IN THE SUPREME COURT OF FLORIDA

MARK A. DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

Case No. 70,551

ON APPEAL FROM THE PINELLAS COUNTY CIRCUIT COURT

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The appellant was charged by indictment with first degree murder, robbery and grand theft. (R 8) The cause proceeded ta trial on January 13, 1987. (R 588) The jury returned a verdict of guilty as charged on all counts on January 20, 1987. (R 220, 892) On January 23, 1987 the sentencing phase was commenced. (R 1484) At the conclusion of that hearing, the jury rendered as recommendation that the appellant be sentenced to death. Thereafter, the trial court continued the sentencing hearing until January 30, 1987. When the sentencing hearing was resumed, the trial court made oral findings as to the aggravating factors in support of the death sentence and imposed sentences on all judgments before the court. (R 1641-1645) A written sentencing order was filed on March 18, 1987. (R 26 -273)

A belated notice of appeal was filed. (R 274-275) It is from this posture that the appellant presents several sentencing issues for this court's review.

STATEMENT OF THE FACTS

Guilt Phase

The appellant, Mark Davis, had been staying at or in the parking lot of the Gandy Efficiency Apartments for four days prior to the murder of Landis. (R 920) The victim, Orville "Skip" Landis, moved into Unit #1 of the Gandy Efficiency Apartments on July 1, 1986 and was assisted in his move by the appellant. (R 959) Subsequent to moving Landis into his apartment, the appellant and Landis began drinking beer. (R 930) During this time the appellant obtained $20 from Landis and gave Landis tattoo equipment as collateral. (R 931) The appellant told Kimberly Rieck that he planned to get the old man drunk and take whatever he could. (R 928) During approximately the same time the appellant told Beverly Castle that he was going to "rip him (Landis) off and do him in". (R 962)

When Landis initially moved in he had not paid his rent or given a deposit. (R *962)* However, on that day Landis cashed a check for $250 and was given another $250 by his son-in-law. (R 1007) Thereafter, Landis attempted to give Beverly Castle $285 for the rent and deposit and Castle told Landis that she would not take the money and that Landis would have to pay the money to Carl Kearney. (R *962)* Landis was intoxicated at this time and the appellant appeared to be in full control of his facilities.

(R **964-965)** The appellant told Landis that he wanted some of Landis' money, (R **963)** Landis told the appellant that he wasn't going to give him money and made reference to the fact that he had already spent quite a bit drinking. (R **964-965)** At this point, the appellant made a grab for Landis' wallet and Landis was able to pull away in time (R 966). Both Landis and the appellant continued to argue as they went to Landis' apartment. (R **966)**

Landis was last seen alive at 8:30 by Beverly Castle. (R 968) At approximately 11-12 that night the appellant arrived at Castle's door and said that he had to leave right away and that he would be seen again in two or three years. (R 966-967) The appellant went from Castle's apartment to Rieck's apartment. (R 967) Upon arriving at Rieck's apartment, the appellant **asked** for a pair of socks and again stated that he would be seeing them again in two or three years. **(R 933-934)** From that point, the appellant was seen driving away in Landis' car. (R **968)**

During the morning and afternoon of July **2, 1986** Landis was not seen and Landis' dog was in the apartment. (R 969) These facts caused Beverly Castle to become concerned that something was wrong, and as such, she got Carl. Kearney to take a look into Landis' apartment. Kearney removed a glass panel from a window and looked inside Landis' apartment that evening. Kearney observed Landis face down in a pool of blood on the mattress. (R

969-970) Thereafter the police were called. When the police arrived they observed numerous stab wounds, a butcher knife in the trash can and tattoo equipment in a cooler. **(R 1012-1013)** Dr. **Wood** reviewed the victim's body and determined that there were **11** stab wounds to the back, four stab wounds to the left side of the neck, one wound across the middle of the neck running from left to right, two stab wounds on the right side of the **neck,** two stab wounds above the breast, one stab wound below the breast, four stab wounds to the abdomen and substantial bruises to both eye areas that were the product of multiple blows to the face which occurred before death. **(R 1096-1115)** Dr. Wood **also** testified that Landis had been choked with substantial force, that Landis was intoxicated to the degree that he was without his full facilities and that perpetrator of murder had been standing next to the bed during the murder. (R **1119, 1121, 1126)** Dr. **Wood** opined that it took Landis approximately ten minutes to die from this prolonged attack. (R 1129)

Fingerprint identification technician Thomas Jones testified that one of the beer cans found in Landis' room had the appellant's fingerprints on it. (R **1183)**

The appellant made two admissions to killing Landis. The appellant told Shannon Stevens that he killed Landis (R 1205) when Landis woke **up** while the appellant was attempting to rob Landis. The appellant also confessed to law enforcement that he

killed Landis. Particularly, the appellant stated that he struck Landis after Landis had "grabbed his nuts" and that he stabbed Landis several times with a butcher knife that he had taken away from Landis. R 1275-1276) Thereafter, the appellant claimed that he went and obtained a smaller knife which he used to slit Landis' throat and stab Landis several more times. (R 1276) The appellant stated that he took $80-85 dollars from Landis' wallet and drove Landis' car to Tampa. (R 1277)

Penalty Phase

The state presented evidence of the appellant's May 16 1983 judgment and sentence from Illinois for burglary as well as statement from the records supervisor that the appellant was on parole at the time of the instant offense. (R 1508) Thereafter, the state introduced the appellant's judgment and sentence for armed robbery in 1980. (R 1509) The state brought forth testimonial evidence that the appellant committed this attempted armed burglary with a knife. (R 1515)

The appellant testified that he was 23 years old and that he had a family in Perkin, Illinois. (R 1517-1518) The appellant expressed that he wished that the murder had never happened and that he had the will to receive a life sentence rather than death sentence. (R 1519-1520) The appellant also testified that he had made the decision not to call his mother during the

sentencing phase so that she would not have to go through the ordeal. (R 1522) On cross examination the appellant admitted that he had absconded from parole when he came to Florida and that he had only been out of jail two to two and a half months when he committed the instant murder. (R 1529)

On January 30, 1988 the trial court entertained a final sentencing hearing. At this time, the state presented evidence that the appellant's 1980 judgement for armed robbery was disposed of as an adult felony judgment rather than a juvenile disposition. (R 1602-1608) During this hearing a victim, Katherine Landis Hansbrough (victim's daughter), made as statement to the lower court in favor of the death sentence. (R 1611-1615) The appellant was offered an opportunity to present further testimony and declined. (R 1616) However, the appellant offered exhibits with respect to the 1983 attempted armed robbery judgment being prosecuted as a juvenile offense and the state also presented documentary evidence that the 1983 was treated as adult felony conviction. (R 1616-1629) Thereafter, the appellant waived having a pre-sentence investigation report prepared. (R 1639)

The trial court's oral pronouncement that the death sentence was being imposed was preceded by the following statutory aggravating factors being found: 1) the instant offense was committed while the appellant was on parole; 2) a prior

conviction of armed robbery; 3) that the instant murder was especially wick, evil, atrocious and cruel; 4) that the instant murder was cold, calculated and premeditated. (R 1642-1643) In the trial court's written sentencing order the court found five statutory aggravating factors. (R 267-269) These statutory aggravating factors were: 1) the capital felony was committed while the appellant was under sentence of imprisonment pursuant to section 921.141(5)(a), Fla. Stat.; 2) that the appellant had previously been convicted of a felony involving the use or threat of violence to some person pursuant to section 921.141(5)(b), Fla. Stat.; 3) that the capital felony was committed while the appellant was engaged in the commission of a robbery pursuant to section 921.141(5)(d), Fla. Stat.; 4) that the capital felony was committed for pecuniary gain pursuant to section 921.141(5)(f), Fla. Stat,; and 5) that the capital felony was especially heinous atrocious, or cruel pursuant to section 921.141(5)(h), Fla. Stat. (R 269-271) However, the trial court considered three of these aggravating factors as a single statutory aggravating factor for purposes of determining the appropriate sentence. (R 270) As such, there are three independent aggravating factors. The lower court further found that the tendered mitigating evidence was of little or no weight when compared to the aggravating factors. (R 271-272)

SUMMARY OF THE ARGUMENT

The appellant's failure to object to the app ication of the statutory aggravating factors with sufficient specificity results in a procedural default of the issue for appellate review, Furthermore, this court has provided guidance to the meaning of the statutory aggravating factor of especially heinous, atrocious or cruel and this definition is within Eighth Amendment constraints. As such, the appellant's claim is without merit.

In Grossman v. State this Court applied a harmless error standard to a Booth v. Maryland issue. In determining harmless error this Court noted 1) the lack of the trial court's written order's reliance on anything contained in the victim impact statement, 2) the numerous aggravating factors, and 3) jury's recommendation of death which was produced exclusive of the complained of victim impact statement. All of these factors which rendered any error harmless are present in this case.

Since there is record evidence which is probative of a heightened degree of intent to murder and the type relied upon by a rational trier of fact, this court should affirm the judgment of the lower court that the statutory aggravating factor exists.

ARGUMENT

ISSUE I

WHETHER THE INSTANT SENTENCE OF DEATH MUST BE VACATED BECAUSE IT WAS RENDERED, IN PART, ON THE AGGRAVATING FACTOR THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The appellant argues for the first time on direct appeal that the statutory aggravating factor that the murder was especially heinous, atrocious or cruel, section 921.141(5)(h), Fla. Stat., is constitutionally flawed under the teachings of Maynard v. Cartwright, 108 S.Ct. 1853 (1988), and as such, the appellant's sentence should be vacated due to the trial court's reliance on this aggravating factor in determining that the death sentence should be imposed. While at the time of this briefing this Court has not ruled on the application of Maynard v. Cartwright to the Florida scheme, the appellee would submit that appellant's failure to raise the issue below amounts to a procedural default of the issue which bars the issue from being entertained on direct appeal. In support of this position the appellee would note that Maynard v. Cartwright is an Eighth Amendment case providing no new or novel concept in this areas of the law, and in such areas this court has applied the procedural default doctrine. See generally Grossman v. State, 525 So.2d 833 (Fla. 1988); Combs v. State, 525 So.2d 853 (Fla. 1988); and Ford v. State, 522 So.2d 345 (Fla.1988).

In Maynard v. Cartwright, the United States Supreme Court found the analogous Oklahoma statutory aggravating factor to be vague and without sufficient guidance since its application failed to limit the discretion of the sentencing jury [so as to be violative of the Eighth Amendment] and vacated the death sentence since at the time the petitioner's cause was reviewed on direct appeal in state court the Oklahoma system did not implement a harmless error analysis, but rather, directed that a life sentence be imposed when there was sentencing error of this sort. A critical point of distinction between the Oklahoma provision and the Florida statute is that the Oklahoma Supreme Court had not applied the restrictive construction doctrine to the Oklahoma statute so as to provide sufficient guidance which would cure the unbridled application of the aggravating factor. However, this court was provided substantial guidance as to the appropriate application and limitations of section 921.141(5)(h), Fla. Stat.

In Magill v. State, 428 So.2d 649 (Fla. 1983), the court rejected a like attack on the statute and stated that sufficient guidance had been provided in State v. Dixon, 283 So.2d 1 (Fla.1973). While Dixon described this aggravating factor as being distinguishable from the norm by circumstances which have been judicially described as conscienceless, pitiless or unnecessarily torturous this statutory aggravating factor has

also been applied to the calculated slaughter of numerous persons in White v. State, 403 So.2d 331 (Fla.1981). As such, the appellee submits, not only has this Court provided well guided meaning for the application of this statutory aggravating factor, but this limitation is within the spirit of Eighth Amendment since it provides a rational basis for determining between those who receive the death sentence and those who do not. The appellee's position is clearly bolstered by the fact that the statutory aggravating factor in issue was upheld by the United States Supreme Court in Profitt v. Florida, 428 U.S. 2452, 254-256 (1976). The Maynard v. Cartwright decision noted this fact while contrasting Profitt with Godfrey v. Georgia, 446 U.S. 420 (1980).

In summation, this Court has provided guidance to the meaning of the statutory aggravating factor of especially heinous, atrocious or cruel and this definition is within Eighth Amendment constraints. As such, the appellant's claim is without merit.

ISSUE II

WHETHER THE STATEMENT GIVEN BY THE VICTIM'S DAUGHTER TO THE SENTENCING JUDGE RESULTS IN THE INSTANT DEATH SENTENCE BEING INFIRM ON EIGHTH AMENDMENT GROUNDS.

The appellant claims in his second issue on appeal that the trial court's entertainment of Katherine Landis Hansbrough' Statement is violative of the Eighth Amendment under the teachings of Booth v. Maryland, 107 S.Ct. 2529 (1987), and that this issue was preserved for appellate review by the objection cited at record pages 1611-1615. [page 14 of appellant's brief at footnote 1]

This Court has applied procedural defaults to Eighth Amendment claims as noted in the appellee's argument in the first issue and has applied a procedural default to a Booth v. Maryland, claim in particular, Grossman v. State, 525 So.2d 833 (1988). The evidentiary procedural default rule in Florida not only derives from case law such as Grossman, but also, has been specifically codified in the Florida Evidence Code. Section 90.104(1)(a), Fla. Stat. Both section 90.104(1)(a) and the case law require that the alleged evidentiary error be preserved by objection and that the objection be both timely and sufficiently specific so as to apprise the lower court of the putative error. See generally Castor v. State, 365 So.2d 701 (1978) and Jackson v. State, 451 So.2d 458 (Fla.1984). As this Court noted

in State v. Rhoden, 448 So.2d 1013 at 1016 (Fla.1984), the primary purposes of the contemporaneous objection rule is to give the trial judge an opportunity to address objections and to correct error. Sub judice, there is nothing in the appellant's general object which apprises the trial judge that the appellant was objecting on Eighth Amendment grounds, that the mere presentation of a statement by a victim would render the sentencing process void, and the victim's statement should not be considered in aggravation or that the trial court had erred in considering the victim's statement in aggravation. As such, the appellant's general objection was without the requisite specificity to preserve the issue for appeal, Castor, supra, and this procedural default precludes the issue from being entertained an the merits, Grossman, supra.

The instant situation is substantially different from that found in Booth v. Maryland since the victim impact statement in Booth was presented pursuant to a statute which mandated that the victim impact statement be considered in the sentencing process. As such, the sentencing decision in Booth was tainted by consideration of factors which were contrary to the Eighth Amendment's requirement that the capital sentencing scheme be finely tailored so as to avoid arbitrary and capricious imposition of a capital sentence. As noted in Grossman, Florida has unequivocally held hard and fast to the concept that the only

aggravating factors to be considered in determining whether to impose a death sentence are those delineated in the capital sentencing statute and that any other considerations in aggravation are error. As such, the law in Florida is that consideration of a victim impact statement in determining the sentence is erroneous in a capital case. Furthermore, the trial court's determination of the aggravating factors is complete void of consideration of the victim's statement and the purely statutory aggravating factors which were found by the trial court were substantiated entirely on record evidence of the crime and the appellant's character and void of any factual reliance on any factar which can be found or inferred from the victim's statement, As such there has been no violation of the Eighth Amendment vis a vis Booth by imposition of irrelevant sentencing factors in the sentence determination process.

In Grossman, at 845-846, this Court applied a harmless error standard to an identical factual setting. In determining harmless error this Court noted 1) the lack af the trial court's written order's reliance on anything contained in the victim impact statement, 2) the numerous aggravating factors, and 3) jury's recommendation of death which was produced exclusive of the complained of victim impact statement. All of these factors which render any error harmless are present in this case. As such, any color to appellant's argument is rendered moot by the application of harmless error rule.

ISSUE III

THERE IS LEGALLY SUFFICIENT EVIDENCE UPON WHICH THE AGGRAVATING FACTOR THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION RESTS.

Prior to discussing the merits of the claim, the appellee would submit that the failure to make the argument now presented to the trial court with the requisite specificity required by Castor v. State, 365 So.2d 701 (Fla. 1978), results in a procedural default of the issue; thereby precluding the issue from being entertained on the merits. Johnson v. State, 478 So.2d 885 (Fla. 3rd DCA 1985) Patterson v. State, 391 So.2d 344 (Fla. 5th DCA 1980).

The appellee respectfully submits that the scope of review is whether there is legally sufficient evidence upon which a rational trier of fact could rely in determining so. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). In U.S. v. Chancey, 715 F.2d 543 (11th Cir. 1983), the court discussed the type of evidence upon which a rational fact finder could rely. In Chancey the court recognized that appellate courts should resolve all disputes in favor of the judgment, but that matters which are contrary to human experience (walking in the rain for an hour and not getting wet/running a mile in a minute) could not be relied

upon for substantiation of a judgment even though these matters affirmatively appear in the record. Sub judice, evidence of appellant's mind set was presented in the form of 1) appellant's statement immediately prior to the murder [I'm going to rip him aff and do away with him]; 2) the type and number of weapons [two knives]; 3) the manner in which the weapon would have to have been used [slitting the victim's throat numerous times after already inflicting mortal blows]; 4) the nature of the wounds [stab wounds to the back which excited the chest of the victim while he was on his bed]; 5) the appellant's statement that the reason he was so brutal and repetitive in his attack was because the victim wouldn't die; and 6) the expert testimony that it took the victim ten minutes for Landis to die. None of the above evidence is contrary to human experience, In fact, most of the above evidence is unrefuted matters of fact, substantiated by reliable demonstrative evidence and consistent with known human experience. As such, the above evidence is the type which may be relied upon. Furthermore, these matters are probative of criminal intent to kill rather than self defense under the teachings of Sireci v. State, 399 So.2d 964 at 967 (Fla. 1981), where the Court stated:

> Evidence from which premeditation can be inferred includes such matters as the nature if the weapon used, the presence or absence if adequate provocation, previous difficulties between the parties, the manner in which the

homicide was committed and the nature and manner of the wounds inflicted.

Whereas there is record evidence which is both probative of a heightened degree of intent to murder and the type relied upon by a rational trier of fact this court should affirm the judgment of the lower court that the statutory aggravating factor exists since there is legally sufficient evidence upon which the judgment rests.

CONCLUSION

Based on the foregoing argument, citations of authority and references to the record, the judgment and sentence of the trial court should be affirmed.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT a true and correct copy of the foregoing has been forwarded by U.S. Mail to BATTAGLIA, ROSS, HASTINGS & DICUS, AUBREY O. DICUS, JR., MARGIE E. IRIZARRY, Post Office Box 41100, St. Petersburg, Florida 33743 this 4th Day of January, 1989.

OF COUNSEL FOR APPELLEE