IN THE SUPREME COURT OF FLORIDA

JASON DIRK WALTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 69,389

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

/sas

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITES:

STATEMENT OF THE CASE AND FACTS

The appellee, the State of Florida, accepts the statements of the case and facts as set forth in the initial brief of the appellant with such corrections or additions as set forth in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

As to Issue I: Appellant's claim predicated upon Booth v. Maryland is clearly procedurally barred where no objection was offered to the trial court. Alternatively, the evidence offered by the state concerning the effects of the crime upon a victim (the 8-year-old child who was present during the crimes) is not the type of evidence proscribed by the United States Supreme Court in Booth dealing with testimony of the victims' family. Also, the statements made by one of the victim's parents, if improperly heard, was harmless error where "victim impact" evidence was not weighed in the process of determining the proper sentence to be imposed upon appellant.

As to Issue II: Where defense counsel injected remorse as a possible non-statutory mitigating circumstance, the state was correctly permitted to rebut or negate this circumstance by evidence of "lack of remorse". Inasmuch as lack of remorse was not considered as an aggravating circumstance or in enhancement of a proper statutory aggravating circumstance, there was no error by the admission of this evidence.

As to Issue III: Where a capital defendant attempts to show that he has no significant history of prior criminal activity, the state is permitted to introduce evidence which negates this mitigating circumstance. The precedent of this Honorable Court reveals that prior convictions are not necessary to negate the mitigating circumstance and, therefore, the state was permitted to introduce appellant's confession and other testimony indicating that he had a history of dealing in drugs.

As to Issue IV: Appellant's contention that the prosecutor made prejudicial comments during closing argument is not preserved for appellate review. Although he objected to one comment, appellant failed to object to the other complained-of comment and made no requests for curative instructions or motions for mistrial. In any event, the prosecutor drew permissible inferences from facts which were in evidence and he permissibly commented on the dearth of mitigating evidence as compared to the abundant evidence of aggravation.

As to Issue V: Failure to object to the jury instructions as given after having an opportunity to do so precludes appellate relief as to the validity of those instructions. In any event, the instructions when taken as a whole demonstrate that the burden of proving aggravating circumstances beyond a reasonable doubt was placed upon the state and not shifted to appellant.

As to Issue VI: The trial court properly applied Florida Statute §921.141 when imposing the three death sentences upon appellant. The evidence submitted justified the rejection of the statutory mitigating circumstance of no significant prior criminal history. The record of the instant case does not reveal that the trial court failed to consider the non-statutory mitigating evidence submitted by appellant. The record also supports the trial court's finding of the following aggravating circumstances: (1) avoidance of lawful arrest; (2) especially heinous, atrocious or cruel; and (3) cold, calculated and premeditated. These aggravating circumstances were all proved beyond a reasonable doubt.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY PERMITTING INTRODUCTION OF EVIDENCE BY THE STATE CONCERNING THE IMPACT OF THE CRIMES UPON A VICTIM, CHRIS FRIDELLA, AND UPON THE SURVIVING PARENTS OF STEPHEN FRIDELLA.

As his first point on appeal, appellant contends that the precepts of Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2527, 96 L.Ed.2d 440 (1987), were violated where evidence concerning the impact of appellant's crimes upon a surviving victim and upon the parents of a deceased victim was offered by the state. Your appellee submits that the dictates of Booth v. Maryland were not violated and, therefore, appellant is entitled to no relief on this point. However, before proceeding with the discussion of the Booth claim on its merits, your appellee also submits that an objection as to the introduction of "victim impact" evidence could have been offered at trial and the failure to do so results in a procedural bar to appellate relief.

This Honorable Court has had the recent occasion to consider a claim such as presented in the instant case. In Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988), this Court ordered that supplemental briefs be submitted concerning the Booth issue. This Court noted that, "The state correctly points out that appellant made no objection, whereas in Booth there was an objection to such evidence." 13 F.L.W. at 131. Your appellee respectfully submits in the instant case that no objection was made as to the introduction of any of the "victim impact"

evidence. In finding a procedural bar in Grossman, this Court observed that victim impact is not one of the aggravating factors enumerated in our capital sentencing statute upon which a death sentence may be predicated, citing Blair v. State, 406 So.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); and Riley v. State, 366 So.2d 19 (Fla. 1978). Thus, a criminal defendant should object to evidence of a non-statutory aggravating factor and, consequently, this Court held that in the absence of a timely objection to the use of "victim impact" evidence, a defendant is procedurally barred from claiming relief under Booth. On this basis alone, appellant is entitled to no relief on this point. See also Thompson v. Lynaugh, 821 F.2d 1080 (5th Cir. 1987). However, even if the merits of this point were considered by this Honorable Court, appellant would be entitled to no relief.

A. Penalty Proceeding Before The Jury

Appellant contends that because testimony was adduced from Doctor Pearson, a psychiatrist, concerning evaluations conducted on Chris Fridella after the homicides, and because argument was offered by the prosecutor concerning the effects of the crimes committed by the appellant upon Chris Fridella, the jury was impermissibly urged to weigh this "victim impact" evidence during their deliberations. In so contending, appellant ignores the significant distinction between the victim impact evidence offered to the sentencing jury in Booth and the offer of evidence

concerning the impact of a crime upon a victim as in the instant case. Testimony was adduced by the state, and reinforced by defense counsel on cross-examination, that appellant ordered that Chris Fridella be placed in the bathroom so that he would not witness the events concerning the robbery (R.665, 684). Testimony was also offered that appellant stated that he didn't want any harm to come to the child (R.580). Certainly the jury could have considered this concern for the welfare of 8-year-old Chris Fridella as a "circumstance of the offense", a valid non-statutory mitigating circumstance. There appears to be no prohibition as to the state rebutting this mitigating circumstance by offering evidence as to the psychological and emotional distress inflicted upon a youthful victim of the offenses committed by appellant. The "victim impact" evidence presented by the state concerning Chris Fridella is not the type of evidence proscribed by the United States Supreme Court in Booth. This evidence concerned the effect of the crime upon a victim who was actually present during the atrocities and was not the type of "victim impact" evidence denounced by the United States Supreme Court, to wit: assertions by a deceased victim's family members concerning their feelings about the crime and their opinions concerning the appropriate sentence for the defendant. Your appellee submits, therefore, that the introduction of the testimony concerning the emotional distress suffered by Chris Fridella was admissible for consideration by jury and judge in the instant case. However, even should this

Honorable Court deem this type of testimony inadmissible, the error in admitting this evidence was harmless beyond a reasonable doubt. Harmless error will be discussed immediately below.

B. Sentencing Before The Trial Court

At the sentencing hearing before the trial court, the parents of victim Stephen Fridella testified (R.875-876). Your appellee concedes that the statements offered by the Fridellas was the type of testimony denounced by the Court in Booth. However, this does not end the inquiry. In Booth v. Maryland, the United States Supreme Court noted that the State of Maryland statutorily required a pre-sentence report in all felony cases, including capital cases. That pre-sentence report had to include a "victim impact statement" describing the effect of the crime on the victim and it's family. Booth v. Maryland, 96 L.Ed.2d at 445-446, n.2. Unlike the State of Maryland, the State of Florida has no statute which mandates consideration of "victim impact statements" as a proper aggravating factor. The Court in Booth was concerned with a state's statute which required consideration of factors other than the defendant's record, characteristics and circumstances of the crime committed. We are not concerned with such a state's statute sub judice. In the instant case, any evidence or statements by the prosecutor concerning the effect of the murder on the victim's family were mere surplusage and was not considered by the trial court when the court weighed the valid aggravating factors enumerated in the statute with all

mitigating evidence. Inasmuch as any "victim impact" evidence or statements by the prosecutor played no part in the weighing of aggravating and mitigating circumstances, the trial court did not improperly focus upon unacceptable aggravating factors. This case, therefore, is squarely on point with the decision of this Honorable Court in Grossman, supra. In Grossman, this Court held:

> . . . First, under section 921.141, the sentencing judge's consideration of aggravating circumstances on which a death penalty may be based is limited to those enumerated in the statute. The statute does not include impact of the murder on the family as an aggravating circumstance. The judge is required to set out in writing for appellate review the findings on which the death sentence is based. The written findings here show that there was no reliance, or even a hint of reliance, (footnote omitted) on the evidence introduced regarding the impact of the murder on the next of kin. (footnote omitted). Second, the trial judge found four aggravating circumstances, all of which are valid, and no mitigating circumstances. The balance in favor of imposing the death sentence is overwhelming. In view of this balance and the fact that the jury recommended death, the trial judge's actual discretion here was relatively narrow. Third, for the purposes of appellate review, the case is analogous to those cases where we affirmed death sentences based on valid aggravating circumstances and no mitigation even though the sentencing judge has found and relied on invalid aggravating circumstances. . . .

Grossman, 13 F.L.W. at 132-133. For the purposes of any harmless error analysis in the instant case, it is clear that the same reasons advanced by this Court in Grossman are equally applicable to the case at bar. Here, the written order of the trial court setting forth the reasons for imposition of the death penalty

contains no reference to any of the "victim impact" evidence. Here, as in Grossman, the trial court found four aggravating circumstances and no mitigating circumstances. Lastly, even if it could be successfully argued that the trial court considered the "victim impact" evidence as a non-statutory aggravating circumstance, this Court observed in Grossman in footnote 9 "that judges are routinely exposed to inadmissible or irrelevant evidence but are disciplined by the demands of the office to block out information which is not relevant to the matter at hand." See also Harris v. Rivera, 454 U.S. 339, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981) (judges are capable of disregarding that which should be disregarded). If it was error in admitting any victim impact evidence in the instant case, that error is harmless beyond a reasonable doubt where the trial court's order does not indicate that he improperly weighed the victim impact evidence in assessing whether to impose the death penalty.

Based upon the procedural default which has occurred in this case by the failure to object to the introduction of evidence concerning a non-statutory aggravating circumstance, and based upon the clearly harmless nature of the victim impact evidence in this case, appellant's first point must fail.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY PERMITTING EVIDENCE CONCERNING APPELLANT'S "LACK OF REMORSE".

Appellant next contends that the trial court erroneously permitted the state to inject evidence of appellant's "lack of remorse" in both the penalty proceedings before the jury and in the sentencing proceedings before the trial judge. In support of his position, appellant relies on this Honorable Court's decision in Pope v. State, 441 So.2d 1073 (Fla. 1983). In Pope, this Honorable Court determined that lack of remorse may not be considered as an aggravating circumstance or in enhancement of a proper statutory aggravating circumstance. Appellant's reliance upon Pope is misplaced where, in the instant case, lack of remorse was not considered by the jury or the trial judge as an aggravating circumstance or as a factor in enhancement of a proper statutory aggravating circumstance.

Initially, your appellee submits that appellant's basic premise, to wit: the state introduced the subject of remorse as a sentencing consideration, is totally belied by the record. No evidence was adduced by the state concerning lack of remorse until after that subject had been opened by direct examination of defense witnesses. On direct examination of the initial defense witness, Kimberly Johnson, defense counsel inquired whether the witness was able to observe the appellant both before and after the murders were committed (R.748). Defense counsel then asked the witness, "What if any changes did you notice in him after

June 18, 1982?" (R.748). Ms. Johnson replied that appellant was quieter and he didn't talk to her quite as much (R.749). On cross-examination, the prosecutor reiterated the question posed by defense counsel concerning any change after the murders occurred (R.750). The prosecutor continued cross-examination along these lines and adduced from the witness that appellant expressed remorse concerning the crimes he had committed "since he has been in jail" (R.753). This testimony concerning remorse was impeached by the prosecutor by use of Ms. Johnson's testimony from appellant's previous trial. At that time, Ms. Johnson testified that appellant never admitted that he had done anything wrong (R.755). As noted by appellant in his brief at page 25, no objection was lodged as to this cross-examination. Appellant questions why no objection was made to this cross-examination as being beyond the scope of direct testimony. However, it is clear that defense counsel in his direct examination opened the door to this testimony by asking about any changes which occurred in Walton after the commission of the murders (R.748).

Appellant also questions the elicitation of testimony from the next defense witness, Lynn Shamber, concerning lack of remorse. Appellant ignores the fact that the question posed to Ms. Shamber by defense counsel was, "Okay. And what if any remorse has he shown to you about this crime?" (R.762). The witness proceeded to testify that Walton stated he regreted the incident happened and that he had made a mistake (R.762). On cross-examination, the prosecutor clarified the direct

examination by eliciting the fact that this expression of remorse occurred subsequent to the initial trial in this cause held in February, 1984 (R.764). Ms. Shamber further testified on cross-examination that the expression of remorse was only a very brief statement occurring in one short conversation subsequent to 1984 (R.764, 768). Ms. Shamber further testified that appellant never expressed any remorse up to and including the time of the initial trial in 1984 (R.764).

In rebuttal, the state called John Gray, Jr., a friend of appellant's. Mr. Gray testified that appellant stated that he admitted going to Gary Peterson's funeral (one of the three murder victims) and that he purchased Mr. Peterson's truck from Mr. Peterson's father (R.791-792). Mr. Gray testified that appellant never expressed any remorse concerning what had happened (R.792). Mr. Gray further testified that after the murders appellant lived with Robin Fridella and Chris Fridella, the ex-wife and son of Stephen Fridella (one of the murder victims) (R.792-793). Although he posed no objection to this testimony during trial, appellant now complains that this rebuttal was improper in that the rebuttal testimony did not tend to discredit defense testimony in evidence. Your appellee strongly disagrees with appellant's conclusion. The testimony as adduced at trial concerning remorse or the lack thereof was originally introduced by defense counsel. Certainly, a showing of remorse is a proper non-statutory mitigating circumstance which could be considered by the jury and the trial judge when

weighing the aggravating circumstances against the mitigating factors. Whether appellant showed remorse only after his arrest and conviction is not the relevant inquiry. Rather, whether appellant showed remorse at any time is a proper non-statutory mitigating circumstance. The evidence adduced by the state, both on cross-examination of defense witnesses and by introduction of rebuttal testimony, was admissible to rebut or negate any possibility of remorse as raised by the defense. In Agan v. State, 445 So.2d 326 (Fla. 1983), cert. denied, 469 U.S. 873, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984), this Honorable Court determined that it is permissible to consider lack of remorse to negate mitigation. This is precisely the effect of the state's evidence concerning lack of remorse in the instant case.

Most significantly, it is beyond peradventure that the jury was not instructed on "lack of remose" being an aggravating circumstance. It is also beyond dispute that in the trial court's written order in support of the death penalty no reference is made to "lack of remorse" as an aggravating circumstance. Sub judice, it is clear that the admonitions of Pope v. State, supra, were given credence in that "lack of remorse" was not considered as an aggravating circumstance or in enhancement of a proper statutory aggravating circumstance. Considering the lack of jury instructions concerning "lack of remorse" and considering the court's written order which makes no mention of "lack of remorse", no improper non-statutory aggravating circumstance was weighed when determining the proper sentence to be imposed upon appellant. Appellant's point must fail.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY PERMITTING THE STATE TO REBUT THE MITIGATING CIRCUMSTANCE OF "NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY" WITH EVIDENCE OF CRIMINAL ACTIVITY NOT RESULTING IN CONVICTION.

As this third point on appeal, appellant contends that the trial court erred by permitting the state to introduce evidence of criminal activity not resulting in conviction. Alternatively, appellant contends that if it was not error for the state to introduce this evidence, appellant was denied the equal protection of the law. For the reasons expressed below, appellant's third point must fail.

There is no question that appellant urged as a mitigating circumstance the fact that he allegedly had no significant history of prior criminal activity. At the outset of the presentation of his case, appellant introduced a "rap sheet" which showed no prior convictions but did show a prior charge of drug-related activity which was dismissed (R.746). The jury was instructed on the mitigating circumstance found in Florida Statute 921.141(6)(a), no significant history of prior criminal activity (R.858). Your appellee submits that where this mitigating circumstance was sought to be proved by the appellant the state could not be denied the right to offer evidence to rebut or negate this mitigating factor.

Appellant concedes in his brief at page 35 that "this Court has held that the sentencing judge may consider criminal activity not resulting in convictions as negating the statutory mitigating

circumstance of no significant history of prior criminal activity." Quince v. State, 414 So.2d 185 (Fla.), cert. denied, 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed.2d 155 (1982); Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979). Your appellee submits that this Honorable Court's decision in Washington, Id, is squarely on point with the situation presented sub judice. In Washington, the defendant's confession to one of the murders contained statements that the defendant had committed a series of burglaries and had sold the stolen merchandise to the murder victim. Although defense counsel in Washington argued that prior convictions are required to negate the mitigating circumstance of no significant history of prior criminal activity, this Court held that §921.141(6)(a), Florida Statutes, makes no reference to conviction and, therefore, convictions need not be shown in order to show past criminal history. Sub judice, appellant, in one of his taped confessions to the police, admitted to the detectives that he dealt in quaaludes, amphetamines and marijuana (R.824). In addition to this admission, testimony was adduced from Jeffrey McCoy, the defendant's brother, during the state's case that appellant sold drugs to all three co-defendants (i.e., McCoy, Van Royal, and Cooper) (R.682). In rebuttal, the state presented the testimony of John Soule concerning drug purchases made by Mr. Soule from appellant. Mr. Soule testified that he purchased marijuana from appellant approximately three times and paid $100 for an ounce on one occasion and $30 on each of two occasions for

quarters of an ounce (R.784-785). Mr. Soule further testified that the marijuana was unusual in that it smelled from being soaked in salt water for a long time. Prior to making the purchases from appellant, Mr. Soule observed co-defendant Cooper in possession of a 50 pound bale of marijuana which was being taken to appellant's house. Mr. Soule sampled some of that marijuana and, that same night, purchased marijuana from appellant. Mr. Soule testified that the marijuana sampled in the possession of Mr. Cooper was the same marijuana sold by appellant (R.785-786). On re-direct examination, Mr. Soule specifically testified that appellant was selling marijuana from the bale that Mr. Cooper possessed (R.788).

John Gray was recalled as a witness in rebuttal for the state and he also testified to the fact that appellant sold marijuana and did so approximately once a week (R.789-790). Mr. Gray further testified that appellant advised that the bales of marijuana which appellant was selling were obtained from the Citrus County impound and were drying out in the attic (R.790-791).

Your appellee submits that the trial court properly admitted the testimony as outlined above as permissible rebuttal to the appellant's assertion of the mitigating circumstance concerning no significant history of prior criminal activity. Appellant's contention in his brief at page 36 that the rebuttal testimony was improper impeachment of the "rap sheet" is not well taken. The state was not merely rebutting the "rap sheet" but rather was

rebutting appellant's claim that the three murders should be mitigated because of no prior significant history of criminal activity. In accordance with this Honorable Court's opinion in Washington, supra, this rebuttal was permissible to show that appellant did, indeed, have a signifcant history of prior criminal activity.

Appellant's reliance upon Robinson v. State, 487 So.2d 1040 (Fla. 1986), is misplaced. In Robinson, the state introduced evidence of two crimes which Robinson committed after the murder for which he was being tried. This Court determined that because the state was unable to rely on the subsequent crimes to prove the aggravating factor of previous conviction of a violent felony, introduction of the subsequent crimes should not be permitted to attack defense witness credibility. In the instant case, however, the evidence was offered to negative a specific mitigating circumstance offered by the defense. As in Washington, supra, this is permissible. A contrary rule would permit a capital defendant to assert with impunity that he is a law abiding citizen regardless of the fact that the defendant had a significant history of prior criminal activity. The mere absence of criminal convictions does not entitle a defendant to mitigate his commission of murders where that defendant does have a prior history of criminal activity.

Appellant alternatively contends that even if it was not error to permit the state to show prior criminal activity, the use of history, rather than convictions, of criminal activity

results in the denial of equal protection rights. Appellant opines that because only offenses for which convictions have been obtained may be scored pursuant to the sentencing guidelines, a capital defendant is accorded fewer procedural protections by the use of criminal activity which does not result in conviction. Appellant's contention is not well taken and he mixes apples with oranges. In a capital case, it is the defendant himself who seeks to mitigate a capital crime by asserting the lack of a prior criminal history. A defendant cannot be permitted on the one hand to assert this factor in mitigation and then on the other hand prevent the state from rebutting this mitigation. The state does not need to rebut this mitigating factor beyond and to the exclusion of every reasonable doubt.[1] A heavier burden is placed on the state in preparing a sentencing guidelines scoresheet and, to effect the principles of the guidelines that sentences imposed for the same type of crimes be comparable, only criminal convictions may be used for scoring purposes. This consideration is simply not of legal consequence when the state attempts to rebut mitigation offered by a capital defendant.

Inasmuch as appellant admitted his criminal activity by dealing in drugs, and inasmuch as the state is permitted to show

---

1/ Indeed, if this was the standard required of the state, convictions might be necessary to show prior criminal conduct. However, where the defendant needs only to reasonably convince the fact finder that a mitigating circumstance exists, rebuttal by the state of the mitigating circumstance need not rise to the level required of the state to, for example, prove the elements of a crime.

that a capital defendant has a significant history of prior criminal activity, the trial court did not err in admitting such evidence to negative the mitigating circumstance offered by appellant.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTOR TO MAKE PURPORTEDLY PREJUDICIAL COMMENTS DURING CLOSING ARGUMENT.

Appellant next contends that certain remarks made by the prosecutor during closing argument violated appellant's rights to a fair penalty proceeding. The prosecutor's closing argument consists of nearly 43 pages in the record (R.796-839). Appellant points to several small passages contained within the prosecutor's closing argument and opines that such statements were so egregious as to deny appellant his right to a fair penalty trial. At the outset, it is significant to note that no motion for mistrial was made by defense counsel during the prosecutor's closing argument. The only objection made was as to argument by the prosecutor concerning facts allegedly not in evidence. This specific point will be addressed below. However, at this point it is necessary to observe that not even a request for curative instructions was made by defense counsel after the purportedly prejudicial comments were made by the prosecutor. There is authority for the proposition that where improper remarks are made, the proper procedure is to object and move for a curative instruction. If the curative instructions are denied or are inadequate, a mistrial is the proper remedy. Thus, the failure to move for curative instructions should preclude appellate relief. The remarks were not so inflammatory as to deny a fair trial and, thus, a request for curative instructions should have been made. Mabery v. State, 303 So.2d 369 (Fla. 3d

DCA 1974), review denied, 312 So.2d 756 (Fla. 1975). Nevertheless, assuming arguendo that this point is preserved for appellate review absent a motion for mistrial, appellant's point must fail on the merits.

It must be remembered that a wide latitude in the closing argument to the jury is permitted. See, e.g., Thomas v. State, 326 So.2d 413 (Fla. 1975). The question to be determined is whether the prosecutor's comment was so prejudicial as to deny the defendant a fair trial. Darden v. State, 329 So.2d 287 (Fla. 1976). Only in the most egregious cases will a defect of constitutional proportion be found. Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). Specifically with respect to a penalty phase in a capital trial, this Honorable Court has held:

> . . . In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty phase trial.

Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). The comments of the prosecutor now complained-of by appellant are not so egregious as to warrant a new penalty trial. In fact, your appellee submits that the comments of the prosecutor are not objectionable.

Appellant first contends that the prosecutor commented on facts not in evidence. Appellant correctly observes that the medical examiner testified that victim Stephen Fridella would have been conscious for seconds and would have lived for a minute or two after sustaining any one of the three wounds inflicted

upon him (Appellant's Brief at p.42; R.551). Appellant complains that the prosecutor argued the following:

> . . . And I suggest there is a reason for the 30 second delay.
>
> Steve Fridella was still showing signs of life, so, after one shot to the armpit and one shot to the neck --
>
> * * *
>
> And the 30-second pause, they looked, they weren't sure he was dead and they finished him off.

(R.809-810). Based upon the testimony of the medical examiner which showed that Stephen Fridella was conscious for seconds and would have lived for a minute or two after any one of the fatal shots, the prosecutor's comment on this evidence was permissible. In Bertolotti, supra, this Court held:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence.

476 So.2d at 134. The prosecutor's comments in the instant case were certainly permissible inferences which may have been reasonably drawn from the evidence. Additionally, the inferences drawn by the prosecutor were permissible in light of the other evidence which was presented during the penalty phase of trial. During his closing argument, the prosecutor commented:

> And if you look at the pictures, you will see something else. Stephen Fridella was almost free. The other victims are completely bound, but Stephen Fridella had almost undone the tape that bound his hands in the few seconds he had once he realized what was imminent. He almost freed himself, but in the

> end he had no chance. See the suffering that was endured prior to the murders. People laying on the floor in anticipation of certain death.

(R.821-822). Thus, appellant's assertion that "the prosecutor's suggestion that Fridella was showing signs of life so they made certain of his death is either beyond the record or rank speculation" (Appellant's Brief at p.42) is belied by the evidence which was presented at the trial. The prosecutor properly drew reasonable inferences from the evidence. Equally perplexing is appellant's contention at page 43 of his brief that the prosecutorial comment discussed above may have caused the jury to find that the cold, calculated and premeditated aggravating circumstance had been proved. No argument was advanced by the prosecutor that the homicides were cold and calculated based upon the fact that Stephen Fridella was still alive and was shot again to make certain of his death. Rather, as the trial court eventually found, the cold, calculated and premeditated aggravating circumstance was predicated upon the weeks of planning and the execution style of the murders. The events supporting the cold and calculated aggravating circumstance all arose prior to any shooting (R.200). The prosecutor's comments discussed above relate to the heinous, atrocious or cruel aggravating circumstance, not the cold and calculating factor.

Appellant also complains that the prosecutor allegedly commented upon the failure to call more witnesses in mitigation. Significantly, no objection, much less a motion for

a mistrial or request for a curative instruction, was made concerning these comments. It is clear that the prosecutor was only commenting on the evidence before the jury. The prosecutor was permissibly arguing that the weight of the mitigating evidence paled in comparison to the abundant evidence of aggravation. Your appellee submits that the prosecutor's comments are not fairly susceptible of being interpreted as comment on the defendant's exercise of his right to remain silent. In any event, even if appellant had objected to the comments and moved for a mistrial, he would still be entitled to no relief. It is clear that these comments were harmless beyond a reasonable doubt when taken in the entire context of the closing argument.

Finally, appellant contends that although no objection was made to the remarks concerning the number of defense witnesses, these remarks should be considered for their cumulative effect. Appellant states that "probably the remarks were fundamental error." (Appellant's Brief at p.47) However, even if the remarks were construed as comments on the right to remain silent, these type of prosecutorial comments are not fundamental error. Clark v. State, 363 So.2d 331 (Fla. 1978). Your appellee submits, as argued above, that the now complained-of remarks of the prosecutor were not objectionable and, therefore, the "cumulative error" doctrine has no applicability in the instant case. There is no indication in the instant record that, because of the prosecutorial comments, appellant was denied a fair penalty phase trial. Appellant's point must fail.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN HIS PENALTY PHASE INSTRUCTIONS TO THE JURY.

Appellant next contends that the trial court reversibly erred in his instructions to the jury during the penalty phase trial sub judice. Your appellee will respond below to the three substantive contentions submitted by appellant in this point. However, at the outset, your appellee submits that appellant has not properly preserved this point for appellate review. Pursuant to the order entered by this Honorable Court to reconstruct the charge conference (R.888), this cause was relinquished to the trial court whereupon a stipulation was filed (R.891) and ratified by the trial court (R.892). The terms of the stipulation clearly demonstrate that the jury instructions to be given were distributed to counsel for both parties prior to the recess referred to at R.794. It is also absolutely clear that counsel for both parties were in agreement as to the instructions and no objections were made by counsel (R.891). The record of the instant case also reveals that no objection was made to the instructions before, during or after the rendition of the instructions by the trial court (R.852-863). Generally, in order for an issue to be preserved for further review by an appellate court, that issue must first be presented to the trial court and the specific legal argument or ground to be argued on appeal must be part of that presentation. Tillman v. State, 471 So.2d 32 (Fla. 1985), citing Steinhorst v. State, 412 So.2d 332 (Fla.

1982), and Black v. State, 367 So.2d 656 (Fla. 3d DCA 1979). Appellant concedes in his brief at page 53 that under the contemporaneous objection rule set forth in Castor v. State, 365 So.2d 701 (Fla. 1978), errors in jury instruction will not be considered on appeal unless objection is lodged in the trial court. More specifically, this Honorable Court has determined that the failure to object to the jury instructions as given by the trial court in the penalty phase precludes appellate review. Bottoson v. State, 443 So.2d 962 (Fla. 1983), cert. denied, 469 U.S. 873, 105 S.Ct. 223, 83 L.Ed.2d 153 (1984); Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981).

Appellant contends that there are circumstances which would permit this Court to deviate from the well-established contemporaneous objection rule. He first complains that the stipulation filed concerning non-objection to the jury instructions needs clarification. Your appellee submits that it is irrelevant as to who prepared the instructions or what those instructions purported to be. Where counsel agreed to the instructions as prepared it is immaterial who prepared them. Similarly, it is immaterial whether the instructions were purported to be standard jury instructions or otherwise. The standard jury instructions are available to counsel for both parties and the trial court and any deviation from the standard jury instructions could easily have been noted by defense counsel or the trial court. Irregardless, opportunity to review the jury

instructions and failure to object to the instructions signifies assent to the instructions as given.

Appellant next claims that the court's instruction to the jury that they "must consider" six aggravating circumstances was so egregious as to constitute fundamental error. This claim will be discussed in its entirety below but at this point it is sufficient to note that the court's instruction did not shift the state's burden of proving the aggravating circumstances. Therefore, no fundamental error occurred and there was no legal reason that the defendant had to personally approve the jury instructions.

It is clear that the failure to object to the jury instructions as given by the trial court precludes appellate review. We respectfully request this Honorable Court to so find. However, your appellee will respond to the contentions of appellant concerning the jury instructions given in the instant case.

Appellant contends that the trial court erred by instructing the jury that: "The aggravating circumstances which you must consider are:" (R.852-853). With respect to this instruction, appellant first contends that the instruction as given does not restrict the jury to consideration of only those aggravating factors announced by the judge. When read in context, the instructions do not lead to this conclusion. Immediately after the judge defined the aggravating circumstances applicable to the

instant case, the jury was instructed: "If you find the aggravating circumstances do not justify the death penalty . . ." (R.858). Thus, when read in conjunction with the definition of the aggravating circumstances, the aggravating circumstances can only refer to those aggravating factors announced by the court. In any event, appellant does not allege in his brief what other aggravating factors could have been considered by the jury. The only evidence and argument offered by the state at penalty phase tended either to prove the aggravating circumstances instructed-upon by the court or to negate or rebut mitigating evidence proffered by the appellant. There is no indication in this record that the trial court's instruction lead to the jury's consideration of aggravating factors not permitted by law.

Appellant's main attack on the court's instruction that the jury must consider certain enumerated aggravating circumstances is premised upon the notion that the instruction illegally shifts the burden of proving the aggravating circumstances. Your appellee submits that the word "consider" means "to think about". The word consider does not imply that the matters to be considered are taken are proven. Prior to advising the jury of the aggravating circumstances to be considered, the court advised that the jury had to determine "whether sufficient aggravating circumstances exist" (R.852). There is no reason to tell the jury that they have to decide whether factors exist if they are already proven. After defining the aggravating circumstances that the jury was to consider, the court instructed that, "Should

you find sufficient aggravating circumstances do exist . . ." (R.858). Once again, this signifies that aggravating circumstances are present only if the jury so finds and not that the aggravating factors were pre-established. Most significantly, with respect to appellant's claim that the court's jury instruction impermissibly relieved the state of its burden of proof concerning the aggravating circumstances, the court instructed the jury:

> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

(R.858). This instruction clearly requires the jury to determine whether the state has proved beyond a reasonable doubt the existence of an aggravating circumstance. Thus, a reasonable juror who was read the entire instructions could not have any mistaken notions as to where the burden of proof lied to prove an aggravating circumstance. Thus, the jury instructions when taken as a whole focused the jury's consideration on only those aggravating factors enumerated in the statute and instructed by the court and required the state to prove the existence of each aggravating circumstance beyond a reasonable doubt.

Appellant next contends that the trial court erroneously instructed the jury on both the "committed during the course of a burglary or a robbery" aggravating factor and the "pecuniary gain" aggravating factor. He contends that instruction was erroneous as an improper doubling because of the court's

instruction to consider the aggravating factors. As discussed above, an instruction to consider aggravating factors is not an instruction that the aggravating factors are established. Therefore, this Honorable Court's decision in Suarez v. State, 481 So.2d 1201 (Fla. 1985), controls on this point. Appellant correctly concedes that this Honorable Court rejected a claim that a penalty phase jury should not be instructed on aggravating factors which, if found by a trial court in its written order, would constitute improperly doubling. In Suarez, this Court held:

> . . . However, Provence and White regarded improperly doubling in the trial judge's sentencing order, and did not relate to the instructions to the penalty phase jury. The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and in mitigation, and it is this sentencing order which is subject to review vis-a-vis doubling.

Suarez at 1209. The same principles are applicable to the case at bar and, therefore, the trial court did not err by instructing the jury on both aggravating circumstances.

As his final complaint concerning the jury instructions given by the trial court sub judice, appellant contends that the trial court erroneously defined "premeditation" in conjunction with the standard jury instruction on the cold, calculated and premeditated circumstance. This contention has no basis in

logic. Appellant concedes that the standard jury instruction on the aggravating circumstance was given. Ordinarily, the jury would have had premeditation defined in the guilt/innocence phase of the trial. Here, however, the jury was empaneled only to render a recommendation as to the sentence to be imposed upon appellant. Thus, by defining premeditation for the jury in the instant case, the trial court permitted that jury to have the same knowledge of "premeditation" as if that jury had decided the guilt or innocence of appellant. Therefore, the jury in the instant case was not instructed any differently than any jury which had already been instructed on premeditation in the guilt/innocence phase and then was instructed pursuant to the standard jury instruction on cold, calculated and premeditated murder.

The "heighened premeditation" which is required is an appellate standard to measure the validity of the aggravating circumstance. There is no requirement that the jury be instructed as to "heightened premeditation". That is a matter for this Court to determine upon appellate review.

In conclusion, although your appellee submits that the jury instructions as given by the trial court did not render appellant's penalty recommendation unreliable, the failure to object to any of the instructions as given precludes appellate relief.

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY APPLIED THE FLORIDA CAPITAL SENTENCING STATUTE, §921.141, FLORIDA STATUTES (1985), WHEN IMPOSING THE DEATH PENALTY UPON APPELLANT.

As his final point on appeal, appellant sets forth several sub-claims pertaining to the trial court's imposition of the death penalty. Appellant contends that the trial court improperly found the existence of two aggravating factors and improperly failed to find mitigating factors. Your appellee contends otherwise and would assert that the trial court properly applied §921.141, and validly imposed three death sentences upon appellant.

A. Trial Court's Failure to Find the Statutory Mitigating Circumstance of "No Significant History of Prior Criminal Activity"

As discussed above in Issue III, this Honorable Court has held that a sentencing judge may negative the statutory mitigating circumstance of no significant history of prior criminal activity by considering criminal activity not resulting in convictions. Washington v. State, supra. Appellant premises his argument concerning this sub-point on the purported notion that only accusations were offered showing that appellant sold marijuana and, therefore, this "testimony would have been insufficient to prove Walton guilty beyond a reasonable doubt of any drug offense." (Appellant's Brief at p.57). Appellant therefore contends that there was a lack of reliability

concerning prior criminal activity. What appellant ignores, however, is the effect of his own confession. During closing argument, the prosecutor referred to appellant's confession which contained admissions of dealing in quaaludes, amphetamines and marijuana (R.824). A review of the taped confession, which was admitted into evidence and heard by the judge and jury, reveals that appellant did, indeed, admit to buying and selling these controlled substances (R.894, pp. 16-17). Considering appellant's confession and considering the wealth of testimony concerning appellant's dealing in drugs by co-defendant Jeff McCoy, John Soule and John Gray (Brief of Appellee, supra, at pp. 16-17), there is no doubt, and the trial court properly found, that appellant had a significant history of prior criminal activity. In accordance with prior decisions of this Court, rejection of the §921.141(6)(a) mitigating factor was proper where highly reliable evidence of a pattern of criminality was shown, even absent convictions. The trial court did not err by rejecting this mitigating circumstance.

B. Alleged Failure of the Trial Court to Consider the Non-Statutory Mitigating Evidence

Appellant fails to note that in the trial court's order imposing the death penalty under the sub-heading "MITIGATING CIRCUMSTANCES" the trial court's first statement is: "The Court finds no mitigating circumstances." Pursuant to the United States Supreme Court opinions in both Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v.

Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), appellant was allowed to present and argue any factor he felt was mitigating. The jury was instructed to consider any other aspect of appellant's character or record or any other circumstance of the offense (R.858). Indeed, appellant does not contend otherwise. Rather, appellant complains that because the trial court's written order does not specifically refer to any of the non-statutory mitigating evidence presented by appellant, that evidence was not considered by the trial court. The jury in the instant cause recommended three sentences of death by votes of 9-3. The trial court, after hearing all of the evidence and arguments, also indicated that "the court finds no mitigating circumstances" (R.200). In Smith v. State, 407 So.2d 894 (Fla. 1981), this Court relied on the decision in Lucas v. State, 376 So.2d 1149 (Fla. 1979), wherein this Court determined:

> . . . The jury and the judge heard the testimony, and apparently concluded that the testimony should be given little or no weight in their decisions. We find nothing in the record which compels a different result.

Smith v. State, 407 So.2d at 902. There is no reason to believe that the trial court did not follow his own instructions and consider all evidence presented in mitigation.

In Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983), the Court held:

> . . . The fact that the sentencing order does not refer to the specific types of non-statutory "mitigating" evidence petitioner introduced indicates only the trial court's finding the evidence was not mitigating, not that such evidence was not considered.

718 F.2d at 1524. Sub judice, the trial court found that there were no mitigating circumstances and such a finding reflects merely that the evidence was not mitigating, not that the trial court failed to consider all the evidence presented. See also, Davis v. State, 461 So.2d 67 (Fla. 1984). The trial court committed no error.

C. The Trial Court's Finding of the Aggravating Factor "To Avoid Lawful Arrest"

Appellant contends that the trial court improperly found as an aggravating circumstance that the murders were committed for the purpose of avoiding or preventing a lawful arrest. He argues, based upon this Court's decision in Menendez v. State, 368 So.2d 1278 (Fla. 1979), that the state did not clearly prove that the dominant or only motive for the murder was the elimination of witnesses. Your appellee submits otherwise and, in accordance with the precedent established by this Court, the trial court correctly found the existence of the aggravating factor.

The facts supporting this aggravating circumstance were proven beyond a reasonable doubt and comply with this Court's caveat issued in Riley v. State, 366 So.2d 19 (Fla. 1978), to wit: "Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." Id. at 22. In its order in support of the imposition of the death penalty, the trial court noted the "elaborate precautions" taken to avoid detection (R.198). As the trial court observed:

> . . . Walton had waited to commit the crimes until heavy rains occurred so no tire tracks would be left in the dirt, road or driveway. All defendants wore gloves to prevent leaving fingerprints and masks to prevent identification.

(R.198-199). Nevertheless, testimony adduced at trial clearly showed that appellant was identified by one of the victims, Gary Peterson. In his confession to Detective Halliday, appellant stated that Mr. Peterson asked, "Is that you, J.D.?" (R.578). Co-defendant Jeffrey McCoy, appellant's brother, testified at trial that when Mr. Peterson was awakened by the appellant, Mr. Peterson looked at appellant and said, "J.D., what are you doing?" (R.672). Subsequent to the identification of appellant by Mr. Peterson, all three victims were taken to the living room and 8-year-old Chris Fridella was placed in the bathroom. Appellant left to search the house and told Jeffrey McCoy to tape up the victims (R.674). For the next five or ten minutes, appellant searched the house after which the appellant told McCoy to leave the house. As he was leaving, McCoy observed the three victims lying on the floor. Bobby Martindale was apparently having epileptic seizures and Gary Peterson was crying and begging the perpetrators not to kill the victims (R.675).

Your appellee submits that the facts as outlined above justify the finding of the aggravating circumstance that the crimes were committed for the purpose of avoiding arrest. The evidence of appellant's detection by Mr. Peterson is overwhelming. In Riley v. State, supra, this Court found this factor to be established by evidence that the victim, who knew

the defendant, was shot and killed during a robbery. The victim was bound and gagged after one of the perpetrators expressed a concern over possible subsequent identification. However, it is not necessary that intent be proved by evidence of an express statement by the defendant or an accomplice indicating their motives in avoiding arrest. Routly v. State, 440 So.2d 1257 (Fla. 1983). Nor is it required that this be the only motive for the murder. In Bolender v. State, 422 So.2d 833 (Fla. 1982), this Court upheld the finding that murders were committed for the purpose of avoiding or preventing a lawful arrest where the victims were murdered partially to prevent retaliation but also to prevent arrest. In Routly v. State, supra, this Honorable Court distinguished Menendez, supra, by focusing upon the fact that in Menendez it was not apparent as to what events preceded the actual killing. In the instant case, however, we do know what transpired immediately prior to the murder. We know that appellant was recognized by one of the victims and the victims were subsequently taped and placed on the floor with one of the victims begging for his life. Your appellee therefore submits that proof of the requisite intent to avoid arrest and detection is very strong in this case. See also, Wright v. State, 473 So.2d 1277 (Fla. 1985); Martin v. State, 420 So.2d 583 (Fla. 1982); Griffin v. State, 414 So.2d 1025 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982); Vaught v. State, 410 So.2d 147 (Fla. 1982); Washington v. State, 362 So.2d 658 (Fla. 1978). The trial court, therefore, properly found the existence of the

aggravating circumstance set forth in Florida Statute §921.141(5)(e).

D. Trial Court's Finding of the Aggravating Factor "Especially Heinous, Atrocious or Cruel"

Appellant attacks the trial court's finding of the especially heinous, atrocious or cruel aggravating circumstance by contending that the facts of the instant case are indistinguishable from the facts presented in Riley v. State, 366 So.2d 19 (Fla. 1978). In Riley, this Court overturned the trial court's finding of this aggravating circumstance where a son witnessed his father's death. This Court held that "There was nothing atrocious (for death penalty purposes) done to the victim, however, who died instantaneously from a gunshot in the head." Id. at 21. Your appellee submits that the facts of the instant case are easily distinguishable from Riley and, as the trial court observed, "This offense is atrocious beyond the capacity of the ordinary citizen to comprehend . . ." (R.199).

In State v. Dixon, 233 So.2d 1 (Fla. 1973), this Court observed that the especially heinous, atrocious or cruel aggravating factor is limited to those capital felonies which are "accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Id. at 9. The murders committed in the instant case were unnecessarily torturous to the victims. As discussed above, the victims were corralled into the living room, had their hands taped behind their backs, and were placed on the floor. One of the victims, Bobby Martindale, lapsed into epileptic seizure and, as noted by victim Stephen Fridella, would have died if he did

not obtain help (R.675-676). Another victim, Gary Peterson, was crying and begging for his life (R.675). The medical testimony adduced at trial showed that five of the six shotgun wounds would not have caused instant death. Two of the victims, Stephen Fridella and Gary Peterson, would have survived for minutes after being shot and would have remained conscious for 30 - 40 seconds after suffering painful wounds (R.543, 551), and, in fact, the evidence showed that Mr. Fridella attempted to free himself from his bindings prior to his death. The wound to the back of Mr. Martindale would not have been incapacitating but the second shotgun wound to the head resulted in instantaneous death (R.544). Because the wound to the head of Mr. Martindale caused massive destruction of the skull, brain and face, there would have been no purpose in inflicting the wound to the back. Therefore, the back wound was inflicted first. These facts alone demonstrate that the victims were caused unnecessary and prolonged pain and mental anguish. In addition to the above, as in Riley, Chris Fridella was in the house when his father and uncle were murdered.

In this case the victims were laid face down and their hands were bound behind them. They were in a helpless condition and were aware of their impending death. In Jones v. State, 411 So.2d 165 (Fla. 1982), this Honorable Court upheld the finding that the murder was especially heinous, atrocious or cruel where the defendant therein ignored the victim's plea to be spared and shot him to death in the style of an execution. Id. at 169. In

the instant case, testimony was presented by the state which showed that one of the victims was begging for his life at the time he was executed. In Steinhorst v. State, 412 So.2d 332 (Fla. 1982), three victims were bound and gagged and confined in a small van with the body of an already murdered victim. There, as in the instant case, the victims were not blindfolded and they were able to feel their impending death. Here, as in Steinhorst, the terror experienced by the last remaining victim is unimaginable. Similarly, in Routly v. State, 440 So.2d 1257 (Fla. 1983), this Court distinguished Cooper v. State, 336 So.2d 1133 (Fla. 1976), and noted that the aggravating factor set forth in Florida Statute 921.141(5)(h) has been upheld even where the victim died instantaneously. This Court determined that before such an instantaneous death occurred, the victim was subjected to agony over the prospect that death would soon occur. Also, in White v. State, 403 So.2d 331 (Fla. 1981), this Honorable Court upheld the finding of the aggravating factor set forth in §921.141(5)(h) where six victims were slaughtered. Thus, it is apparent that a review of the precedent established by this Honorable Court concerning especially heinous, atrocious or cruel capital felonies mandates affirmance of the trial court's finding of this aggravating factor in the case at bar.

E. Trial Court's Finding of the Aggravating Factor "Cold, Calculated and Premeditated"

Appellant lastly contends that the trial court erred by finding that the murders committed in the instant case were done

so in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Appellant correctly notes that the trial court relied upon evidence which showed that several weeks before the crimes occurred appellant made a statement that the only way to get Steve Fridella off his back was to "waste him" (R.200, 642). Appellant had a relationship with Robin Fridella, the ex-wife of victim Stephen Fridella, and appellant was afraid that his relationship would end. The plan that was set in motion weeks prior to the murders culminated in the death of three victims.

Appellant's plan to commit these murders is evidence of the cold, calculated and premeditated manner in which they were committed. Once appellant decided to "waste" Stephen Fridella, appellant waited until such time that heavy rain would aid in the ability to cover-up the crimes. Enough weapons and sufficient ammunition were taken to kill all the victims. The victims were placed on the floor with their hands tied behind their backs, yet no effort was made to gag the victims or to bind their feet. The television was turned up full volume so that the screams of the victims could not be heard. These facts support a showing of the "heightened" premeditation necessary to validate the aggravating circumstance under consideration.

Appellant opines that this aggravating circumstance is inapplicable where "there was no evidence to support" the notion that appellant directed the shooting of Stephen Fridella. The record totally belies this contention. Jeffrey McCoy, in his

confession to the police and in his testimony at trial, made it clear that appellant intended to kill the victims. Appellant told McCoy that he held onto the head of one of the victims and attempted to shoot by pulling the trigger, but the gun misfired (R.609, 628-629, 678-679). Although appellant in his confession asserted that he test-fired the gun prior to entering the house (which makes no sense inasmuch as a test-fire would alert the victims), McCoy did not see appellant test-fire the gun (R.700). Thus, in accordance with the heightened premeditation as exhibited by Walton's plan to "waste" Fridella, the trial court properly found the aggravating circumstance of §921.141(5)(i).

This Honorable Court has interpreted the cold, calculated and premeditated aggravating factor to require a heightened form of premeditation over and above that necessary to sustain a conviction for first degree murder. Decisions of this Court have found the aggravating factor to exist where the facts demonstrate an execution style killing. Jent v. State, 408 So.2d 1024 (Fla. 1981); Combs v. State, 403 So.2d 418 (Fla. 1981). Here, the victims were face-down, hands behind them, and they were shot with a 12-gauge shotgun at a distance of approximately 3 - 6 feet. The execution-style of these murders, coupled with the weeks-long plan of Walton to "waste" Stephen Fridella, justify the trial court's finding of this aggravating circumstance.

CONCLUSION

Based on the foregoing reasons, arguments and citations of authority, the sentences of death imposed upon appellant should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Robert J. Krauss

ROBERT J. KRAUSS
Assistant Attorney General
Florida Bar #: 238538
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Douglas S. Connor, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830, this 22nd day of April, 1988.

Robert J. Krauss

OF COUNSEL FOR APPELLEE