IN THE SUPREME COURT OF FLORIDA

FILED
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JAMES RICHARD BROWN,

Appellant,

v.

CASE NO. 70,230

STATE OF FLORIDA,

Appellee.

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

**BRIEF OF THE APPELLEE**

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## PRELIMINARY STATEMENT

The record on appeal which is contained in nine volumes will be referred to by the symbol "R" followed by the appropriate page number. References to appellant's brief will be by the symbol "ApB."

## SUMMARY OF THE ARGUMENT

Issue I -- The objection which appellant interposed below was neither specific nor on the same grounds that he now raises on this appeal. When appellant was given the opportunity to voir dire the witness as to the basis for his opinion, he failed to establish an inadequate basis. Moreover, the prosecutor established a sufficient basis for the opinion given.

Issue II -- Appellant's attempt to cross examine the victim's daughter about the victim's prior conviction for exporting firearms was neither relevant nor the proper method by which a prior conviction can be introduced.

Issue III -- While appellant raises several theories for reversal under this issue, he did not raise them below when he had an adequate opportunity. The only one of the theories he raised, and abandoned, below was that he was not present. But, his attorney was present, actively participated in what occured and waived appellant's presence.

Issue IV -- The evidence in this case adequately supports the finding that the murder was committed in a cold, calculated manner.

Issue V -- The evidence was more than adequate to establish that appellant formed the conscious purpose to take a life. This suffices to sustain a conviction for premeditated murder.

Issue VI -- Both the judge and jury felt this crime deserved the death penalty. Appellant has said nothing under this issue which justifies overturning the sentence of death.

Issue VII -- The fact that the assistant state attorney prepared the order sentencing appellant to death does not call for reversal because it merely reflected the judge's findings. This conclusion is fortified by the fact that appellant's counsel did not object when the lower court directed the assistant state attorney to draw up the order.

Issue VIII -- The lower court weighed and considered all of the mitigating factors which appellant proffered.

Issue IX -- This issue, to the extent it has any merit, which we do not concede, has been procedurally defaulted for failure to interpose an objection at anytime.

# ARGUMENT

## ISSUE I

THE TRIAL COURT ERRED IN ALLOWING THE FBI FIREARMS IDENTIFICATION ANALYST TO GIVE HIS EXPERT OPINION THAT STATE'S EXHIBITS 14 AND 15 (THE BULLET FRAGMENTS FOUND BEHIND THE CHINA CABINET, AND THE BULLET JACKET FOUND ON THE SHELF IN THE CHINA CABINET) APPEARED TO BE CONSISTENT WITH THE OTHER BULLET FRAGMENTS HE HAD EXAMINED.

Appellant complains that FBI agent Paul Schrecker, a firearms identification expert, was improperly allowed to give his opinion to the effect that the bullet fragments, (Exhibit 14), found behind the china cabinet and the aluminum jacket, (Exhibit 15), found inside the china cabinet, appeared to be consistent with other bullet fragments because the state did not establish any basis or predicate for this testimony in that his opinion was not based on any test results or microscopic examination or comparisons. (ApB - 59 - 60) The specific objected to quetion was

> Mr. Schrecker, Exhibits 14 and 15 that you had not examined that you just testified were the bullet jacket and fragment from the north wall in the china cabinet, could you look at those now and make any type determination as to what they are or where they came from?

(R 475 - ApB - 31)

As can be seen, that question does not ask the expert whether exhibits 14 and 15 are consistent. It only asks whether he could <u>now</u> determine where they came from.

**Florida Evidence Code 90.705** (1) specifically allows an expert to testify as to his opinion or inference without prior disclosure of the underlying facts or data. Bringing out the lack of any basis supportive of the opinion is left to cross examination. Subsection (2) does afford the party, against whom the opinion is offered, to conduct a voir dire examination of the witness in order to establish that the expert is basing his opinion without sufficient underlying facts or data to form his opinion. See City of Hialeah v. Weatherford, 466 So.2d 1127, 1229 (Fla. 3d DCA 1985) where, in interpreting **90.705,** the court said:

> "Under current law the burden of challenging the sufficiency of the basis for the opinion rests with the party against whom it is offered."

In the instant case, the prosecutor was attempting to establish whether the expert could now make this determination as to what the exhibits were and where they came from. Appellant objected, and then, pursuant to subsection (2), was afforded an opportunity to voir dire the witness. (R 476 - 478) During this voir dire, however, he did not prima facie establish that there was insufficient basis upon which the expert could now make this determination. The voir dire focused on the fact that, with respect to the other ballistic evidence, the expert had conducted laboratory tests and examinations, but he had not with respect to exhibits 14 and 15. (R 476 - 478) Not one voir dire question was asked as to whether the expert needed to make laboratory comparisons in order to determine what exhibits 14 and 15 " . . . are or where they came from." (R 475)

Thereafter, appellant again objected, stating that

> " . . . to have him compare something that he doesn't even have a microscope here, I think, would be speculative."

(R 478)

In the first place, the prosecutor had not asked him to compare. The question only asked whether the witness could now make any determination as to where exhibits 14 and 15 came from. The voir dire conducted by defense counsel did not establish he could not, because the question focused on how he examined the other evidence, not whether or why he could or could not now determine the source of exhibits 14 and 15. Thus, counsel for appellant never established there was an insufficient basis for the opinion.

In the second place, after the court overruled the objection, the expert testified that, as far as exhibit 14 was concerned, these lead fragments contained no marks that could be of value for a firearms comparison. (R 478) As to exhibit 15, he stated that it

> " . . . appears to be a silver colored, possibly aluminum bullet jacket.

(R 478)

He could tell this, (obviously without microscopic examination) " . . . because of the base shape," explaining "[t]here is a cannelure ring which is kind of a rolled identification ring on the bullet." (R 478)

Consequently, as far as the prosecutor's initial, objected to question was concerned, the expert was well able to determine

what those exhibits were and where they came from simply from a naked, visual observation.

Then came the specific question to which appellant now objects, but to which he did not object below:

> Q. Is there anything really particularly inconsistent as to 14 and 15 and the rest of the items, the bullet fragments that you examined?
>
> A. Well, again, based on a very gross observation, they appear to be similar.

(R 479)

An objection, to be preserved for appellate purposes, must be with specificity, Jackson v. State, 456 So.2d 916 (Fla. 1 DCA 1984), Steinhorst v. State, 412 So.2d 916 (Fla. 1 DCA 1984), Ferguson v. State, 417 So.2d 639 (Fla. 1982) and on the same grounds as raised on appeal. Steinhorst.

As the First District observed in Jackson:

> "If appellant had raised this specific objection . . . it could have been disposed of quite simply by putting one more question to the witness."

Id. at 919

In the instant case, not only did appellant not object to the specific question about which he now complains, but when given the opportunity below to voir dire the expert as provided in **Evidence Code 90.705(2)**, he never focused on the basis for expert's testimony.

Regardless, the evidence did establish a basis for the expert's testimony to the effect that on a " . . . very gross

examination . . . " exhibits 14 and 15 " . . . appear to be similar" with the rest of the ballIstic items, (R 479); viz: his visual in court, observation.

Appellant, of course, claims that this testimony destroyed his fabricated defense. His contention below was that Raymond Stacey was the first to fire a weapon, the implication being that that was the bullet fragments comprising exhibits 14 and 15. It is implausible to believe that if exhibits 14 and 15 were so crucial to establishing another gun was involved, appellant would not have had his own expert examine the exhibits. Nevertheless, on re-cross the expert admitted that those exhibits could be a different caliber, a .357, a .38 or a .9 millimeter. (R 479) Consequently, the opinion that was given by the expert rested on an adequate basis.

## ISSUE II

THE TRIAL COURT ERRED IN EXCLUSING EVIDENCE OF THE PRIOR CRIMINAL CONVICTIONS OF THE DECEASED, JOHN BAXTER, FOR DRUG AND FIREARMS OFFENSES.

During appellant's cross examination of Barbara Merrick, decedent's daughter, appellant's attempt to ask her if her father had had " . . . any problems with law enforcement." (R 308) The prosecutor objected and an extended discussion ensued as to whether Barbara Merrick could be cross examined concerning the decedent's criminal record. Appellant argued it went to show his violent behavior. (R 309) He contended he could ask Mrs. Merrick about her father's prior convictions. The court pointed out it would be hearsay. (R 310 - 311) Correctly so. **Florida Evidence Code 90.801.** Appellant did not argue below, nor does he here, that any exception is applicable.

During a long and convoluted argument below, appellant argued, as he does here, that he should have been allowed to ask decedent's daughter questions concerning her father's previous conviction of unlawful importation of a controlled substance and unlawful exportation of firearms because such evidence was relevant. (R 308 - 325, ApB 78 - 83)

But simply because evidence is relevant does not, without more, allow it to be received. As McCormick, Evidence, Second Edition observes:

> "The great body of law of evidence consists of rules that operate to exclude relevant evidence.

Id at 121

In addition to being relevant, a foundation or predicate for its admissibility must also be established. It must be demonstrated either that the evidence does not fall under a rule of exclusion or that it falls under one of the exceptions, if any. Appellant recognizes this because his argument in this appeal is concerned solely with the relevancy of the evidence, culminating in footnote 26 of his brief, where he says even if the rules permit exclusion of this arguably relevant evidence, this Court should nevertheless allow it because it was critical to his defense.

1. Method of Proof

When appellant first asked the question, the prosecutor interposed a relevancy objection (R 308), but when appellant argued that it was relevant to show the decedent's violent behavior (R 309), the question turned to the method of proof. Thereafter, the argument focused, not on relevancy, but on the method of proof. Throughout, in attempting to determine the method of proof, the court assumed the relevancy of the evidence. (R 309 - 325) First, the Court pointed out that to ask the daughter would be hearsay. (R 310) Then, the court determined that appellant was not trying to impeach the decedent. (R 311) Thereafter, the court determined that appellant was attempting to ask the daughter the question as a character trait in order to show the victim as the aggressor, (R 312), which, said the court, " . . . you are entitled to show." i.e. it would be relevant for that purpose. (R 312) See **Florida Evidence Code 90.404(b).**

But as the lower court also pointed out, (R 318) the method of proving a character trait is by reputation. **Florida Evidence Code 90.405** -- not through the hearsay testimony of the daughter that the decedent had been convicted of a crime. When the court asked counsel if he wished to proffer his question, counsel declined. (R 318) **Florida Evidence Code 90.104(1)(b)** controls, that is, when an appellant complains about a ruling excluding evidence he cannot complain, on appeal, unless below, he proffers what the answer would be. Mitchell v. State, 321 So.2d 108 (Fla. 1 DCA 1975).

The court informed defense cousel that it would allow the defense to ask the daughter her opinion as to whether her father was a violent man, but defense counsel declined (R 320) because he knew she would testify her father was not violent. (R 322) Counsel then argued that he would not want to ask her such a question unless he could impeach her by asking her questions concerning her father's convictions for firearms exportation. The court refused to allow such evidence, and correctly by so, because the attempt was to impeach the victim, not his daughter, through a prior conviction. This is governed by **Florida Evidence Code 90.610**, but the method is by first asking the testifying witness if he or she has ever been convicted of a crime enumerated in **90.610.** Mead v. State, 86 So.2d 773 (Fla. 1956). It is impermissible to go into the nature of the conviction. Ashcraft v. State, 465 So.2d 1374 (Fla. 2d DCA 1985). Evidence of specific acts cannot be introduced to impeach the credibility of a witness. Urga v. State, 155 So.2d 719 (2nd DCA 1963).

In summary then, appellant did not demonstrate below, nor has he demonstrated here, the method by which the evidence would be admissible, assuming it is relevant.

2. Relevancy

Moreover, the evidence was not even relevant. A defendant may introduce evidence of the victim's character trait for violence on the issue of who was the aggressor, Fine v. State, 70 So. 379 (Fa. 1915), Marcum v. State, 341 So.2d 815 (Fla. 2d DCA 1977). As stated above, this must be introduced through reputation evidence. Additionally, a defendant may introduce evidence of specific violent acts on the part of the victim, not for the purpose of showing who was the aggressor, but for the purpose of showing why the defendant acted in self defense, if such is the claim. Campos v. State, 366 So.2d 782 (Fla. 3d DCA 1978). But, in this latter instance, two predicates must be established: (1) that the defendant was aware of these specific acts of violence and (2) that the victim made some over act that reasonably indicated a need for action by the defendant in self defense. Williams v. State, 252 So.2d 243 (Fla. 4th DCA 1971).

Presumably, appellant was attempting to pursue this latter course, but he failed miserably. Neither of the above two criteria were met. He neither knew nor even heard of his victim; nor could he point to any overt act on the part of the victim, except perhaps a nod. Finally, the fact that someone may have been convicted of illegally exporting firearms is not evidence of a specific act of violence.

## ISSUE III

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF (1) VIOLATION OF FLA. R. CR. P. 3.410 (FAILURE TO RESPOND IN OPEN COURT TO A JURY REQUEST TO REVIEW TESTIMONY); (2) ABSENCE OF THE TRIAL JUDGE FROM A CRITICAL STAGE OF THE TRAIL; (3) APPELLANT'S OWN ABSENCE FROM A CRITICAL STAGE OF THE TRIAL; (4) ENTRY OF THE PROSECUTOR AND DEFENSE COUNSEL INTO THE JURY ROOM DURING DELIBERATIONS; AND (5) THE PROSECUTOR'S STATEMENT TO THE JURORS THAT HE DID NOT WANT ANY OTHER QUESTIONS.

The trial transcript reflects that, after the court instructed the jury, they retired to consider their verdicts. Thereafter, they returned with verdicts of guilty as to all counts. (R 713 - 714) There is nothing in the trial transcript record to indicate that during the interim the jury made any request or requests. (R 713)

However, in his motion for new trial, appellant included one paragraph which said:

> 5. That the Defendant was not present during the proceeding when the jury requested transcripts of testimony of three of the State's witnesses, thereby denying the Defendant an opportunity to fully participate in this facet of the proceeding, pursuant to Florida Rules of Criminal Procedure 3.600(b)(1).

(R 915)

On March 9, 1987, counsel for appellant appeared before the court on his motion for new trial and stated:

> " . . .I will submit it without argument."

(R 799)

Nevertheless, one of the assistant state attorneys brought up paragraph 5, concerning the fact that counsel had waived appellant's presence. (R 800)

The court reminded counsel that, with respect to appellant's presence, he had told appellant's counsel:

> " . . . I would be glad to have everydoby present if you wanted it."
>
> (R 801)

To which appelalnt's counsel responded:

> "That may be the fact, your Honor. My memory fails me on that point.
>
> (R 801)

No further argument was made on the motion for new trial concerning this matter.

The lower court denied the motion for new trial (R 915) and, on that same day, March 9, 1987, appellant filed his notice of appeal. (R 917)

Curiously, after the lower court had lost jurisdiction because of the filing of the notice of appeal, **Florida Rule of Appellate Procedure, Rule 9.600(b)**, the lower court, on April 15, 1987, conducted a hearing " . . . to make a record . . ." (R 807) No testimony was taken, no factual findings made, nor any rulings made with respect to the motion for new trial. Moreover, no additional issues were raised by appellant. All that occured was a colloquy between court and counsel as to what had occurred on February 20, 1987. (R 807 - 812)

Counsel informed the court that, while the jury was deliberating, the bailiff was notified they had a question. (R 807) The judge was contacted by telephone by counsel for the parties and the bailiff. Although the judge stated he would come in, (R 809), all agreed that counsel should ask the jury the nature of the question, (R 807), instructing them to writ the question down on paper, (R 807), which would be taken to the court. (R 808) Counsel and the bailiff returned to the judge's office (R 808) and, via telephone, relayed the question to the judge. (R 808) They all discussed the answers to be given. The jury had wanted the transcripts of the testimony of some witnesses. Counsel for both parties agreed that the Court should instruct them that they could not have this testimony; that the jury was to ". . . rely on their memories." (R 808 - 809) An answer was dictated and typed for the jury, (R 809), which stated:

> TRANSCRIPTS ARE NOT AVAILABLE, YOU MUST RELY ON YOUR MEMORY
>
> Judge Harry Lee Coe, III

This answer was stapled to the paper which the jury had submitted, asking the question, and " . . . returned to the jurors . . ." (R 809)

Appellant now claims that because of what occurred he is entitled to a new trial, not only on the absence of the defendant issue which he did raise in is motion for new trial, but on four other theories which he did not raise below; viz:

(a) Violation of Fla. R. Crim. P. 3.410;

(b) Absence of the trial judge from a critical stage;

(c) Entry of the prosecutor and defense counsel into the jury room;

(d) Prosecutor's statement to the jury that he did not want any other questions.

1. Waiver of Issues

(a), (b), (c) and (d) above should all be rejected because they were never raised below. The only issue that was raised in te motion for new trial was the issue involving the defendant's absence. Failure to raise an issue at the trial level precludes consideration of that issue on appeal. An appeal should be confined to those questions and only those questions which were before the trial court. This Court has stated it will not review questions not presented to the trial court, but raised for the first time on appeal. White v. State, 446 So.2d 1031 (Fla. 1984); Ashford v. State, 274 So.2d 517 (Fla. 1973); Silver v. State, 188 So.2d 380 (Fla. 1966); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Moreover, as stated by this Court in Tillman v. State, 471 So.2d 32 (Fla. 1985)

> In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument on ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.

Id - 35 (emphasis supplied)

See also Jackson v. State, supra, for a similar statement. Accord Bertrolotti v. Dugger, 514 So.2d 1095 (Fla. 1987); Junco v. State, 510 So.2d 909 (Fla. 3 DCA 1987).

While appellant may have filed a motion for new trial, the only specific legal argument he made was that he was not present. As stated, appellant's counsel submitted his motion for new trial without argument. Consequently, neither via written motion, nor by way of oral argument did he call the court's attention to these other issues which he now raises on this appeal. Not even the post appeal hearing of April 15, 1987 served to put the lower court on notice of these specific legal issues. Even if the court would have had jurisdiction to hear these at the time, the court's attention was not called to them. In footnote 9 of State v. Neil, 457 So.2d 482, 486 (Fla. 1984), this Court said:

> 9. As stated in **Castor v. State,** 365 So.2d 701, 703 (Fla. 1978):
>
> The requirement of contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings.

Of course, appellant relies on the old fundamental error argument. When you don't preserve your issue for appellate purposes, claim it to be fundamental error. Since it is an amorphous concept, the argument will carry some plausability. Error is not fundamental simply because someone stays it is. the federal decisions throw some light on the fundamental error

concept. Absent a showing of cause and prejudice, federal courts are required to reject constitutional claims that were procedurally defaulted in state court. Wainwright v. Sykes, 433 U.S 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977). Plain error does not excuse the default, United States v. Frady, 456 U.S. 152, 71 L.Ed.2d 816, 102 S.Ct. 1584 (1982), nor does the argument that the error violates due process. Engle v. Isaace, 456 U.S. 107, 71 L.Ed.2d 783 (1982). As stated by the Eighth Circuit in Clark v. Wood, 823 F.2d 1241, 1251 (8th Cir. 1987):

> When a federal habeas petitioner's failure to object is treated by the state court as a procedural default of his claim, the failure is to be scrutinized by the federal court under the cause and prejudice standard, as opposed to the fundamental fairness standard.

We know then, that as far as the federal courts are concerned, neither "plain error" nor a "due process" violation will excuse a procedural default. As far as the federal courts are concerned, absent a showing of cause and prejudice, a procedural default may only be excused where the constitutional violation has probably resulted in the conviction of one who is actually innocent. Murray v. Carrier, 47 U.S. 478, 91 L.ed.2d 397, 106 S.Ct. 2639 (1986); Smith v. Murray, 477 U.S. 527, 91 L.Ed.2d 434 106 S.Ct. 2661; Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987) -- then of course, it would constitute fundamental error.

We know that a defendant's absence from the courtroom does not constitute fundamental error because an express affirmative waiver is not required. In United States v. Gagnon, 470 U.S. 522, 84 L.Ed.2d 486, 105 S.Ct. 1482 (1985), the Court said that

the failure of a crimianl defendant to invoke his right to be present at a conference between judge and jurors constitutes a waiver of that right. Additionally, even where a defendant objects, reversal is not mandated absent a showing of prejudice. See also Williams v. State, 488 So.2d 62 (Fla. 196) which holds that communication between a judge and jury without notice to the defense should be analyzed using harmless error principles. Harmless error, obviously, cannot be fundamental. Williams v. State, 400 So.2d 542 (Fla. 3 DCA 1981) footnote 7.

Absence of the Judge

Absence of the judge does not constitute fundamental error. As the Third District recognized in Peri v. State, 426 So.2d 102 (Fla. 3 DCA 1983) it " . . . does not, ipso facto, render the proceedings a nultity . . . ." Automatic reversal is required only " . . . when a judge, over the defendant's objection, absents himself or herself from the proceedings . . . " Id. 1027 (emphasis supplied.) Accord: Haith v. United States, 342 F.2d 158 (3rd Cir. 1965); Stivone v. United States, 341 F.2d 253 (3rd Cir. 1965).

Appellant's counsel not only did not object, he invited the alleged error by actively participating in what occurred. McCrae v. State, 395 So.2d 1145 (Fla. 1980).

Naturally, appellant claims that the judge's absence requires an express affirmative waiver by the defendant personally. The High Court, however, has long recognized that decisions by counsel, during the course of a trial, are binding on the

defendant. See Henry v. Mississippi, 379 U.S. 443, 451 - 452 (1964); Estelle v. Williams, 425 U.S. 501, 512 (1976); Wainwright v. Sykes, supra, Chief Justice Burger concurring, Justice Stevens concurring, footnote 2; and Taylor v. Illinois, 98 L.Ed.2d 798 (1988), wherein the High Court said:

> The argument that the client should not be held responsible for his lawyer's misconduct strikes at the heart of the attorney-client relationship. Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has -- and must have -- full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval.

Taylor at 816

To summarize: Active participation by appellant's counsel in what occurred, together with the failure to object or to raise his issues in his motion for new trial precludes consideration of them on this appeal.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR.

Appellee does not concede that the facts of this case do not fall within what this Court considers the classic cold, calculated factor, that is, cases of contract murder or execution style killings. Perry v. State, 522 So.2d 817 (Fla. 1988).

Moreover, this Court has applied this factor to other than contract murders and execution styled killings where there is evidence of heightened premeditation in the commission of the murder. See for instance, cases cited in Preston v. State, 444 So.2d 939 (Fla. 1984). The lower court found and, we submit, there is competent, substantial evidence in this record to support the finding that the murder was committed in a cold, calculated manner. (R 943 - 946)

In Rogers v. State, 511 So.2d 526 (Fla. 1987) this Court utilized the standard dictionary definition to define "calculate;" viz: "[t]o plan the nature of before-hand: think out . . .to design, prepare or adapt by forethought or careful plan." Id. 533. The facts which the lower court set out in order in support of the finding that the crime was committed in a cold, calculated manner support this definition. Moreover, they are supported by the record: The lower court stated in its order:

> The capitol felony was a homicide and was committed in a cold, calculated, and

> premeditated manner without any pretense of moral or legal justification. State witnesses testified that shortly before the shooting of the three victims in this case, the defendant went out to his car which was parked in the victim's driveway. The testimony further indicates that defendant was out at his car for no more than five (5) minutes. Throughout the evening while the defendant was at the victim's house, he repeatedly asked them if they were police. Defendant's concern was that he had procured marijuana for the victims, and if they were police, he could have been arrested. After returning from his car, defendant re-entered the victim's house, armed with a .380 automatic pistol. He sat down at a table surrounded by his three victims. When defendant asked once more if they were police, Brian Merrick responded by saying "so what if we are cops," at which piont, defendant produced his firearm and shot at all three victims killing John Baxter, and seriously wounding Brian Merrick and Taymond Stacey. The evidence clearly indicates that defendant planned to massacre the family of Brian Merrick because he believed that they were police. Defendant went to his car to get his gun with the idea that he was going to kill his victims. He at that time coldly planned the killing. There was no pretense of moral or legal justification for defendants [sic] actions which could have easily ended in three killings instead of only one. Testimony of Barbara Merrick, a state witness, was that after shooting Raymond Stacey once in the back, defendant then stood over the wounded and immobilized Raymond Stacey, and put his gun within inches of Mr. Stacey's head, and pulled the trigger in an attempt to finish the execution of Mr. Stacey, but defendant's gun was out of bullets and would not fire. With these facts present before the court, this court finds that the homicide of John Baxter was committed in a cold, calculated, and premeditated matter without any pretense of moral or legal justification.

(R 945 - 946)

In other words, for whatever reasons, appellant cold bloodedly planned the execution of these people.

There is more than ample evidence in the record of this cause to support all of the court's factual findings. The murder weapon was in appellant's glove compartment. Appellant had previously pointed out this fact to Brian Merrick " . . . just in case you are or if you were cops." (R 207) Appellant throughout, was obsessed with the idea that they may be "cops," (R 207, 214, 295, 298, 365 - 366), to the point of even frisking decedent. (R 366) Appellant's concern with the size of Raymond Stacey, (R 367) was telling as to what he was planning. Appellant left a few minutes, obviously to get the weapon inside the glove compartment of his automobile. (R 297 - 298, 367 - 368)

It goes without saying, that this Court is free to substitute its judgment for the lower court as to the factual findings made with respect to the cold, calculated factor. However, if this Court views the record for the purpose of determining whether there is substantial, competent evidence to support the findings of the lower court, it must conclude that there is.

## ISSUE V

THE EVIDENCE OF PREMEDITATION IS INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION OF FIRST DEGREE MURDER.

It would be redundant for appellee to again argue the facts which support a finding of premeditated murder. As appellant has done, appellee will rely on his argument with respect to Issue IV.

There are, however, a few additional observations. As this Court has stated on more than one occassion, the degree of premeditation required to sustain a verdict of first degree murder is considerably less than that required to sustain a finding that the murder was committed in a cold, calculated manner. Preston v. State, supra, at 946; Washington v. State, 432 So.2d 44 (Fla. 1983). While premeditated murder requires the conscious purpose to take a life, McCutchen v. State, 96 So.2d 152 (Fla. 1957), it is not necessary that this intent to kill exist for any particular length of time. Polls v. State, 179 So.2d 236 (Fla. 2 DCA 1965). The intent to kill may occur a moment before the act. Lowe v. State, 105 So. 829 (Fla. 1925).

Moreover, while in reviewing the cold, calculated factor, this Court may independently review the facts and arrive at its own conclusion, in reviewing the conviction, the standard of review is to determine if there is substantial, competent evidence in the record to support the verdict after all the conflicts in the evidence have been resolved in favor of the verdict. Tibbs v. State, 397 So.2d 1120 (Fla. 1981); Williams v. State, 437 So.2d 133 (Fla. 1983).

## ISSUE VI

EVEN ASSUMING ARGUENDO THAT THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING FACTOR COULD BE UPHELD, IMPOSITION OF THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED UNDER THE TOTALITY OF THE CIRCUMSTANCES OF THIS CASE.

Appellant finds little merit in this issue since in a 126 page brief, he allots but two sentences to the issue. We will give the issue no more deference than to say that this was a most aggravated and unmitigated of homicides. The jury thought so. The lower court thought so.

## ISSUE VII

THE TRIAL COURT ERRED IN DELEGATING TO THE PROSECUTOR THE RESPONSIBILITY OF PREPARING THE ORDER SENTENCING APPELLANT TO DEATH, IN VIOLATION OF FLA. STAT. §921.141, AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee agrees with appellant to the effect that Nibert v. State, 508 So.2d 1 (Fla. 1978) and Patterson v. State, 513 So.2d 1237 (Fla. 1987) are controlling.

In Patterson, this Court found that the judge had improperly delegated to the state attorney the responsibility to prepare the sentencing order because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. In Nibert, the Court said it did not constitute reversible error because the judge had made the findings and conducted the weighing process; all that the state attorney did was prepare the order pursuant to those findings. Moreover, noted the court, defense counsel did not object when the judge instructed the state attorney to reduce is findings in writing.

The instant case is quite analogous to Nibert. When the judge asked the assistant state attorney to prepare an order, no objection was interposed. (R 18 - 19)

Naturally, appellant argues this case does not fall within the ambit of Nibert because, he says, the judge never specifically identified which aggravating circumstances and mitigating circumstances he was finding.

It is clear which two aggravating circumstances the judge was finding because only two were argued to the court or jury, (R 741, 742, 781), and the jury was instructed only as to two. (R 749 - 750) Prior to the penalty phase of the trial, the court had inquired of the prosecutor which aggravating circumstances he was relying on for purposes of instructions. A lengthy discussion ensued as to which aggravating circumstances were applicable. During this discussion, the Court rejected all aggravating circumstances except cold, calculated and previous conviction of a felony involving threat or violence to a person. (R 716 - 729) See for instance R 729.

In other words, when the judge told the prosecutor that he found two aggravating circumstances, it was clear which two, because he had already rejected all the others. The same holds true with respect to mitigating circumstances. In his allocution to the court defense counsel called the Court's attention to only one, possibly two, mitigating circumstances saying:

> Now, in this case, Judge, we have at least one, possibly two mitigating. The first mitigating, that the gentleman has no prior criminal record. The second, we've alleged, is that of his age. Even though he is thirty-seven, he is not that young, but I think the age of thirty-seven would show to the Court that for thirty-seven years this man has had no criminal record.
>
> (R 788)

When counsel argued to the jury, his argument centered around the fact that appellant " . . . had never been convicted

of a felony. He has been a law-abiding citizen for thirty-seven years," pointing to just but one " . . . little misdemeanor back when he was a teenager." (R 748)

It is manifest then, that when the judge said he found one mitigating, he meant no significant criminal history. It was the one emphasized by defense counsel and it was the one that all agreed existed. If that was not the specific one that the judge meant, he would not have signed the order. Appellant's argument that the judge might have wanted to find the defendant's age and good work record as mitigating factors is unavailing. The judge had specifically said he found only one. The order contained one, and he signed it.

The same holds true with respect to appellant's argument that it was the prosecutor, not the judge, who articulated the reasons supporting the aggravating factor findings. The order was submitted to the judge. If he had not agreed with the reasons, he would not have signed the sentencing order. It is " . . . a well-established presumption that . . . judge[s] adhere . . . to basic rules of procedure, Harris v. Rivera, 454 U.S. 339 70 L.Ed.2d 530, 102 S.Ct. 460 (1981) and disregard -- that which should be disregarded. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983). There is a presumption of regularity that attaches to official acts. Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981); Robinson v. State, 325 So.2d 427 (Fla. 1st DCA 1976); Engle v. State, 438 So.2d 803 (Fla. 1983).

ISSUE VIII

IN FAILING TO WEIGH OR CONSIDER THE PROFFERED NON-STATUTORY MITIGATING CIRCUMSTANCE OF APPELLANT'S HISTORY, THROUGHOUT MOST OF HIS ADULT LIFE, OF GAINFUL EMPLOYMENT, THE TRIAL COURT VIOLATED THE CONSTITUTIONAL PRINCIPLE OF LOCKETT V. OHIO, 438 U.S. 586 (1978) AND ITS PROGENY.

Appellant presents no argument with respect to this issue. He simply relies on the arguments and authorities in his Issue VII.

In issue VII he argues that in delegating to the assistant state attorney the duty of preparing the sentencing order, the judge neither identified the mitigating factors he found to exist, nor weighed or even considered those proffered.

In this issue her claims that the effect of the judge's delegation was to violate the principle of Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny.

In the first place, neither Lockett nor any of its progeny; viz Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982); Skipper v. South Carolina, 476 U.S. 1, 90 L.Ed.2d 1, 106 S.Ct. ___ (1986); Hitchcock v. Dugger, 481 U.S. ___ 95 L.Ed.2d 347, 107 S.Ct. 1821 (1987) require either the advisory jury or the judge to find a mitigating factor to exist. All that is required is that the sentencing authority consider the mitigating factors which it is asked to consider. As was observed in Issue VII, counsel argued to the court that there was at least one, possibly two, mitigating. (R 788) He specified the first as being no prior criminal history. He identifeid the second as

being appellant's age. (R 12) Then he asked the court to consider as a factor the fact that appellant had been gainfully employed most of his life. (R 788) Then again, counsel emphasized two: appellant's age and no prior criminal record, plus the fact that appellant had been gainfully employed all of his life. (R 788 - 789)

The judge listened. He in no way indicated he would not consider these factors. In fact, at one point in the weighing process, while the court was listening to counsel, the court said:

> THE COURT: Excuse me. I want to be able to give you plenty of time and do this in a very calm, deliberate fashion because I know it's important to you and your client and to the State, so let me just -- it's just a little too much confusion and milling around here.
>
> Let me continue this about fifteen or twenty minutes so we can get it settled down. I have a jury coming in and out. I apologize. I want you to have a nice, calm atmosphere in which to be heard, and there is just too much milling around and too much talking.

(R 784)

This, most certainly, is not the statement of a judge who is refusing to consider what counsel is advocating. He specifically said he wanted to " . . . do this in a very calm, deliberate fashion . . ."

After hearing counsel out, he announced he was finding one mitigating circumstance. There can be little doubt as to which one it was. Otherwise, he would not have signed the order.

ISSUE IX

THE JURY'S RECOMMENDATION OF DEATH WAS IRREPARABLY TAINTED BY A SERIES OF COMMENTS BY THE TRIAL JUDGE AND THE PROSECUTOR DENIGRATING THE IMPORTANCE OF THEIR PENALTY VERDICT.

The Caldwell v. Mississippi Issue

In Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985), a prosecuting attorney had argued to the jury that theirs was not the final decision in imposing the death sentence; that it was subject to automatic review. Defense counsel objected, but the court overruled the objection. The defense appealed the issue, but a divided 4 - 4 Mississippi court affirmed the death sentence. The prevailing opinion opined that the prosecutor's statement did not violate the Eighth Amendment. On Certiorari, the High Court disagreed, stating that the prosecutor's comments, uncorrected by the judge, after objection, diminished the role of the jury in that it led the " . . . sentencer . . ."[jury] . . . to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

As did the Eleventh Circuit Court of Appeals in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) as amended 816 F.2d 1493 (11th Cir. 1987) and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), petitioner contends that the precepts of Caldwell should be extended to Florida's sentencing structure.

Adams and Mann reason, essentially, that because the jury's role in Florida is so important as per Tedder v. State, 322 So.2d 908 (Fla. 1975), the Caldwell decision applies to Florida even

though in Florida the jury is not, as in Mississippi, the sentencing authority.

In his brief, appellant points to the following record cites as instances where either the judge or prosecutor informed the jury that their role was minor. (R 10, 15, 97, 738, 749)

Appellee has examined each record cite and has failed to find one instance where the defense interposed an objection.

Consequently, appellee takes the position that the issue has been procedurally defaulted because no contemporaneous objection was made. Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977); Clark v. State, 363 So.2d 331 (Fla. 1978); Caldwell, supra.

Moreover, appellee would take no part in a "merits" discussion, and would admonish this Court not to even come close to using the word, or even in any way indicating that it was denying this issue on any other than because of a procedural default -- if such be the case -- because that will only open the door for federal courts to second guess this court as to what it said. The federal law is that where an issue has been procedurally defaulted, if, nevertheless, the state appellate court considers the merits of the issue, the federal courts will also consider the merits. County Court of Ulster County, New York v. Allen, 422 U.S. 140 (1979). The Circuit Courts of Appeal have used any innocuous statement made by state appellate courts to say the state appellate court ruled on the merits of the issue. See Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), footnote 4 and Rosenfeld v. Dunham, 820 F.2d 52 (2nd Cir. 1987)

## CONCLUSION

Based on the above and foregoing reasons, arguments and authorities, the 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 furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000, Drawer PD, Bartow, Florida 33830, this 18th day of July, 1987.

OF COUNSEL FOR APPELLEE.