IN THE SUPREME COURT OF FLORIDA

ARTHUR D. RUTHERFORD,

Appellant,

v. CASE NO. 69,825

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Arthur D. Rutherford, the criminal defendant below, will be referred to herein as Rutherford or Appellant. The State of Florida, the prosecution below, will be referred to herein as the State or Appellee. All proceedings took place before Circuit Court Judge Clyde B. Wells.

For the Court's convenience, Appellee will use the Appellant's designations. (AB. 1). The record on appeal consists of five volumes; citations will be indicated parenthetically as "R" followed by the appropriate page number(s). The supplemental record consists of one volume; citations will be indicated

parenthetically as "SR" followed by the appropriate page number(s). The second supplemental record consists of one volume; citations will be indicated parenthetically as "SSR" followed by the appropriate page number(s). The first trial of this case is included in a supplemental record filed on January 29, 1988. This supplemental record consists of seven volumes; citations will be indicated parenthetically as "PT" followed by the appropriate page number(s). Citations to Appellant's initial brief will be indicated parenthetically as "AB" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

For the purpose of resolving the issues raised herein Appellee accepts Appellant's Statement of the Case (AB.2-4), and accepts as accurate, though incomplete, Appellant's Statement of the Facts (AB. 4-14), and therefore submits the following additional information:

Harold Attaway testified that on August 22, 1985, he went with the Appellant to Stella Salaman's residence at about 7:00 in the morning. (R. 370-371). Before arriving at Salaman's house, Rutherford said, "If I reach for that gun you'll know that I mean business." (R. 372). Attaway said that this statement scared him. He thought Rutherford really meant to kill the woman. (R. 373). This was the first that he knew that the Appellant really meant business when he talked about the way he was going to kill the lady. (R. 373). On two different occasions, two weeks and one week before Salaman's death, Rutherford talked about killing a lady for her money. (R. 373-374). He told Attaway that he thought the lady had money and that they would get the money from her. He said he would make it look like an accident, like she fell in the bathtub. Appellant said he thought she had some money and that they could get it if they killed her. (R. 374). He would make it look like she fell and hit her head in the bathtub. (R. 375).

John Cook testified that Rutherford is his nephew. (R. 476). About a week before Salaman's death, Rutherford told him he knew where they could make some easy money. (R. 476). Rutherford said he was going to knock a woman in the head. He did not identify the woman. (R. 477).

Sherman Pittman testified that Rutherford had ridden with him over to a supply house in Pensacola a couple of weeks or so before Salaman's death. (R. 482-483). During the ride Rutherford said he needed some money and he did not know how he was going to get it. He said he was going to make this old lady, Salaman, write him out a check as though for some construction work. Rutherford was referring to Ms. Salaman. Rutherford said he would get her by the arm and make her sign the check and would then put her in the bathtub. (R. 483, 485). Rutherford kept talking about doing it and Pittman kept trying to tell him it would not work. Rutherford said, " . . . he couldn't do the time but he damn sure was gonna do the crime." (R. 484). After Salaman was killed Pittman realized that she was the same woman Rutherford had been talking about. (R. 486). When he found out that the woman Rutherford was talking about was the woman that had been killed he called the police. (R. 488).

SUMMARY OF ARGUMENT

I. The trial court did not violate the constitutional prohibition against double jeopardy when it retried Rutherford after having granted a mistrial at his bequest.

II. Rutherford was properly sentenced to death. The conclusion from the evidence is inescapable that the Appellant dislocated the victim's arm in the course of the robbery. She had had her head struck by an object or had had her head bashed against an object causing severe injuries. Further, she was placed in a bathtub where she was submerged under water. The trial court's finding that the homicide was especially heinous, atrocious and cruel should be upheld.

The homicide was committed in a cold, calculated and premeditated manner. The Appellant discussed with several people, before and after the crime, of his plan to rob and kill the victim.

Nonstatutory mitigating circumstances were properly considered by the trial court. The trial court is not required to find nonstatutory mitigating circumstances in every case.

III. The trial court carefully weighed the aggravating and mitigating circumstances in a qualitative manner, and correctly concluded that death is the appropriate sentence for Rutherford.

IV. The trial court did not consider and give weight to the first jury's sentencing recommendation. The sentence imposed by the court conformed to the sentence recommended by the trial jury.

V. No error occurred by the trial court allowing the testimony of the victim's three friends at the penalty phase of the trial.

VI. Placing the Appellant in leg irons was clearly justified in view of his conduct, verbal threats and the need for security.

VII. The trial court did not dilute the jury's understanding of its sentencing responsibility in instructing the jury as to the rendition of an advisory sentence.

VIII. Appellee submits that, relative to the robbery sentence, Appellant is entitled to the inclusion in the record of the sentencing guidelines scoresheet.

Rutherford has failed to demonstrate reversible error and his judgment and sentence should be affirmed.

ARGUMENT

ISSUE I

THE DOUBLE JEOPARDY CLAUSE DID NOT BAR RUTHERFORD'S RETRIAL. (Restated by Appellee)

Appellant complains that at his first trial two prosecution witnesses, Sherman Pittman and Kenneth Cook, testified about statements Rutherford made which had not been disclosed on the State's discovery answer. (PT. 321, 336). The State had listed the names of the witnesses. (PT. 386-391). Defense counsel did not timely object to the testimony of the two witnesses and in fact cross-examined both witnesses. (PT. 321-334, 336-344). Since the testimony was not objected to the defense waived any right to complain.

Appellee submits that the circumstances did not constitute a discovery violation, even so, the law is well settled that discovery violations are procedural in nature and must be raised by timely objection. Lucas v. State, 376 So.2d 1149 (Fla. 1979); Carillo v. State, 382 So.2d 429 (Fla. 2d DCA 1980). Therefore, the failure of the Appellant to timely object to the introduction of the questioned testimony constituted a waiver as stated in 55 Fla.Jur., 2d, TRIAL:

> An objection to the admission of evidence must be timely. The proper time for preserving errors relating to the admissibility of evidence is when the evidence is offered to the trial court. Thus, when a question asked a

> witness is itself improper, or calls for an improper answer, objection must be made before the witness answers. In general, an objection to a question after it has been answered comes too late.

Likewise in Section 49 of the same work it states:

> By statute, the right to predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted evidence is generally contingent on a timely objection or motion to strike appearing on the record, stating the specific ground of objection if it is not apparent from the context. Thus, as a rule, if a ruling of the trial court on a question of evidence is to be assigned as error, timely objection must be made thereto, and a ruling thereon obtained from the trial court. When evidence is admitted without objection, it is regarded as having been received by consent. Evidence that is received without objection and is not in any way controverted should generally be given all the probative force and effect that it ordinarily would have without technical requirements of limitations." (Emphasis added)

Appellee submits therefore that Appellant affirmatively waived any right to complain by failing to timely object to the introduction of the now complained of testimony. Defense counsel allowed the two witnesses to testify without objection and even waited until another witness had testified before moving for a mistrial. (PT. 384-400).

The trial court conducted an extensive Richardson inquiry. With reference to one of the two witnesses, Cook, it was shown

that the substance of that witness' testimony was disclosed to the Appellant prior to trial during a discovery deposition taken by the defense. (PT. 396). It is difficult to see how the Appellant has a basis to complain about the introduction of this testimony.

With reference to the second witness, Pittman, the state attorney informed the trial court that he did not know the substance of the witness' testimony until the day before Pittman testified. The prosecutor had not talked with the witness until the noon break on the day he testified and he was the first witness after the lunch hour. (PT. 397-398). The testimony was cummulative to the other evidence. The witness was a close friend of the Appellant and his family and had visited Appellant after his arrest on a number of occasions. The substance of the witness' testimony was known to the Appellant because Appellant knew that the witness had talked with law enforcement about the testimony shortly after the murder. (PT. 329-333). The witness' name had been given to the defense months before the trial and Appellant knew the witness had been subpoened to the trial.

Defense counsel chose not to depose the witnesses even though their names had been provided to him by the State. (PT. 390).

It was error for the trial court to have granted the mistrial in this cause. The defense did not object to the

testimony of Pittman and Cook, which testimony was cummulative in nature, nor did he request curative instructions to the jury. In fact, as noted earlier, counsel for the defense extensively cross-examined the two witnesses. The purpose of an objection by counsel is to ferret out possible prejudice and correct it at the time of the trial. See Castor v. State, 365 So.2d 701 (Fla. 1978); Clark v. State, 363 So.2d 331 (Fla. 1978); Ferguson v. State, 417 So.2d 639 (Fla. 1982).

Appellant argues that even though the mistrial was granted at his request, Rutherford should not have been retried and that to do so was in violation of the double jeopardy clause. This argument is without merit.

First, the Appellant did not raise the issue of double jeopardy before the second trial via motion or objection. Appellant argues that, " . . . the error is fundamental and can be litigated for the first time in this appeal." and cites as authority State v. Johnson, 483 So.2d 420 (Fla. 1986). (AB. 18). This argument is clearly meritless and the holding in State v. Johnson, supra, is inapplicable to the case sub judice.

The Florida Supreme Court in State v. Johnson, supra, held that the trial court violated the constitutional prohibition against double jeopardy when it set aside an unconditionally accepted plea and proceeded to try and convict the defendant of the originally charged offenses. The case did not involve a

mistrial at the bequest of the defendant which completely distinguishes it from the case at bar.

In Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) the United States Supreme Court dealt with the issue of mistrials and claims of double jeopardy. The double jeopardy clause protects a criminal defendant from repeated prosecution for the same offense. Where the trial is terminated over the objection of the defendant, the classical test for lifting the double jeopardy bar to a second trial is the "manifest necessity" standard. But in the case of a mistrial declared at the behest of the defendant, quite different principles come into play. Even where the defendant moves for a mistrial there is a narrow exception to the rule that the double jeopardy clause is no bar to retrial. The Supreme Court delineated the bounds of the exception stating that, " . . . we do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." Oregon v. Kennedy, 72 L.Ed.2d 415, at 427.

In the case sub judice, the prosecutorial conduct culminating in the termination of the first trial was clearly conduct not intended to provoke the defendant into moving for a

mistrial. In view of the circumstances of this case, the double jeopardy clause provides no bar to retrial.

In State Ex Rel Gibson v. Olliff, 452 So.2d 110 (Fla. 1st DCA 1984) the court determined that the defendant failed to demonstrate that her scheduled trial was barred by the constitutional prohibition against double jeopardy.

> Petitioner's contention in this regard is based on the assertion that in the course of her first trial on February 7, 1984, her counsel was forced to move for a mistrial because of the prosecutor's misconduct in knowingly failing to disclose to her counsel that a key witness for the prosecution had admitted to giving false testimony on his pretrial deposition taken by petitioner's counsel. Although the trial court granted the motion for mistrial on this ground, in denying petitioner's double jeopardy claim the trial court found that the prosecutor's non-disclosure of the admission to him by the State's witness was in violation of the discovery rule but was not willful and did not constitute prosecutorial misconduct. This finding . . . adversely disposes of petitioner's contention that the prosecutor's wrongful failure to disclose the false testimony was intended to provoke or "goad" petitioner into moving for a mistrial.

State Ex Rel Gibson at 111.

The record reveals in the case sub judice that the prosecutor's conduct was not intended to provoke the Appellant into moving for a mistrial.

In conclusion, Appellee submits that Rutherford did not, at the first trial, object to the testimony now complained of nor did he request curative instructions or sanctions. The mistrial was granted at Rutherford's request. Further, Rutherford made no objection or motion to the trial court concerning a double jeopardy violation. Finally, the claim of a double jeopardy violation must fail on the merits. Rutherford's right to be free from double jeopardy has not been violated. Reversible error did not occur.

ISSUE II

RUTHERFORD WAS PROPERLY SENTENCED TO DEATH. (Restated by Appellee)

At the penalty phase of the trial, the court heard evidence of the aggravating and mitigating factors to be considered by the jury in determining what sentence the jury would recommend and what sentence the court would impose.

A.

THE TRIAL COURT PROPERLY FOUND THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

The trial court addressed the finding of heinous, atrocious and cruel in its sentencing order as follows:

> (h) The Court finds that this crime was especially heinous, atrocious and cruel. The evidence in this case showed that the victim had a dislocated arm, leading the Court to the conclusion that the defendant dislocated the victim's arm in the course of the robbery. Additionally, the victim had a number of gashes on her head where she had obviously had her head struck by an object or had her head bashed against an object causing the severe injuries to the victim. Additionally, the victim was placed in the bathtub where she was submerged under water. Her death was attributed to asphyxiation, but the pathologist could not rule out the effects of the blows as a cause of death.
>
> While the Court cannot use the attitude of the defendant and his lack of remorse for this crime as an aggravating circumstance, the Court

> does find that the defendant's lack of remorse adds weight to the Court's determination that the crime was especially heinous, atrocious and cruel.
>
> Sireci vs. State 399 So 2d 964 (1981)

(SSR. 4).

The aggravating circumstance of heinous, atrocious and cruel clearly has been established. The victim had a dislocated arm leading to the conclusion that Appellant dislocated her arm in the course of the robbery. Additionally, the victim had a number of gashes on her head where she had had her head struck by an object or had her head bashed against an object causing severe injuries. Further, the victim was placed in the bathtub where she was submerged under water. The facts of this case demonstrate that this murder was "extremely wicked or shockingly evil," or "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering" of the victim. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); Wilson v. State, 493 So.2d 1019 (Fla. 1986).

Appellant argues that, "the trial court relied upon the unsupported conclusion that Rutherford lacked remorse for the crime. (AB. 23). This argument is without merit and is a misrepresentation of the trial court's written findings. The trial court stated,

> While the Court cannot use the attitude

> of the defendant and his lack of remorse for this crime as an aggravating circumstance, the Court does find that the defendant's lack of remorse adds weight to the Court's determination that the crime was especially heinous, atrocious and cruel. (Emphasis supplied)

The trial court recognized and clearly stated that it could not use lack of remorse as an aggravating circumstance. The Court merely stated that lack of remorse "adds weight" to the determination that the crime was especially heinous, atrocious and cruel. Although, in its written findings, the trial court cited Sireci v. State, 399 So.2d 964 (Fla. 1981) the court plainly did not rely on lack of remorse as an aggravating circumstance.

In Pope v. State, 441 So.2d 1073 (Fla. 1983) this Court recognized that lack of remorse is not an aggravating circumstance, nor should it enhance an aggravating factor. Accord, Patterson v. State, 513 So.2d 1263 (Fla. 1987); McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

Reading the trial court's written findings reveal that there was not an enhancement of the heinous, atrocious and cruel aggravating factor based upon the improper use of lack of remorse. The court made the determination of heinous, atrocious and cruel in the first paragraph and then in the following paragraph discussed the lack of remorse, stating that the lack of remorse adds weight to the court's determination. The court made

the determination prior to discussing lack of remorse and the court clearly recognized that it could not consider lack of remorse in making its determination. There was no error in the finding that the homicide was especially heinous, atrocious and cruel.

B.

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

In its sentencing order the court found as follows:

> (i) The crime was committed in a cold, calculated, and premeditated manner without any pretence (sic) of moral or legal justification. This aggravating circumstance was proven by the witnesses whom the defendant told of his plan to kill the victim to get her money. The defendant discussed this crime with two or more people and stated to one of them that he would do the crime, but would not do the time. This was further established by the testimony at the penalty phase of the trial that indicated the victim was deathly afraid of the defendant and had expressed her fear of the defendant and her fear of being alone with him.

(SSR. 4).

The evidence presented proved beyond a reasonable doubt that a heightened form of premeditation existed, one exhibiting a cold, calculated manner without any pretense of moral or legal justification.

The evidence showed that Rutherford planned in advance to rob and murder the victim who was extremely frightened of him. Rutherford had discussed his plan to kill the victim in order to get her money with three of the state's witnesses. He had a fully formed conscious purpose to kill. Wilson v. State, 493 So.2d 1019 (Fla. 1986). He planned the crime in advance and attempted to get others to help him execute his plan. Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury which may be established by circumstantial evidence. Preston v. State, 444 So.2d 939 (Fla. 1984) The jury in the guilt phase, found Rutherford guilty of premeditated murder. There was no error in the trial court finding that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

C.

THE TRIAL COURT PROPERLY CONSIDERED NONSTATUTORY MITIGATING CIRCUMSTANCES.

Mitigating circumstances were addressed by the trial court in its sentencing order as follows:

> The Court has also considered the mitigating circumstances presented in this case, including those listed in 941.141(6) and the possibility of mitigating factors other than those listed in the Statute.

> The Court finds mitigating factor "a" present in that the defendant had no prior significant history of criminal activity.
>
> The Court has considered the testimony of the defendant regarding his past, including his extensive testimony about his record in Vietnam. When his testimony is weighed against the credibility of the defendant on other matters where the Court was able to test his credibility, considered further in light of the total lack of any corroboration, the Court concludes that there were no other factors presented that constitute mitigating factors.

(SSR. 5).

The trial court is not required to find nonstatutory mitigating circumstances in every case. In fact, this Court held in Porter v. State, 429 So.2d 293 (Fla. 1983) as follows:

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

Id. at 296.

The trial court instructed the jury, "Among the mitigating circumstances you may consider, if established by the evidence,

are: one, Arthur D. Rutherford has no significant history of prior criminal activity. Two, any other aspect of the defendant's character or record, and any other circumstances of the offense." (R. 921).

It is clear from the record that the trial judge understood that Appellant was entitled to the benefit of any nonstatutory mitigating circumstances.

It is within the province of the trial judge to decide whether a particular mitigating circumstance has been proven and the weight to be given that factor. Toole v. State, 479 So.2d 731 (Fla. 1985); Smith v. State, 407 So.2d 894 (Fla. 1982); Card v. State, 453 So.2d 17 (Fla.) cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); Card v. Dugger, 512 So.2d 829 (Fla. 1987). Reversal is not warranted simply because Rutherford concludes differently.

ISSUE III

THE TRIAL COURT DID NOT SENTENCE RUTHERFORD TO DEATH BY USING A COUNTING PROCESS TO EVALUATE WHETHER THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED THE MITIGATING CIRCUMSTANCES. (Restated by Appellee)

Appellant argues that the trial court erred in sentencing Rutherford to death by using a counting process to evaluate whether the aggravating circumstances outweighed the mitigating circumstances and cites as authority State v. Dixon, 283 So.2d 1 (Fla. 1973) and Proffitt v. Florida, 428 U.S. 242 (1976). (AB. 29). This argument must fail.

A sentencing scheme is provided in §921.141, Fla.Stat. where the aggravating circumstances are weighed against the mitigating ones in order to determine the appropriate sentence. State v. Dixon, 283 So.2d 1, 7 (Fla. 1973) states that because the process is qualitative not quantitative, this "weighing process is left to the carefully scrutinized judgment of the jurors and judges."

The trial court, in the case sub judice, followed the standard enunciated in State v. Dixon, supra, and carefully weighed the aggravating and mitigating circumstances in a qualitative manner.

The trial court did not utilize a counting process resulting in the imposition of the death sentence merely because the total

number of aggravating circumstances exceeded the total number of mitigating ones.

This case bears little resemblance to the facts of Proffitt, supra. Here the Appellant had a premeditated plan which he implemented resulting in the robbery and brutal death of an elderly woman.

The jury was correctly instructed, contrary to Appellant's assertions in brief, as to how to evaluate the aggravating and mitigating circumstances. The instructions were in pertinent part as follows:

> THE COURT; Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for the crime of first degree premeditated felony murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.

One, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.

Two, the crime for which the defendant is to be sentenced was committed for financial gain.

Three, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

Four, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The aggravating circumstance regarding the crime being committed during a robbery and the aggravating circumstance that the crime was committed for financial gain merges and becomes only one aggravating circumstance.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweight the aggravating circumstances.

Among the mitigating circumstances you may consider, if established by the evidence, are: one, Arthur D.

Rutherford has no significant history of prior criminal activity.

Two, any other aspect of the defendant's character or record, and any other circumstances of the offense.

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

If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimious (sic).

The fact that the determination of whether you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence,

> and all of it, realizing that human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

(R. 920-923).

There is no reversible error in these jury instructions. Given the facts of this case, considering both aggravating and mitigating circumstances, death is the appropriate sentence for Rutherford.

ISSUE IV

THE TRIAL COURT DID NOT CONSIDER AND GIVE WEIGHT TO THE SENTENCING RECOMMENDATION OF THE JURY FROM THE PRIOR TRIAL WHICH HAD RESULTED IN A MISTRIAL. (Restated by Appellee)

Appellant argues that in his sentencing order the trial judge specifically considered and gave weight to the first jury's sentencing recommendation. This argument is misleading, inaccurate and completely without merit.

Rutherford's death sentence was not based in part upon consideration of the jury's recommendation from the first trial, in violation of the Eighth and Fourteenth Amendments. The trial court merely commented in his sentencing order, that, "the appropriate sentence in this case is the sentence that was recommended by the trial jury by a majority of seven and by the previous mistrial jury by a majority of eight." (SSR. 5-6). Clearly, the trial court did not consider and give weight to the first jury's sentencing recommendation.

The sentencing order, read in its entirety, makes it clear that the trial court considered the aggravating and mitigating factors and concluded that the appropriate sentence for the crime committed in this case is death. This sentence conformed to the sentence recommended by the trial jury. It also happened to be the sentence recommended by the mistrial jury. The trial judge's comment plainly does not constitute reversible error.

This case bears no resemblance to the facts present in Huff v. State, 495 So.2d 145 (Fla. 1986), cited by Appellant, wherein the trial judge took judicial notice of the entire proceedings in the first trial of Huff, which had been reversed for a new trial.

Appellant further cites Lucas v. State, 417 So.2d 250 (Fla. 1982) in support of his argument. In Lucas the trial court, on remand, relied on the original sentencing order which clearly distinguishes it from the facts of the instant case where the trial court did not rely on the first jury's recommendation.

Reversible error was not committed. Rutherford was properly sentenced as evidenced by reading the sentencing order. (SSR. 3-6).

ISSUE V

THE TRIAL COURT DID NOT ERR IN ADMITTING HEARSAY EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL. (Restated by Appellee)

During the penalty phase of the trial, the State introduced the testimony of three of the victim's friends. (R. 804, 814, 819).

Appellant argues that, "Much of their testimony consisted of hearsay statements the victim allegedly made concerning her anxious feelings when Rutherford was present.", and that the admission of this testimony constituted error. (AB. 35).

With reference to the testimony of friend, Lois LaVaugh, the defense made no objection to her testimony. (R. 804-810). Since Appellant did not timely object to the testimony he has not preserved this point for appellate review. Clark v. State, 363 So.2d 331 (Fla. 1978). The purpose of an objection by counsel is to ferret out possible prejudice and correct it at the time of trial. Castor v. State, 365 So.2d 701 (Fla. 1978).

With reference to the testimony of friend, Richard LaVaugh, Appellee submits that he gave no testimony on direct examination relative to the victim's anxious feelings about Rutherford. (R. 813-817). In fact, defense counsel on cross-examination, solicited the only testimony about the victim's fear of Rutherford. The State cannot be blamed for defense counsel's

questions. (R. 819). Clearly, there is no reversible error relative to the testimony of Richard LaVaugh.

With reference to the testimony of friend, Beverly Elkins, the defense made no objection to her testimony concerning the victim's fears of Rutherford. (R. 823-825). Appellant did not timely object and thus has not preserved this point for review. (See argument above).

No error occurred by the trial court allowing the testimony of the three friends. Plainly, there is no merit to this argument.

ISSUE VI

APPELLANT WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT ORDERED HIM TO BE PLACED IN LEG IRONS, OUTSIDE THE PRESENCE OF THE JURY, DURING THE CLOSING ARGUMENTS OF THE PENALTY PHASE OF THE TRIAL. (Restated by Appellee)

Rutherford testified during the penalty phase of the trial. He directed the following comments to the state attorney, "Listen, this ain't the end of it. You and your little dope raiding petty laws. You are going to get it." (R. 888). As he was leaving the stand, the Appellant had, at a very close distance, personally threatened the state attorney. (R. 895). Rutherford's comments concluded the defense's presentation at the penalty phase of the trial after which a charge conference was held in chambers.

Following the conclusion of the charge conference, the court indicated that security was concerned about Appellant's actions. (R. 894). The court stated that, "The bailiff has expressed and the deputies in charge of the defendant have expressed concern about the defendant's conduct, security, and based on his conviction for the ultimate crime of first degree murder and facing a possible recommendation of death, the court has ordered that he be placed in leg irons." (R. 895). Defense counsel objected.

Appellant was seated before the jury was brought back in. There is no evidence that the jury saw the leg irons. (R. 895).

Reversible error was not committed by the trial court's action. A criminal defendant may not be compelled to stand trial wearing shackles unless there is a bona fide need to insure security or prevent disruption of the proceedings. In Jones v. State, 449 So.2d 253, cert. denied, 105 S.Ct. 269, 469 U.S. 893, 83 L.Ed.2d 205 (Fla. 1984) the Supreme Court of Florida disagreed with the defendant's complaint that he was greatly prejudiced and thereby denied his constitutional right to a fair trial when he was chained to his chair in the presence of the jury. This Court held that the record clearly shows the utter lack of merit in the defendant's argument. "Whatever prejudice defendant suffered resulted from his own willful attempt to disrupt, indeed stop, the orderly proceedings of the court." The trial court's action was justified. Binding or shackling the defendant is not only a constitutionally permissible method of handling an obstreperous defendant but, under the circumstances here, it was the least restrictive method available to the trial court. Jones v. State, 449 So.2d 253 at 259, 261-262.

As the United States Supreme Court said:

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards

> of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

Illinois v. Allen, 397 U.S. 337, 343-44, 90 S.Ct. 1057, 1060-61, 25 L.Ed.2d 353 (1970).

The First District Court of Appeal dealt with this issue in Zygadlo v. State, 341 So.2d 1053 (Fla. 1st DCA 1977), cert. denied, 353 So.2d 681 (Fla. 1977), holding as follows:

> At the commencement of the trial, Zygadlo objected to leg shackles which were placed on him at the direc-tion of the trial court. The court had the shackles put on him because he had escaped on at least one prior occasion when appearing before the court. Because of the recent escape, the court felt it necessary for maintenance of courtroom security and decorum that the shackles be applied. The shackles were not the large type. The record does not disclose whether the jurors were aware of the shackles. The record does disclose overwhelming evidence of Zygadlo's guilt of each of the four crimes.
>
> On the facts disclosed by the record, the trial court exercised good discretion in taking action to maintain

> courtroom security and decorum during the trial. There is no evidence that the jurors saw the leg shackles. There is no evidence that Zygadlo was prejudiced. There is overwhelming evidence that he was guilty of the four crimes. We affirm the finding of guilt.

Zygaldo at 1053.

In Zygadlo v. Wainwright, 720 F.2d 1221 (11th Cir. 1983), cert. denied, 466 U.S. 941, 104 S.Ct. 1921, 80 L.Ed.2d 468 (1984) the Eleventh Circuit Court of Appeals affirmed the United States District Court for the Middle District of Florida in denying Zygadlo's petition for writ of habeas corpus which contended that the trial court's order that defendant wear leg shackles at trial denied him a fair trial. The court concluded that the trial judge properly exercised his discretion in ordering the security measures. The court noted that the trial court specifically entered the considerations supporting his decision into the record and allowed the defense counsel an opportunity to enter his objections out of the presence of the jury.

In the instant case the trial judge entered the considerations supporting his decision into the record and allowed defense counsel an opportunity to enter his objections out of the presence of the jury. Appellant, like Zygadlo, did not dispute the factual basis of the judge's decision or request a hearing, nor did he suggest an alternative or less obtrusive means of restraint.

In Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified on rehearing, 833 F.2d 250 (11th Cir. 1987), cert. granted, Dugger v. Elledge, No. 87-1234, the court held that Elledge was denied the required procedure when the court refused him an adequate opportunity to challenge the untested information that served as the basis for the shackling. The court should have given the defense a reasonable opportunity to meet the surprise information or at the very least should have allowed Elledge the opportunity to speak with his attorney. In the case sub judice, specific evidence supporting the need for leg irons was articulated on the record, consistent with the holding by the Eleventh Circuit in Elledge v. Dugger, supra. (R. 895).

In the case sub judice the court indicated that it felt it necessary for maintenance of courtroom security that the shackles be applied. The record does not disclose whether the jurors were aware of the shackles. The record discloses overwhelming evidence of Rutherford's guilt. Appellee submits that on the facts disclosed by the record, the trial court exercised good discretion in taking action to maintain courtroom security and decorum during the trial.

In Illinois v. Allen, supra, the United States Supreme Court expressed the view that Allen lost his constitutional right to be present throughout his trial and that it was not unconstitutional to remove him from the courtroom and to proceed with his trial in his absence since his disorderly, disruptive and disrespectful

behavior was of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint.

The principle established in Illinois v. Allen, supra, clearly, is that trial judges confronted with disruptive defendants in criminal cases must be given sufficient discretion to meet the circumstances of each case.

The United States Supreme Court in Estelle v. Williams, 425 U.S. 501, 48 L.Ed.2d 126, 96 S.Ct. 1691 (1976) considered the potential effects of presenting an accused before the jury in prison attire, recognizing that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. In its opinion, the court referred to its decision in Illinois v. Allen wherein it expressly recognized that the sight of shackles and gags might have a significant effect on the jury's feelings abut the defendant, yet the Court upheld the practice when necessary to control a contumacious defendant, who brings his plight upon himself and presents the court with a limited range of alternatives. Estelle v. Williams, 48 L.Ed.2d at 131.

The Supreme Court has characterized shackling as an "inherently prejudicial practice." Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525, 534 (1986). When shackling occurs, it must be subjected to "close judicial scrutiny" to

determine if there was an essential state interest furthered by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed. Holbrook v. Flynn, supra; Estelle v. Williams, supra.

In the instant case, placing the Appellant in leg irons was clearly justified in view of the Appellant's conduct, verbal threats and the need for security. Appellant had been convicted for first degree murder and was facing a possible recommendation of death. Appellant's disruptive behavior created a legitimate concern about security and the trial court clearly was justified in placing Appellant in leg irons.

The record evidences a substantial need to impose physical restraints upon the Appellant, who made no suggestion as to alternative or less obtrusive means of restraint. Specific evidence supporting the need for leg irons was articulated on the record during the charge conference held preceeding the closing arguments during the penalty phase. Reversible error did not occur.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION. (Restated by Appellee)

Appellant argues that the trial court read the standard penalty phase jury instructions to the jury, stating that the instruction violates Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Appellant states further that the instruction is not a misstatement of Florida law but is incomplete and misleading. Appellee completely agrees that this instruction is not a misstatement of Florida law. Appellee submits, however, that the instruction is not incomplete and misleading.

Read as a whole, the charge to the jury was clearly proper. The charge, in pertinent part is as follows:

> THE COURT; Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for the crime of first degree premeditated felony murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.

(R. 920).

* * *

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimious (sic).

The fact that the determination of whether you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determines that Arthur D. Rutherford should be sentenced to death, your advisory sentence will be: "A majority of the jury, by a vote of blank, advise and recommend to the Court that it impose the death penalty upon Arthur D. Rutherford."

On the other hand, if by six or more votes the jury determines that Arthur D. Rutherford should not be sentenced

> to death, your advisory sentence will be: "The jury advises and recommends to the Court that it impose the sentence of life imprisonment upon Arthur D. Rutherford without possibility of parole for twenty-five years."

(R. 922-923).

Appellee notes that defense counsel did not object to the jury instructions which he now complains about. (R. 920-923).

Also, at the commencement of the penalty phase the court gave preliminary instructions to the jury. The trial court stated, "And we will receive some advisory opinions for the jury as to the sentence that the Court will impose . . ." (R. 780). The trial court later stated, "The final decision as do (sic) what sentence shall be imposed rests with the judge of the Court but the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed on the defendant." (R. 781).

This Court in Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, 107 S.Ct. 1617 (1987) considered the Caldwell issue, stating:

> Under Mississippi law it is the jury who makes the ultimate decision as to the appropriateness of the defendant's death. See Miss.Code.Ann. §99-19-101 (Supp. 1985). Whereas, in Florida it is the trial judge who is the ultimate "sentencer." See Thompson v. State, 456 So.2d 444 (Fla. 1984). The jury's recommendation, although an integral

> part of Florida's capital sentencing scheme, is merely advisory. See §921.141(2), Fla.Stat. (1985). This scheme has been upheld against constitutional challenge. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Id., at 805.

The trial court did not dilute the jury's understanding of its sentencing responsibility in instructing the jury as to the rendition of an advisory sentence. See Aldridge v. State, 503 So.2d 1257 (Fla. 1987).

This claim lacks substantive merit and should be rejected by this Court.

ISSUE VIII

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN SENTENCING RUTHERFORD ON THE ROBBERY CHARGE. (Restated by Appellee)

The trial court sentenced Rutherford to thirty years imprisonment on the robbery conviction to run concurrently with the death sentence imposed for the first degree murder conviction. (R. 161-162, 949).

Appellant argues that the trial court committed reversible error because a sentencing guidelines scoresheet was not prepared.

Appellee agrees with Appellant that the record is devoid of a sentencing guidelines scoresheet. Based upon controlling authority, Appellee submits that Appellant is entitled to the inclusion in the record of the sentencing guidelines scoresheet. See, Fla.R.Crim.P. 3.701(d)(1); Uptagrafft v. State, 499 So.2d 33 (Fla. 1st DCA 1986). (See motion filed contemporaneously herewith.)

CONCLUSION

Rutherford has failed to demonstrate reversible error. Based upon the foregoing argument and the authority cited herein, Appellant's judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to W. C. McLain, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 6th of April, 1988.

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