired self-

image due to teasing regarding loss of teeth as a child and due to discrimination against his partial Indian heritage (XI 2148-2151). Regarding the "forcep baby" evidence, however, Dr. Krop did not testify as to whether the appellant actually suffered brain damage, only that studies show that measurable brain damage can occur (XI 2138-2139). On cross-examination, Dr. Krop opined that the appellant was neither legally insane nor psychotic at the time he murdered Mehrle Reeder (XI 2152). Moreover, Dr. Krop specifically stated that only one statutory mitigating factor, age, was applicable to the appellant (XI 2153-2154).

The appellant also presented Eva Puffer, a social worker acquainted with the appellant's family while they lived in Traverse City, Michigan. Puffer testified that she never saw any signs of physical abuse of the appellant (XI 2165). Moreover, she could only speculate as to the appellant being discriminated against as she never personally observed the appellant so treated (XI 2166). Basically, Puffer's conclusion was that society failed the appellant (XI 2166-2170).

SUMMARY OF ARGUMENT

In his appeal of his conviction for first degree murder and the sentence of death imposed thereon, the appellant raises three challenges to the guilt phase of his trial, four challenges to the sentencing phase and, lastly, he challenges the trial court's imposition of statutory court costs. None of the appellant's contentions merit relief.

Regarding the challenges to the guilt phase, this Court will first conclude that the trial court was correct when it did not inquire of the appellant about his decision not to testify. No error occurred because the trial court is not duty-bound, nor should it be, to inquire of a defendant's choice not to testify; the appellant has not proven his case that the current rule of law should be changed. Nor did the trial court err when it admitted evidence of the appellant's subsequent conduct in the State of Texas. The similar fact evidence offered by the state was properly admitted regardless of its importance to the state's case; said evidence was relevant to prove the appellant's possession of the murder weapon and his modus operandi as well as to contradict his statements implicating his now deceased co-defendant. Lastly, the trial court properly conducted two brief portions of the trial in the appellant's absence as the appellant could and did knowingly, voluntarily and intelligently waive his presence.

Regarding the appellant's attacks on his death sentence, this Court will conclude that the appellant's sentence of death was constitutionally imposed. The appellant lacks standing to

raise some of his challenges as to this Court's application of the death penalty. His primary argument - that this Court's inconsistent rulings in various capital cases renders Florida's death penalty statutes unconstitutional as applied - is defective; his arguments rest on misinterpretations of this Court's prior decisions and they fail to address specifically three of the four aggravating circumstances upon which the appellant's death sentence was imposed. Also, his claim that his sentence of death could not be imposed because the jury was not instructed on statutory aggravating circumstances during the guilt phase is entirely spurious in light of his conceding the facial validity of Florida's death penalty statutes. Finally, the trial court properly found four statutory aggravating circumstances to apply to this case. These findings should be upheld as they are supported by substantial, if not overwhelming, evidence. The trial court's ultimate conclusion that the aggravating factors "far outweighed" any mitigating factors and the trial court's imposition of a sentence of death against the appellant should be affirmed.

In reviewing the facts of this case, this Court will be convinced that the appellant's unabated and murderous rampage across this country, his witness-elimination motive in murdering the store clerk he robbed, and his cold-blooded execution of that store clerk are factors which warrant the imposition of the supreme penalty. The appellant, the murderer of Mehrle Reeder, should receive a sentence of death. The appellee respectfully suggests that this Court will agree and will affirm the

appellant's conviction and sentence of death.

ARGUMENT

POINT ONE

THE TRIAL COURT PROPERLY ALLOWED THE APPELLANT THE OPPORTUNITY TO PRESENT HIS DEFENSE WITHOUT JUDICIAL INQUIRY INTO HIS DECISION NOT TO TESTIFY.

The appellant argues that the trial court committed reversible error when it permitted him and his trial counsel to rest their case without inquiring of the appellant, personally and on the record, about whether he was freely, voluntarily and intelligently waiving his right to testify. The appellant premises this claim of error on a suggestion that the right to testify is a constitutionally guaranteed right and that the trial court is duty-bound to inquire as to a waiver thereof. The appellant claims authority for this position under Florida and federal constitutional law.

Preliminarily, this Court should note that in the absence of express decisional authority from the United States Supreme Court, there is a split of authority as to whether the right to testify is a constitutionally protected federal right. Compare, Wright v. Estelle, 549 F.2d 971 (5th Cir. 1977), aff'd on rehearing, 572 F.2d 1071 (5th Cir. 1978) and United States v. Systems Architects, Inc., 757 F.2d 373 (1st Cir. 1985) with United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984) and Hollenbeck v. Estelle, 672 F.2d 451 (5th Cir. 1982). As in Wright, assuming that there is such a constitutionally guaranteed federal right to testify, the existence of such a right in no way implicates a trial court's duty to secure an affirmative waiver thereof when a defendant chooses not to take the stand. The

weakness in the appellant's position is apparent; he cites no controlling authority therefor. Federal case law actually holds to the contrary, ruling that the trial court has no duty to inquire regarding a defendant's right to testify. Systems Architects, Inc., supra at 375 ["While the due process clause of the Fifth Amendment may be understood to grant the accused the right to testify, the "if" and "when" of whether the accused will testify is primarily a matter of trial strategy to be decided between the defendant and his attorney."]; United States v. Janoe, 720 F.2d 1156 (10th Cir. 1983) [there is no constitutional or statutory mandate that a trial court inquire into a defendant's decision not to testify]. Even in a Fifth Circuit Court of Appeal case finding that the right to testify is guaranteed by federal constitutional law, a trial court's inquiry into a defendant's decision not to testify was not mandated, but only "a model of appropriate judicial concern...." Hollenbeck, supra at 452.

The appellant tries to substantiate his federal claim on several grounds, all of which are distinguishible. First, the appellant cites a string of due process cases and claims they establish "the right of affected persons to testify." [Appellant's Initial Brief, page 15 and cases therein cited]. The appellee distinguishes these cases on the basis that they hold that procedural due process requires granting an opportunity to be heard prior to a deprivation of liberty or of a vested right; the right to testify may be included within the scope of the right to be heard, but the former is certainly not

coincidental with the latter. In any event, it is certainly true in this case that the appellant was given an ample opportunity to be heard.

The appellant also cites Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), the case which incorporated the Sixth Amendment right to compulsory process into the Fourteenth Amendment to the Constitution of the United States, as support for his claim of a federally guaranteed right to testify. While there is dicta in that case to indicate that the right to testify is secured by due process, this authority does not mandate that a trial court inquire as to a defendant's waiver of that right.

The appellant also argues that this federal claim is also grounded in his right to free speech. This claim is entirely bankrupt, however, as the appellant does not even allege that any law or rule of court was used to infringe upon his First Amendment right to free speech or that there was otherwise some state action which infringed upon that right. Moreover, the First Amendment to the Constitution of the United States has never been construed to require the judicial branch of the state to prompt an accused to speak at his trial.

The appellant also attempts to analogize this argument to several cases where he claims federal constitutional law requires that a trial court inquire as to be a defendant's waiver of different rights. Again, all of these cases are distinguishible. In Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966), the United States Supreme Court held

that a defendant's agreement to a "prima facie" trial, wherein he would not cross-examine state witnesses, was the functional equivalent of a plea of guilty; therefore, the trial court was required to inquire as to whether the defendant waived his right to a regular trial knowingly, voluntarily and intelligently. See, Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the Supreme Court held that it was error for a trial court to appoint counsel after a knowing waiver of the right to counsel. In Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the Supreme Court did not rule a trial court must personally secure a waiver of instructions on lesser included offenses from a defendant; Beck held that a state statute depriving a defendant of an instruction on a lesser crime was unconstitutional. Although there is case law to support the position that a trial court must secure a knowing, voluntary and intelligent waiver of the rights to a trial, trial by jury or the assistance of counsel, e.g., Boykin, supra, and Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed.2d 854 (1930), those cases are distinguishible from the case sub judice. Those cases involve waivers of rights which directly relate to the adversary nature of criminal proceedings. Although a right to testify must be exercised in the context of a trial, a waiver of that right does not nullify the "adversariness" of that trial.

The appellant reiterates these same arguments under the equivalent provisions of the Florida Constitution, specifically Article 1, §§4,9,16 and 22. The appellant also cites state case

law that he claims imposes higher and more stringent standards of judicial conduct in capital cases, again concluding that a trial court has a burden of securing an affirmative waiver of a defendant's right to testify.

As to these identical state claims, the appellee asserts that the appellant's arguments have previously been rejected. The appellee cites Cutter v. State, 460 So.3d 538 (Fla. 2nd DCA 1984), which specifically rejects People v. Curtis, 681 P.2d 504 (Colo. 1984), a case heavily relied upon by the appellant. Cutter held that a state trial court has no duty to inquire regarding a defendant's waiver of his right to testify. See also, Hyer v. State, 462 So.2d 448 (Fla. 2nd DCA 1984) and Furr v. State, 464 So.2d 693 (Fla. 2nd DCA 1985) [capital felony where life sentence imposed]. Furthermore, the appellant's analogy to Harris v. State, 438 So.2d 787 (Fla. 1983), and Jones v. State, 484 So.2d 577 (Fla. 1986), is clearly inappropriate. Although those cases hold that a defendant, not his counsel, must personally waive his right to an instruction on a lesser offense, those cases do not impose a duty on the trial court to seek such a waiver. Rather, the general rule is that the trial court must instruct on all appropriate lesser offenses, leaving the defendant in a positon of having to step forward to announce his waiver.

The appellant also suggests his position that a trial court is duty-bound to inquire regarding waivers of the right to testify is supported on policy grounds. The appellant suggests that issues such as this can be "laid to rest", thereby reducing

avenues of collateral attack. [Appellant's Initial Brief, page 18]. While counsel's attitude for social concern appears enlightened, this court should share the appellee's skepticism of that argument. The appellee doubts that such issues can be resolved on direct appeal. This claim, which bears more than a faint resemblance to a claim of ineffective assistance of counsel, can always be refashioned by future counsel into a factually sufficient collateral attack on ineffectiveness grounds. Even if the appellant's argument was to be accepted purely on policy grounds, the appellant has certainly not proven that such ad hoc judicial rulemaking should be applied retroactively. Clearly, however, there is countervailing policy against the appellant's position. To require a trial court to inquire as to such waivers would ultimately thrust the trial judge into the role of arbiter of defense strategy and not that of a neutral magistrate. Moreover, requiring such an inquiry in order to forclose future ineffectiveness claims is hardly economic in the judicial sense; in effect, the trial court would be conducting two trials at once - one for the defendant's guilt and one for counsel's effectiveness. Such a policy is an impermissible obstacle to a defendant's right to a fair and unfettered trial as to the sole issue of his guilt or innocence.

Finally, after assuming that he has demonstrated error, the appellant contends that such error was not harmless. Such a contention, however, is based on sheer speculation. There is no record evidence to show what the appellant might have testified to on his own behalf; the appellant could have confessed.

Therefore, it is impossible to demonstrate if or to what extent the jury's verdict would have been affected. Under these circumstances, if the trial court committed error by failing to secure a proper waiver from the appellant of his right to testify, clearly the record would only support a finding of harmless error. Wright, supra. Since, however, there is no duty on the trial court to inquire as to a defendant's waiver of his right to testify, there is no error. Therefore, the appellant's argument on this issue should be rejected.

POINT TWO

THE TRIAL COURT PROPERLY ADMITTED SIMILAR FACT EVIDENCE DURING THE GUILT PHASE OF APPELLANT'S TRIAL AS IT WAS RELEVANT TO PROVE IDENTITY; SAID EVIDENCE WAS ADMISSIBLE AS ITS PROBATIVE VALUE OUTWEIGHED ANY UNDUE PREJUDICE, ETC., ARISING DURING THE PENALTY PHASE.

The appellant also argues that the trial court erred in admitting the testimony of Camillia Carroll regarding the robbery/kidnapping/attempted murder of her by the appellant. The appellant challenges the trial court's ruling on two related grounds. First, the appellant asserts that Carroll's testimony was inadmissible under section 90.404(2), Florida Statutes (1985), as her testimony was not relevant to prove any material fact and tended only to prove bad character or propensity. However, his only specific challenge to this evidence was that since the issue of identity was proven by his own statements, there was no necessity to introduce Williams Rule evidence; consequently, the admission of said evidence was error. Williams v. State, 110 So.2d 654 (Fla. 1959). Second, the appellant asserts that the evidence in question was inadmissible under section 90.403, Florida Statutes (1985), as its probative value was outweighed by several countervailing factors recognized by the rules of evidence. The appellant, however, specifically claims that any unfair prejudice arose only during the penalty phase.

The appellant's arguments, however, are based on substantial misrepresentations of the evidence in the record. The appellant ardently maintains that the jury was erroneously permitted to

hear numerous witnesses testify regarding the appellant's crime spree in Kansas. He fails to admit, however, that it was he who presented this evidence during the guilt phase in an effort to demonstrate it was Walter, and not he, who possessed the Reeder murder weapon during the shoot-out in Kansas (IX 1594-1612, 1623-1624) (X 1808-1865). Since it was the appellant who opened the door to his criminal activity in Kansas, he should not now be heard to claim error. Toole v. State, 479 So.2d 731 (Fla. 1985). The appellant also describes Carroll's testimony as cumulative. In analyzing the evidence presented by the state, Carroll's testimony can not be cumulative to evidence regarding the appellant's prior convictions for capital felonies and felonies involving violence in Kansas as each was introduced to prove different material facts at separate stages of the trial; the former was offered to prove the appellant's possession of the murder weapon while the latter was offered to prove a statutory aggravating circumstance. Furthermore, the appellant does not make it clear that Carroll's testimony was presented only during the guilt phase, that the jury was instructed twice as to the proper method to evaluate Williams Rule evidence in determining guilt, and that there was no evidence or argument regarding Carroll's testimony or the incident in Texas during the penalty phase.

The appellant's Williams Rule argument is totally without merit. This Court has consistently held that the relevancy, not the necessity, of the evidence in question is the proper standard in determining the admissibility thereof. Ruffin v. State, 397

So.2d 277 (Fla. 1981); Oats v. State, 446 So.2d 90 (Fla. 1984); see also, Ferguson v. State, 417 So.2d 631 (Fla. 1982) and Ashley v. State, 265 So.2d 685 (Fla. 1972) [both holding Williams Rule evidence properly admitted even though state introduced evidence of defendant's confession]. This argument should be rejected.

There is also case law authority to suggest that this evidence would be admissible based on its relevancy alone without regard to section 90.404(2), Florida Stautes (1985). It must be noted that the appellant made several statements regarding his involvement in the Tenneco robbery/murder; in two of those statements he claimed that Walter had been the triggerman in both the Ocala and the Texas crimes (IX 1737-1740). Since Walter had been conveniently killed in the Kansas shoot-out, the state was faced with the very real possibility that the appellant would try to implicate Walter at trial. Therefore, the trial court properly admitted Carroll's testimony that the appellant was the triggerman in the Texas robbery; such testimony was necessary to explain or contravert a relevant statement made by the appellant. Waterhouse v. State, 429 So.2d 301 (Fla. 1983).

Although the issue is not contested by the appellant, the appellee maintains that the Williams Rule evidence - Carroll's testimony and the stipulations of fact indicating she was shot with the same gun which killed Reeder - was properly admitted as evidence of identity. §90.404(2), Fla. Stat. (1985). The evidence in question was relevant to the disputed issue of appellant's possession of the Reeder murder weapon at a time proximate to the Ocala murder. O'Connell v. State, 480 So.2d

1284 (Fla. 1985) [admission of Williams Rule evidence demonstrating connection of defendant to murder weapon upheld]; Ruffin, supra [admission of Williams Rule evidence demonstrating connection of defendant to murder weapon through the theft of a weapon stolen from an officer shot by defendant upheld]; Ferguson, supra [admission of Williams Rule evidence demonstrating defendant's possession of weapon upheld]. Ashley, supra [admission of Williams Rule evidence demonstrating that defendant committed four murders hours prior to alleged murder by use of same gun upheld].

The evidence in question was also sufficiently similar to the circumstances of the Ocala murder to constitute modus operandi evidence of identity. The appellee asserts that these two crimes share a particular uniqueness. Both crimes involved the robbery of a gas station/convenience store; both stores were located near interstate highways; both stores only had one clerk on duty; both robberies involved the purchase of small packages of candy as a ruse to have the clerk open the cash register; both crimes were committed within two days of each other; and both crimes were facilitated with the use of the same gun. What is more proof of the shared uniqueness of these crimes is that they were committed hundreds of miles apart - a distance to be covered in two days of automobile travel - yet the same gun was used in each crime; the only reasonable and logical inference is that these similar crimes were committed by the same person traveling cross-country. That person, according to Carroll, the surviving robbery victim, was the appellant. The appellee

maintains this second position as an additional basis to uphold the trial court's admission of Carroll's testimony. Williams, supra; see also, Chandler v. State, 442 So.2d 171 (Fla. 1983) [explanation regarding passage of time between alleged and collateral crimes relevant to determining similarity of offenses].

Any dissimilarity between the Ocala murder and the collateral crimes in Texas can be reasonably attributed to a difference in the opportunities presented to the appellant and not a difference in modus operandi. Chandler, supra. Therefore, the following dissimilarities do not render as error the trial court's ruling admitting said evidence. The age and sex of the clerk as well as the time of day the crimes occurred are attributable to circumstance in light of the reasonable inference that the appellant was traveling cross-county on the interstate highway system. Also, the kidnapping of Carroll is attributable to the appellant's desire to avoid detection from people inhabiting the houses directly behind the Mobile station; such a concern was not necessary to the appellant when he committed the Ocala robbery under cover of darkness.

As to the appellant's second claim, the appellee would ask this Court to note that the decision to admit evidence based on its relevancy is one for the trial court; its decision should not be reversed absent an abuse of discretion. Blanco v. State, 452 So.2d 520 (Fla. 1984). The appellant has only made the naked allegation that this evidence was irrelevant and unduly prejudical. On the other hand, the appellee has amply

demonstrated the substantial relevance of Carroll's testimony. The appellee asserts that no abuse of discretion has been shown. To dispose of the appellant's claim, the appellee cites Randolph v. State, 463 So.2d 186 (Fla. 1984), which holds that the admission of evidence relevant to an issue in the guilt phase of a capital trial will not be held as error based on a claim of possible prejudice in the penalty phase. The appellant's argument ignores the very basis of a bifurcated trial, the separation of the issue of guilt from the issue of the jury's advisory sentence; therefore, this argument should be rejected.

Even if this argument were to be examined, this Court would find it without merit. Under section 90.403, Florida Statutes (1985), the decision to exclude evidence based on a claim of unfair prejudice is one for the trial court; as before, the appellant has failed to demonstrate any abuse of discretion. In the face of the substantial relevance of this evidence, the appellant has failed to demonstrate that any countervailing factor(s) outweighed the probative value of the evidence in question. As previously stated, Carroll's testimony was not cumulative to the state's evidence of the appellant's convictions for crimes in Kansas; each was introduced to prove a different material fact. See, Black's Law Dictionary, 343 (5th Ed. 1979). Nor could the evidence of the Texas crimes be considered as causing a confusion of issues, thereby misleading the jury. Carroll's testimony was admitted during the guilt phase of the trial and the jury was twice instructed on how to consider such evidence (IX 1701) (XI 2003). The appellant can not presume such

an instruction was ignored. At most, the appellant fantasizes that he has suffered prejudice. It is rather unlikely that on the eleventh day of court proceedings - the day of the penalty phase proceeding - the jury was overwhelmed by testimony it heard six days earlier. The appellee adamantly disputes the appellant's contention that Carroll's testimony was "a raw appeal to juror emotion" which infected the penalty phase proceeding and unfairly prejudiced his defense therein. [Appellant's Initial Brief, page 21-22]. When compared to the appellant's unabated brutality as evidenced by his crimes in Kansas, the Texas incident seems almost insignificant. The appellee asserts that there was no undue prejudice from Carroll's testimony, therefore the trial court's admission thereof could not have been error.

Finally, it is interesting to note that the appellant tries to argue that the admission of Carroll's testimony caused undue prejudice as it amounted to prosecutorial overkill. As mentioned earlier, the appellee posits that the introduction of the appellant's statements actually necessitated the introduction of Carroll's testimony. Carroll's testimony was relevant to the state's case to show that the appellant lied when he tried to pin the Texas crimes on Walter after Walter had died; this evidence leads to the logical inference that the appellant also lied when he tried to blame the Reeder murder on Walter. The trial court properly admitted Carroll's testimony as it was relevant to disprove an anticipated defense. For this reason, as well as the numerous aforementioned reasons, the trial court properly admitted Carroll's testimony and the related stipulations of

fact; therefore, the appellant's arguments on this issue should be rejected.

POINT THREE

THE TRIAL COURT PROPERLY CONDUCTED PORTIONS OF THE TRIAL IN THE APPELLANT'S ABSENCE AS THE APPELLANT VALIDLY WAIVED HIS PRESENCE.

As a preliminary matter, the appellee addresses the appellant's cursory final argument that a defendant on trial in a capital case is incapable of waiving his presence during critical stages of the proceedings. This Court has specifically rejected that argument, holding that a defendant may waive his right to be present at any given stage of his trial on capital charges. Peede v. State, 474 So.2d 808 (Fla. 1985) [see footnote, page 814, specifically rejecting Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified on rehearing, 706 F.2d 311 (11th Cir. 1983)]; also, Muehleman v. State, 12 F.L.W. 39 (Fla. January 8, 1987). The appellee also urges this Court to note that neither the Florida nor the federal rules of procedure distinguish capital from non-capital cases in providing when and how a defendant may waive his right to be present. Fla. R. Crim. P. 3.180(a),(b); Fed. R. Crim. P. 43(a),(b) To accept the appellant's argument would be to accept the illogical and nonsensical conclusion that although a defendant in a capital case may plead guilty, thereby waiving his right to an entire trial, he can not voluntarily waive his presence at just a stage of that trial.

Also as a preliminary matter, it is important to note that while the examining, challenging, impanelling and swearing of the jury are critical stages of the trial requiring the defendant's presence, this Court has held that the excusal of prospective

jurors is not a critical stage of the proceedings requiring the defendant's presence. Fla. R. Crim. P. 3.180; North v. State, 65 So.2d 77 (Fla. 1953), aff'd, 346 U.S. 932, 74 S.Ct. 376, 98 L.Ed. 423 (1954). Since the excusal of jurors in this case occurred after the commencement of the trial itself, the appellee will assume arguendo that the appellant's first absence occurred during a critical stage of the proceedings. The appellee, however, urges this Court to consider this issue.

As to the appellee's argument on this issue, precedent states that the appellant could have validly waived his right to be present during a portion of voir dire and while his mother testified during the penalty phase of the trial. The question which remains is whether the appellant's presence was validly waived. In discussing the validity of a defendant's waiver of his presence at a jury view, this court has recently held that a defendant's waiver of his presence will be upheld if it is found to be a knowing, voluntary and intelligent waiver. Amazon v. State, 487 So.2d 8 (Fla. 1986). In Amazon, this court also held that counsel may waive his client's presence

> provided that the client, subsequent to the waiver, ratifies the waiver either by examination by the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver. [emphasis supplied].

supra, at 11. See also, State v. Melendez, 244 So.2d 137 (Fla. 1971) [non-capital case]. Clearly, the holding in Amazon applies to the case sub judice as both jury selection and a jury view are classified similarly under Florida Rule of Criminal Procedure

3.180(a)(4),(7).

In examining the appellant's first waiver of his presence, this Court should first note that the appellant predicates his claim of error only on the trial court's failure to obtain an express waiver by the appellant subsequent to his counsel's waiver. Amazon, supra, however, specifically permitted a second form of ratification - a waiver by acquiescence with actual or constructive knowledge of the rights waived. In Amazon, this Court specifically upheld this latter form of ratification because it was shown that the defendant was advised by counsel of his right to be present and he authorizied his attorneys to waive his presence; this Court concluded that such a waiver was knowing, voluntary and intelligent, and therefore valid. The statements of appellant's trial counsel clearly indicate that the appellant conferred with counsel prior to the waiver and authorized the waiver of his presence at the outset of voir dire (I 11-12). Therefore, the appellant's subsequent acquiescence to this procedure satisfied the rule established in Amazon. Moreover, the appellant's

> obvious participation in this waiver represents more than the mere acquiescence in and knowledge of counsel's request which has been found sufficient in Amazon v. State [citation omitted] and State v. Melendez [citation omitted].

Muehleman, supra at 41. The appellant's waiver of his presence in this first instance should be deemed valid.

The appellant also claims that the trial court erred by propounding to the venire certain questions he did not

anticipate, thereby exceeding the scope of his waiver of his presence. The appellee asserts that this claim has no factual basis. The record plainly shows that trial counsel, speaking on the appellant's behalf, waived the appellant's presence during the entirety of the trial court's inquiry; the representations of trial counsel indicate that the appellant was waiving his presence until such time as the parties were to address the jury (I 10-11). The appellee's position is supported by the fact that at no time during the trial court's inquiry did counsel object to any of the trial court's questions of the venire, thereby indicating that such questions were contemplated by the appellant and his counsel.

Even if the trial court did exceed the scope of the appellant's waiver, or even if there was no valid waiver under Amazon, supra, or Muehleman, supra, there is still no reversible error present. In claiming that his absence during a portion of voir dire was reversible error, the appellant relies on Francis v. State, 413 So.2d 1175 (Fla. 1982); Francis, however, is distinguishible and provides no basis for relief. In Francis, this Court held that a defendant's involuntary absence during the exercise of peremptory challenges is reversible error. In this case, however, the appellant has never alleged, either at trial or on appeal, that his absence was involuntary. See also, Herzog v. State, 439 So.2d 1372 (Fla. 1983) [voluntariness found based on defense counsel's statements]. Moreover, the appellant was not absent during the exercise of peremptory challenges by his counsel, only during limited questioning of the venire by the

trial court. Regardless of the appellant's presence, the trial court would still have been required to qualify the venire as it did. §§40.01, 40.013, Fla. Stat. (1985). The harmless error rule does apply to this issue. Francis, supra; Garcia v. State, 492 So.2d 360 (Fla. 1986). The appellee asserts that if error is present, it is highly unlikely that the absence thereof would have affected the outcome of this trial. Garcia, supra [absence at pre-trial conference wherein legal issues discussed not prejudicial].

As to whether the appellant validly waived his right to be present during the testimony of his mother, the record plainly demonstrates that the trial court contemporaneously inquired of the appellant and obtained an express waiver of the appellant's presence (XI 2117-2119). Appellant's trial counsel had represented that the appellant desired to leave the courtroom during his mother's testimony because it would avoid both the appellant and his mother from becoming too emotional (XI 2117-2118). The trial court then inquired and found that the appellant had requested such a temporary absence (XI 2118). Upon its return, the jury was instructed that the appellant was absent temporarily and at his own request (XI 2119). The appellee posits that the appellant's waiver was knowingly and voluntarily made. Peede, supra; Amazon, supra; Muehleman, supra; see also, Hooper v. State, 476 So.2d 1253 (Fla. 1985). This Court should rule this second waiver valid. As it has been shown that appellant could and did validly waive his presence on both occasions, the appellee urges this court to reject his arguments

on this point.

POINT FOUR

SECTIONS 775.082(1) AND 921.141, FLORIDA STATUTES (1985) ARE CONSTITUTIONAL AS THIS COURT HAS LOGICALLY AND LEGALLY ENFORCED SAID STATUTES.

The appellant next raises a novel challenge to the constitutionality of sections 775.082(1) and 921.141, Florida Statutes (1985), Florida's death penalty statutes. Acknowledging Proffitt v. Florida, 428 U.S. 242, 96 S.Ct.2960, 49 L.Ed.2d 913 (1976), he concedes that Florida's death penalty statutes are facially constitutional. Since he can not now claim that the Florida Legislature has grievously erred in enacting said statutes, the appellant now claims that this Court has grievously erred in enforcing them. The appellant suggests that this Court's body of decisional law regarding the death penalty demonstrates a pattern of inconsistent application of the death penalty statutes, rendering those statutes unconstitutional as applied. The appellant also claims that Florida's death penalty can never be constitutionally applied because this Court does not review cases where a person who is convicted of first degree murder receives a life sentence. He also draws the same conclusion from this Court's practice to review the trial court's findings regarding mitigating circumstances based on an abuse of discretion standard. The appellant's argument's are legally and logically defective and this claim should be rejected.

The appellant's claims bear more than a faint resemblance to the personal opinions espoused by Neil Skene in his law review article "Review of Capital Cases: Does the Florida Supreme Court

Know What It's Doing?" Stetson Law Review (1986). The appellee maintains that said critique has no authoritative value whatsoever. The appellant misapprehends the law when he concludes that this Court's consistency in applying its own decisional law is paramount. The appellee respectfully submits that this Court's analysis of its own decisional law is only a vehicle - the means, and not the ends - by which this Court can review each sentence of death on a case-by-case basis. An individual review of each death sentence is bound to produce some variance in decisional law. The appellee submits that such a variance is attributable to the uniqueness of each case and does not demonstrate an arbitrary and capricious imposition of Florida's death penalty statutes.

The appellant's sentence of death is based on the trial court's finding that four statutory aggravating circumstances existed: prior convictions for capital felonies or felonies involving the use or threat of violence to another person; capital felony while in the commission of a robbery; capital felony for the purpose of avoiding or preventing a lawful arrest; and capital felony being a homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (XIV 2548-2551). §921.141(5)(b),(d),(e),(i), Fla. Stat. (1985). The appellant generally charges that eight of nine statutory aggravating circumstances are vague, subjective and unrestrictive, resulting in this Court's inconsistent enforcement and an unconstitutional application of Florida's death penalty statutes. However, the

appellant only discusses three aggravating circumstances which he claims have been inconsistently applied: capital felony being especially heinous, atrocious or cruel; capital felony being a homicide committed in a cold, calculated and premediated manner, etc.; and the defendant knowingly creating a great risk of death to many persons. Since only the second aggravating circumstance was found to exist in this case, this Court need only consider the appellant's arguments on that issue.

To challenge the constitutionality of Florida's death penalty statutes as applied to him, the appellant must show that in his instance the death penalty was imposed in an arbitrary and capricious manner. The appellant claims that certain decisional law regarding two aggravating circumstances - heinous, atrocious and cruel and knowingly creating a great risk of death to many persons - demonstrates that this Court has inconsistently and unconstitutionally applied those aggravating factors in other cases. Since those aggravating circumstances were not found by the trial court to apply in the appellant's case, ipso facto, this Court can not unconstitutionally apply them against the appellant. Simply stated, the appellant has no standing to challenge the constitutionality of those portions of Florida's death penalty statutes as he was not affected thereby. Clark v. State, 443 So.2d 973 (Fla. 1983) [footnote 2].

The appellant only specifically challenges one of the four aggravating factors found to apply to him, i.e. that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. He cites

Caruthers v. State, 465 So.2d 496 (Fla. 1985), D. Johnson v. State, 465 So.2d 499 (Fla. 1985), and Provenzano v. State, 11 F.L.W. 541 (Fla. October 16, 1986), and claims that these decisions indicate a disparity in interpreting the meaning of this aggravating factor. The appellee urges this Court to note that with regard to this aggravating circumstance, the appellant does not claim that said factor has been disparately applied to him. His only contention is that there is contraditory language in certain decisions of this court. Caruthers and Provenzano, he claims, hold that this aggravating circumstance focuses on the manner of the killing while D. Johnson rules that this circumstance relates to the defendant's state of mind. The appellee disagrees. A close reading of Provenzano indicates that both the manner of the killing and the defendant's intent are considered and that neither portion of this aggravating circumstance is mutually exclusive of the other. The manner of the killing is an issue related to the facts while the defendant's intent, i.e. heightened premeditation, is a conclusion to be drawn therefrom; the former indicates the latter. Furthermore, the differences in the facts of Caruthers and D. Johnson, as well as this Court's differing rulings on the appropriateness of the respective sentences of death, prove that this Court has not ruled inconsistently in similar cases.

Since the appellant does not specifically claim that the other three aggravating circumstances underlying his death sentence have been misapplied by this court in prior cases, the appellee will only briefly comment on them. Subsections (b) and

(d) of section 921.141 - prior convictions for capital felonies and felonies involving violence and capital felony while in the commission of a robbery - are specific and well-defined aggravating circumstances. They are generally evident from the briefest summary of the facts of any case to which they apply. The appellee maintains that these aggravating circumstances are not susceptible to misinterpretation and have not been misinterpreted by this Court. The appellee asserts that the trial court's findings as to both of these aggravating circumstances are supported by the evidence, therefore these aggravating circumstances have not been unconstitutionally applied to the appellant. As to subsection (e), the aggravating circumstance of a capital felony committed to avoid a lawful arrest, this Court has consistently interpreted this circumstance to apply to only one instance where a police officer is not a murder victim, i.e. the elimination of a witness. Riley v. State, 366 So.2d 19 (Fla. 1978). The evidence supporting the finding of this aggravating circumstance is discussed below in point five. Based thereon, this Court will find that this final aggravating circumstance is supported by evidence in the record, and therefore it was not unconstitutionally applied to the appellant. See, Peavy v. State, 442 So.2d 200 (Fla. 1983).

The appellant also claims that this Court can never constitutionally apply Florida's death penalty statutes because it does not review first degree murder cases where a sentence of life imprisonment is imposed. The appellant assumes that a comparative review of such cases would reveal a disparity in the

application the death penalty, with more serious cases receiving only a sentence of life imprisonment. Since there is no demonstration to that effect in the record of this case, the appellant's contention must be dismissed as pure speculation. This court has previously held that such a review is not constitutionally required. Dobbert v. State, 375 So.2d 1069 (Fla. 1979). Even if the appellant's premise was accepted, the ramifications of such a position are not as the appellant suggests. If the constitutional application of Florida's death penalty statutes rests on a comparative review of all cases where a death sentence is potentially applicable, this Court would be forced to step into the confines of grand jury rooms across the State of Florida, invading their secrecy and monitoring grand jury deliberations. Having already conceded the facial validity of Florida's death penalty, the appellant can not now challenge the authority of a duly empowered grand jury to accuse someone of first degree murder. Rather than speculating when the death penalty should be applied based on cases where the issue is not presented, this Court should review those cases where a sentence of death has been imposed and decide the issues presented, namely, whether such a sentence can be constitutionally applied under the facts of that case.

Therefore, the appellee asserts that a review of a "spectrum" of cases where the death penalty is a possible penalty is not necessary to achieve a constitutional application of Florida's death penalty statutes. Assuming that this Court's decisional law was limited to just those cases where a sentence

of death has been executed, Florida's death penalty statutes could still be constitutionally applied. Using those cases as a polestar, this Court would be able to decide whether the case under review rises to that level which has been previously accepted as a constitutional application of the death penalty. This position is supported by the undeniable force of logic: those cases where a sentence of death has been executed must be conclusively accepted as a constitutional application of the death penalty; cases compared thereto and found to be simiarly constitutional will further define the limits of the constitutional application of the death penalty; such analysis leads to greater precision in the application of the death penalty, not, as the appellant claims, greater inconsistency. This Court, of course, has always maintained it conducted such analysis.

Finally, contrary to the appellant's position, plenary review of a trial court's findings regarding mitigating circumstances is not necessary to achieve a constitutional application of Florida's death penalty statutes. Plenary review of findings regarding aggravating circumstances is necessary to insure that the death penalty was legally considered as a possible penalty in any given case. However, plenary review of mitigating circumstances would invade the weighing process delegated to the jury and to the trial court. Lucas v. State, 376 So.2d 1149 (Fla. 1979); Hargrave v. State, 336 So.2d 1 (Fla. 1978). Consideration of evidence of mitigating circumstances is directly tied to assessments of credibility and demeanor not

available to this court on the basis of a cold record. See, Johnston v. State, 497 So.2d 863 (Fla. 1986) [depth of weighing process utilized by trial court]. Besides, the appellant can not show how plenary review would advance his case. The trial court did find numerous mitigating circumstances to exist, but discounted their relative weight when compared to appellant's nine prior convictions for capital felonies or felonies involving violence, as well as three other aggravating circumstances. Lastly, the appellant's analogy to "appellate" review of the voluntariness of a confession, citing Miller v. Fenton, U.S.____, 106 S.Ct. 445, ____ L.Ed.2d ____ (1985), is incorrect. Miller does not deal with the process of appellate review; rather it involves the extent of factual inquiry permitted by federal rules on habeas corpus petitions from state convictions.

Therefore, the appellee asserts that in attacking the constitutionality of Florida's death penalty statutes as applied to him, the appellant challenges portions of those statutes for which he has no standing and relies on illogical and unsubstantiated legal analysis. Contrary to the appellant's view, this Court is not lost in the wilderness of capital punishment constitutional law; with its prior decisions as its compass, this Court can chart a clear course to apply Florida's death penalty statutes logically, faithfully and constitutionally. Therefore, the appellant's claims on this issue should be rejected and the imposition of his sentence of death should be affirmed as constitutional.

POINT FIVE

THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING A LAWFUL ARREST.

One of the aggravating circumstances found by the trial court was that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. §921.141 (5)(e), Fla. Stat. (1985). This finding of the trial court was based upon the appellant's own statements and similar fact evidence; the trial court concluded therefrom that the appellant's dominant motive for murdering Reeder was to eliminate Reeder as a witness (XIV 2549-2550). The appellant contests this finding as insufficient, claiming that there was much conflicting evidence regarding the appellant's motive for murdering Reeder. The evidence, however, clearly supports this finding of the trial court.

In order to sustain a finding for this particular aggravating circumstance in a case where the murder victim is not a police officer, the state must establish by "strong evidence" that the sole or dominant motive for the murder is the elimination of a witness. Riley, supra at 22; Clark, supra.

The appellant first claims the evidence of his motive was insufficient because his statements were conflicting as to the exact motive for the murder. The appellant's claim that Reeder was killed as part of the game "Dungeons and Dragons" is not proven by the record. While the appellant did make a statement to that effect during his interview with Tillery, the existence of said statement does not ipso facto make it credible. The appellant originally road-tested that excuse in his interview

with McDonald (IX 1389-1392) (X 1790-1792). McDonald testified that the appellant offered several lame excuses for his conduct; McDonald testified that her distinct impression was that the appellant was fabricating the "Dungeons and Dragons" story (IX 1389-1391).

> The fact that appellant gave several inconsistent statements... before trial does not preclude the use of those and other statements as evidence of aggravating circumstances where they bear indicia of reliability.

D. Johnson v. State, supra at 506.

The appellant also contends that the evidence of this aggravating circumstance is insufficient because he never admitted shooting Reeder. This argument is patently incorrect as he did admit to shooting Reeder in his interviews with McDonald and King, as well as in his interview by Tillery (IX 1387-1390, 1502-1503, 1518) (X 1789-1792). Significantly, the appellant did state to Tillery

> Anytime I seen a witness, I took him out, or a least I shot him. (X 1789). [emphasis supplied].

Obviously, in referring to a "him", the appellant must have been referring to Reeder, a male, in addition to Carroll, a female. Lastly, the appellant's statement that Walter shot Reeder because the appellant believed that Reeder was shooting at them is not credible; it must be noted that that statement was made by the appellant after he refused to tell King who dropped the beer, thereafter changing his story (IX 1503). The appellee suggests that this second version of events as related to King was

fabricated to protect whoever it was who was getting the beer, most probably Lisa Dunn.

Findings by a trial court regarding aggravating and mitigating circumstances are issues of fact; such findings should not be reversed unless there is an absence of substantial competent evidence as support therefor. Sireci v. State, 399 So.2d 964 (Fla. 1981). In determining whether certain aggravating circumstances exist, the trial court may decide which evidence is reliable, discarding evidence inconsistent therewith. L. Johnson v. State, 442 So.2d 185 (Fla. 1983). This Court should affirm this finding of the trial court as it is supported by the record. The physical, circumstantial and similar fact evidence overwhelmingly supports the trial court's finding that the appellant was the triggerman in the Reeder murder. McDonald's testimony expressing skepticism of the appellant's "Dungeons and Dragons" excuse and the appellant's admissions to Tillery that he did not want to leave any witnesses further supports the trial court's finding of witness elimination.

This Court has previously and repeatedly held that a defendant's own statements may form the basis for a finding that the sole or dominant motive for the murder was the elimination of a witness. Kokal v. State, 492 So.2d 1317 (Fla. 1986) [statement that "dead men can't talk" sufficient for finding of this aggravating circumstance]; D. Johnson, supra [statement that victim "was going to send me back" sufficient]; Herring v. State, 446 So.2d 1049 (Fla. 1984); Oats, supra; Clark, supra [statement

to cellmate that victim "could identify him" sufficient]; L. Johnson, supra [statement "dead witnesses don't talk" sufficient]; Pope v. State, 441 So.2d 1073 (Fla. 1983).

This Court has also repeatedly held that the circumstances of the crime or evidence of a similar crime may support a finding for witness-elimination. Herring, supra [shooting convenience store clerk once while clerk was standing behind counter and again after clerk had fallen to floor sufficient for finding of this aggravating circumstance]; Oats, supra [similar fact evidence and related confession sufficient]; Pope, supra; Vaught v. State, 410 So.2d 147 (Fla. 1982) [victim's announcment that he knew perpetrator was defendant; victim shot five times - four times after he fell to floor - sufficient].

The evidence in this case strongly indicates that the dominant motive for the murder of Reeder was "witness-elimination". After stating to Tillery that the motive of witness-elimination "had a lot to do with a lot of things I did," the appellant's arguments on this issue are incredible and unpersuavive (X 1790). Based upon Riley, supra, and the arguments and other authorities above, the appellant's arguments on this point should be rejected.

POINT SIX

THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, ETC.;SAID AGGRAVATING CIRCUMSTANCE DID NOT CONSTITUTE AN IMPERMISSIBLE DOUBLING WITH THE AGGRAVATING CIRCUMSTANCE OF CAPITAL FELONY COMMITTED FOR THE PURPOSE OF AVOIDING A LAWFUL ARREST.

The appellant's next claim is that there is insufficient evidence to establish the aggravating circumstance of a capital felony committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. §921.141(5)(i), Fla. Stat. (1985). He contends that this aggravating circumstance can only be sustained by evidence of the appellant's intent; he disputes that any such intent was proven as the evidence indicated either that he was not actually the triggerman or that he did not plan to murder the clerk in advance of the robbery or that he gave alternative explanations of his motive for murdering Reeder. The appellant also contends that if this aggravating circumstance was properly found to exist, it constitutes an impermissible doubling with the aggravating circumstance of a capital felony for the purpose of avoiding a lawful arrest, i.e. witness-elimination; he insists that a duplication exists as both aggravating circumstances focus on the appellant's intent.

As to the sufficiency of the evidence supporting the aggravating factor of cold, calculated and premeditated manner, et al., the appellee has previously posited that said factor does not exclusively relate to the intent of the murderer. Rather,

evidence of both the manner and method of the killing as well as the killer's intent may be used to support a finding hereof. Caruthers, supra; Provenzano, supra. Both are related in that the latter is inferential of the former - the method evidences the motive. While the appellee can not change the language in D. Johnson, supra, - a quote which is the beginning and the end of the appellant's argument - the appellee submits that the interpretation advanced by the appellant does not square with the unambiguous language of section 921.141(5)(i);

> The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The latter phrase "without any pretense..." most certainly relates to the perpetrator's intent, but it can not be denied that the first portion of this aggravating factor relates to the manner in which murder was committed. Therefore, the appellee's interpretation is correct as it gives effect to the language of the law in its entirety.

There is ample evidence in this case to support the trial court's finding as to this aggravating circumstance. The evidence proves that the manner of the murder was cold, calculated and premeditated and that the appellant's intent lacked any moral or legal justification. The appellant's arguments to the contrary belie the record. His claim that the evidence did not prove he was the triggerman ignores the overwhelming evidence that he was the sole possessor of the Reeder murder weapon from the time he fraudulently obtained it

from Lisa Dunn through the time it was recovered nearest to him after the shoot-out in Kansas; the appellant's statements to McDonald, Tillery and King wherein he insistently and consistently maintained he was the triggerman also disprove the appellant's claim. As to whether the trial court's conclusion that the appellant intended to kill the Tenneco clerk before he executed the robbery is supported by the record, the appellee maintains that such a conclusion is inescapable (XIV 2550). The appellant admitted to McDonald and King that he planned the robbery in advance; the appellant was armed as he walked into the store; the robbery and murder occurred within minutes, showing no hesitation in killing Reeder; finally, the appellant even admitted his motive to eliminate any witnesses. Moreover, while the appellant's alternative explanations of his motive to McDonald create a conflict as to witness-elimination as a motive, his admissions that he "just like to kill people" or that he "had a screwed up attitude" or that he "just didn't care" certainly indicates that the appellant's murder of Reeder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (VIII 1392).

The trial court's finding that this aggravating circumstance applies to this case is sustained by the record. The fact that the appellant shot Reeder twice in the chest - once as he was falling down - then walked around the counter to execute Reeder with two coup de grace shots to the head area plainly demonstrates that this murder was cold and calculated in the extreme. The circumstances of this crime also evidence the

appellant's heightened premeditation. Considering the manner in which the murder was committed together with the appellant's heightened premeditation, this Court should affirm the trial court's finding of this aggravating circumstance. Parker v. State, 476 So.2d 134 (Fla. 1985) [victim stabbed in stomach then shot "execution style" after falling to ground sufficient to establish this aggravating circumstance]; Squires v. State, 450 So.2d 208 (Fla. 1984) [four coup de grace pistol shots to the victim's head sufficient]; Herring, supra, [second shot after victim had fallen to floor sufficient to show heightened premeditation].

As to the appellant's cursory doubling argument, a closer analysis of the "doubling" concept reveals that in this case the cold, calculated and premeditated aggravating factor is not duplicative of the aggravating circumstance of capital felony to avoid lawful arrest. A doubling of aggravating factors occurs when two individual aggravating circumstances are based on the "same aspect" or "feature" of the crime or of the criminal's character. Provence v. State, 337 So.2d 783 (Fla. 1976); Vaught, supra; Agan v. State, 445 So.2d 326 (Fla. 1983). However, a doubling will not be found in certain circumstances. First,

> [t]here is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravating factors are themselves separate and distinct and not merely restatements of each other ....

Echols v. State, 484 So.2d 568, 575 (Fla. 1985).

Conversely,

> [w]hile there may well be some overlap on ... two [aggravating circumstances], it is not a complete doubling [if] ... [s]ufficient distinct facts support ... both ... aggravating circumstances.

Suarez v. State, 481 So.2d 1201, 1209 (Fla. 1985).

In determining whether there is an impermissible doubling, this Court may examine the record as well as the order of the trial court. See, Echols, supra, and Hill v. State, 422 So.2d 816 (Fla. 1982).

The aggravating circumstances of cold, calculated and premeditated and murder to avoid a lawful arrest do not substantially overlap. While the aggravating factor of cold, calculated and premeditated applies to contract or execution-style murders, that classification is not meant to be all-inclusive. McCray v. State, 416 So.2d 804 (Fla. 1982). Execution-style murders can be sufficiently distinguished from, and therefore should not be confused with, witness-elimination murders; a murder which is cold and calculated in its manner is distinguishable from a perpetrator's intent to eliminate a witness. Moreover, there are separate and distinct facts to support each aggravating circumstance. The appellant's first two shots to Reeder's chest, each of which could have been fatal, demonstrate the appellant's intent to eliminate a witness; the appellant walking around the counter and plugging Reeder twice more in the head area are cold-blooded execution-style acts which evidence heightened premeditation. The facts supporting these two aggravating circumstances are different and the circumstances themselves do not overlap. Under this analysis, it is evident

that there is no impermissible doubling. Furthermore, the following cases all support the appellee's position that no doubling is present, as in the cases cited both of these aggravating circumstances were upheld: Herring, supra [convenience store robbery/murder]; Burr v. State, 466 So.2d 1051 (Fla. 1985) [convenience store robbery/murder]; Clark, supra.

*****

With regard to points five and six, the appellee alternatively argues that a new sentencing determination by the trial judge would not be required if this Court finds that the trial court impermissibly relied upon an aggravating circumstance. As this Court held in Hargrave, supra at 5-6.

> this Court supplies the channeled discretion and deliberation necessary to avert the constitutional deficiencies condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)....[T]he [Florida death penalty] statute does not comprehend a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum. It requires a weighing of those circumstances.

This Court has also held that even if a trial court does improperly rely on an aggravating circumstance

> [a]ppellant's contention that this error requires that the death sentence be vacated, however, does not necessarily follow. The error can be harmless if it does not interfere with the weighing process in which the judge is required to engage.

Vaught, supra at 150-151. The appellee submits that applying a harmless error test in this instance is not only constitutionally permissible but clearly appropriate. Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

In its order delineating its findings regarding aggravating and mitigating circumstances, the trial court found four aggravating circumstances to exist: prior convictions for capital felonies or felonies involving violence [three first degree murders plus two aggravated kidnappings plus two aggravated robberies plus two aggravated batteries for a total of nine relevant prior convictions]; capital felony committed while the appellant was engaged in a robbery; capital felony committed for the purpose of avoiding a lawful arrest; and capital felony committed in a cold, calculated and premeditated manner, etc.. The trial court also found one statutory and three non-statutory mitigating circumstances:

> a. That DANIEL EUGENE REMETA had a mental age of approximately thirteen years. Florida Statute 921.141(5)(g).
>
> Dr. Kropp testified to his opinion of DANIEL EUGENE REMETA's mental age as of the time of the murder of Merhle Reeder.
>
> b. That DANIEL EUGENE REMETA had a deprived childhood, was raised in an unstable, poverty stricken home atmosphere by alcoholic parents and was abused as a child.
>
> c. That DANIEL EUGENE REMETA was of low average to average intelligence and was subject to discrimination because of his race, being American Indian, and his speech impediment.
>
> d. That DANIEL EUGENE REMETA is a long term substance abuser who was institutionalized from age thirteen due to delinquent and criminal

> behavior.
>
> Dr. Kropp, as well as other witnesses, presented evidence of DANIEL EUGENE REMETA'S childhood, home environment, and social acceptance. Dr. Kropp testified as to DANIEL EUGENE REMETA'S psychological makeup. It should be noted that Dr. Kropp stated that DANIEL EUGENE REMETA was not insane, appreciated the nature of his acts, and had in fact admitted to Dr. Kropp that he in fact killed Merhle Reeder.

(XIV 2548-2551). The trial court concluded that "the aggravating circumstances far outweigh[ed] the mitigating circumstances so that the only appropriate sentence in this cause is death" (XIV 2551). [emphasis supplied].

The finding of an inappropriate aggravating factor would be harmless under the facts of this case as it did not interfere with the trial court's weighing of the relative unimportance of the mitigating circumstances. In light of the appellant's prior convictions, including three other murders, the appellee asserts that that this circumstance alone "far outweigh[s]" the totality of the mitigating factors. See, Stano v. State, 460 So.2d 890 (Fla. 1984). The appellee respectfully suggests that the trial court's reliance on an improper aggravating factor would not have affected its imposition of a sentence of death. The appellee would request affirmance as any improper consideration of an aggravating circumstance would be harmless. Hargrave, supra, and Vaught, supra [sentences of death affirmed as improper doubling ruled harmless].

POINT SEVEN

THE DEATH PENALTY WAS NOT IMPOSED AGAINST THE APPELLANT IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND TO DUE PROCESS AS THE CRITERIA ENUMERATED IN SECTION 921.141(5), FLORIDA STATUTES (1985) ARE SENTENCING CRITERIA NOT WARRANTING INSTRUCTION TO THE JURY DURING THE GUILT PHASE.

The appellant's last attack upon his sentence of death is so convoluted that it is difficult for the appellee to address it in any logical manner. Essentially, the appellant's premise is that the aggravating circumstances enumerated in section 921.141(5), Florida Statutes (1985) are actually essential elements of the crime of "capital first degree murder" as defined by section 782.04(1)(a), Florida Statutes (1985). From that premise, he hypothesizes that since the jury was not instructed on these aggravating circumstances, they did not return a verdict of guilty for "capital first degree murder". In light of this "verdict", the appellant concludes that the imposition of a sentence of death would violate his rights to a jury trial and to due process as the jury did not consider any aggravating circumstances in rendering its verdict.

There are so many gaping holes in this argument that this Court should deem it utterly without merit. It totally disregards the Florida Legislature's inherent power to define certain conduct as a crime, to classify such conduct by its degree of severity and to affix an appropriate punishment therefor. The appellant's claim,

> The term "capital crime" is but a convenient label, placing form over substance.

is advanced without any authority to dispute the aforementioned legislative power. [Appellant's Initial Brief, page 43]. Moreover, the appellant should be estopped from raising such an argument as he has already conceded the facial validity of Florida's capital sentencing procedure, a procedure that does not require that the jury be instructed regarding aggravating circumstances during the guilt phase of the trial. See, Proffitt v. Florida, supra.

To begin, the appellee would point out that there is no such crime in the State of Florida as "capital first degree murder". The crime of first degree murder is defined and proscribed in section 782.04(1)(a). That crime is therein classified as a capital felony and the alternative sanctions of life imprisonment without parole eligibility for twenty-five years or death are prescribed in section 775.082(1), Florida Statutes (1985). The appellant misinterprets section 775.082(1) in claiming that former alternative is "the only sanction necessarily available." Under section 775.082(1), the alternative penalties of life imprisonment or death are mutually exclusive; therefore, to the extent that one of the two alternatives must be selected by the trial judge, the alternative actually chosen is the only one necessarily available. The only legal way to impose either one of those two alternative sentences is to employ the sentencing procedures mandated in sections 775.082(1) and 782.04(1)(b), Florida Statutes (1985) and described in section

921.141, Florida Statutes (1985).

The appellant's attempt to graft statutory aggravating criteria onto the definiton of first degree murder is logically unsound. For example, the appellant suggests

> Without at least one of these statutory elements being present the death penalty cannot be imposed. These elements thus define the crime for which the death penalty may be imposed.

[Appellant's Initial Brief, page 44]. The appellee asserts that in light of the statutory scheme previously discussed, the appellant's conclusions are patently wrong; the elements of first degree murder are always the same, but the statutory sentencing criteria define when the death penalty may be imposed for that crime.

The bottom line of the appellant's argument is that after he concedes the facial validity of Florida's death penalty statutes, he wants to bastardize the enlightened concept of a bifurcated trial in a capital case. The very basis of bifurcation is to separate the issue of guilt of the crime of first degree murder from the issue of the appropriate sentence. Instructing the jury as to aggravating circumstances during the guilt phase totally confuses those two issues. It also leads to unintended consequences, consequences that the appellant would have to concede would be detrimental to his case.

The appellee assumes arguendo that the statutory aggravating circumstances are elements of the crime that the jury should consider in rendering its verdict. If the jury must consider those aggravating circumstances in rendering its verdict, ipso

facto, it must do so upon evidence. Therefore, under the appellant's argument, the state now has the burden of proving during the guilt phase of the trial that, for example, a defendant was under a sentence of imprisonment, on parole, or had previous convictions for other capital felonies or felonies involving the use or threat of violence to another person. Furthermore, if the state must prove during the guilt phase of the trial that statutory aggravating circumstances exist, the appellee claims that the state is entitled to the relaxed rules of admissibility authorizied under section 921.141(1). The state would then be allowed to bring in any relevant evidence about how heinous, atrocious and cruel or how cold, calculated and premeditated the murder was. If the jury returns a verdict finding that such aggravating circumstances exist, why not just dispense with a review of mitigating factors and make a sentence of death automatic? Clearly, none of the forgoing ramifications of the appellant's arguments are acceptable as they would deprive a defendant of "an informed, focused, guided and objective inquiry into the question whether he should be sentenced to death." Proffitt v. Florida, supra at 96 S.Ct. 2970.

The appellee also asserts that this Court has implicitly rejected the appellant's argument in its decisions holding that aggravating circumstances need not be alleged in the indictment or included in a bill of particulars. e.g., Sireci, supra; Tafero v. State, 403 So.2d 355 (Fla. 1981); Medina v. State, 466 So.2d 1046 (Fla. 1985); Dufour v. State, 495 So.2d 154 (Fla. 1986); Johnston, supra. If aggravating circumstances need not be

alleged in the indictment, they can not be elements of the crime of first degree murder and the jury need not be instructed on them.

The appellee asserts that in enacting section 921.141, the Florida Legislature was enumerating sentencing considerations which need not be considered by a jury during a trial on the issue of guilt. Therefore, the appellant was not deprived of due process or of any right to a trial by jury. See, McMillan v. Pennsylvania, 477 U.S. ___, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), citing Spaziano v. Florida, 468 U.S. ____, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). These sentencing considerations are the very essence of a separate penalty phase proceeding. The law is well settled that this scheme is constitutional, therefore, the appellant's arguments on this issue should be rejected.

POINT EIGHT

THE APPELLANT HAS NOT PRESERVED FOR APPELLATE REVIEW THE ISSUE OF THE TRIAL COURT'S ASSESSMENT OF STATUTORY COURT COSTS.

Under section 27.3455, Florida Statutes (1985), a trial court is required to assess statutory court costs; however, if the defendant is indigent, a trial court is required to impose community service. Appellate review of a trial court's failure to impose community service in lieu of costs is not preserved if the defendant does not request the court to review his indigency status. Slaughter v. State, 493 So.2d 1109 (Fla. 1st DCA 1986). The appellant made no such motion below, therefore he has not preserved said issue for review by this Court.

Alternatively, the appellee would ask this Court to note that in addition to the sentence of death imposed in this case the appellant is serving several life sentences in Kansas and will not be eligible for parole on those sentences for another 150 years (XI 2074, 2081). Therefore, the issues of the trial court's failure to impose community service in lieu of costs or of the denial of gain-time for failure to pay the costs imposed are issues controlled by the longstanding doctrine of de minimus non curat lex.

CONCLUSION

Based upon the arguments and authorities discussed herein, the appellee respectfully prays that the appellant's conviction for first degree murder and the sentence of death imposed thereon by the trial court be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief of appellee has been furnished by mail to: Larry B. Henderson, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, on this 10th day of February, 1987.

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