IN THE SUPREME COURT OF FLORIDA

DARRELL WAYNE HALLMAN,

Appellant,

vs.

Case No. 70,761

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant was charged by indictment with (1) first degree murder; **(2)** robbery; **(3)** kidnapping; **(4)** robbery and **(5)** kidnapping (R **1).**

At trial, Scott Anderson testified that appellant asked where he could get a gun, said he'd pay **$500.00** for it and that he couldn't tell Anderson what he was going to do with it (R **642-645).** Hallman told the witness that he had it all planned (R **645).** Anderson gave him the gun (R **651).**

Cab driver Gloria Strahan picked up a customer (appellant) who said he needed to cash a check. They pulled into the bank and appellant said he had a gun and was going to commit an armed robbery. As directed by appellant the cab driver entered the bank with Hallman. She observed Mrs. Alexander put money in a grocery bag and heard her say they'd been robbed when appellant left. The witness heard gunshots and, since she had paramedic training, put pressure on the chest wound of the victim (R **666-680).**

Bank customer Malcomb Fox saw appellant carrying a bag in his hand and draw a gun from his waistband. He looked back and saw the guard fall (R **699-700,** R **709).**

Bank teller Faye Alexander described giving the money demanded by appellant at gunpoint to him (R **723-744).** Other bank employees Terry Le Fevere, Rose Wood and Carolyn Jean Haller similarly described their observations at the bank (R **757-778).**

Mark Harrell and Claude Williams saw the man carrying a bag, get into a brown car that had pulled up and drive away (R **801-817).**

Pamela Harrell saw appellant standing by a car, raise his hand and the guard dropped to the ground (R **821-822).** Beatrice Harrell saw appellant walk toward her after the shooting (R **845).**

Vernon Warren was driving his brown **1979** Toyota when appellant got in, pulled a gun on him and commanded him to drive where he was told. Eventually, Warren was let out and Hallman departed in the stolen car (R **853-866).**

Thomas Folson saw a suspicious man carrying a bag enter a trailer. He called police when he heard of the bank robbery and saw police arrest appellant (R **874-886).**

Roy Skinner gave police consent to search his trailer. A month earlier appellant asked to borrow money to get a gun (R **884, 893).**

Warren's stolen vehicle was found a couple of blocks from Sherwood Mobile Home Park **(R 899).**

Crime scene technician Melinda Clayton testified that a revolver was found inside the suit case with a large quantity of money. She also described a pillow case with bloodstained clothing (R **935-937).**

Officer Street testified that appellant had received a gunshot wound in the left side (R **958).**

George Kistner described blood in the Warren vehicle (R 965).

Herman Moulden stated that the victim's gun was found at the scene - all six bullets had been fired (R 991-992). The gun found at the trailer had two fired and three live cartridges. He also described the denominations of the bank money recovered (R 1005-1011).

Pathologist Dr. Frances Drake stated that the victim had a single bullet wound to the chest (R 1048).

Mike Ivanchevich testified that the cab was hit three times by gunfire (R 1067).

The jury returned verdicts of guilty of murder in count 1, guilty of robbery with a firearm in count 2, guilty of kidnapping with a firearm in count 3, guilty of grand theft (a lesser offense in count 4) and guilty of kidnapping with a firearm in count 5 (R 1307-1308).

At the penalty phase, the state introduced the testimony of probation officer George Olivo who declared that appellant was released on parole March 1, 1983, following receipt of a ten year sentence for robbery. In 1979, Hallman and two companions had robbed a Super X Drug Store. At gunpoint they ordered fifteen people to lay on the floor while they attempted to retrieve drugs (R 1397-1398).

Defense witness Jerry Sadler described appellant as no problem while Sadler supervised his parole (R 1414-1415).

D.O.C. senior correctional specialist Joseph Crawford reported finding no disciplinary reports on appellant (R 1423). Hallman had to serve a three year mandatory minimum sentence for

use of a firearm in the robbery (R **1428).** He received an early release date (R **1430-1432).**

Appellant's sisters Linda Harris, Betty Hendrick and Helen Edwards described appellant's family background: their father was an alcoholic and abusive (R **1437,** R **1454, R 1460).**

It was stipulated that psychologist Dr. Zwingelberg administered psychological tests; Hallman was within low average range of intellectual abilities (R **1466).**

Another sister, Shirley Phals, described appellant as kind and generous and helpful (R **1488).** Helen Edwards' husband, Wilham, described appellant as kind, generous and helpful (R 1495).

Father Patrick O'Dorte described the defendant as simple and easily led; he talked to him about becoming a Roman Catholic (R **1501-1502).** This witness was unaware that appellant had previously robbed a drug store with a handgun. He acknowledged that obtaining a handgun to commit a robbery would demand more premeditation than a mere theft (R **1503-1504).**

Appellant testified in his own behalf and described the abuse from his alcoholic father (R **1508-1509).** His foster parents were simultaneously kind and mean (R **1514).** He urged that he had a clear disciplinary record while in prison (R **1521);** his divorce tore him apart (R 1527). Hallman didn't intend to hurt anybody during the armed robbery at the bank (R **1535).** On cross-examination, he conceded that he had selected this particular bank because he felt they didn't have a guard and

there was a better chance of getting money with a gun (R 1548-1549). He admitted going to prison for an armed robbery (R 1551).

The jury recommended life imprisonment (R 1635, R 1660) but the trial judge overrode the recommendation R 1704-1707).

SUMMARY OF THE ARGUMENT

Point I: The lower court did not err reversibly in finding as an aggravating factor that the instant homicide was especially heinous, atrocious or cruel. Such an aggravating factor may be permissibly found, even where death is caused by a single gunshot wound, where there is mental anguish on the part of the victim of his imminent demise. Furthermore, even if this Court were to find error on this point, the remaining valid aggravating factors and absence of meaningful factors in mitigation require affirmance.

Point 11: The lower court did not err in finding as an aggravating circumstance that appellant created a great risk of death to many persons. Almost a dozen persons were in or near the bank or the parking lot where the shoot-out occurred and could easily have been seriously injured by a stray or ricochet bullet. *Cf.* Suarez v. State, 481 So.2d 1201 (Fla. 1985).

Point 111: The trial court correctly found the aggravating factor that the capital felony was committed to avoid lawful arrest and appellant candidly acknowledges that the factor should not be challenged. Appellant argues that the jury may have given it little weight but since in Florida the jury does not engage in specific fact finding at the penalty phase it is true that we do not know the weight assigned. However, the trial judge's sentencing order is subject to appellate review and the presence of multiple unchallenged aggravating evidence requires affirmance of the jury override.

Point IV: The trial court did not improperly override the jury's recommendation. The trial court was aware of the standard of Tedder v. State, 322 So.2d 908 (Fla. 1975), considered all that was presented to it, and concluded that the presence of multiple valid aggravating factors outweighed whatever had been proffered in mitigation and that death was the appropriate sanction.

Point V: The trial judge's order is not inadequate for meaningful appellate review. The order recites that he considered all the statutory and nonstatutory mitigating evidence presented and deemed it insufficient when compared to the applicable aggravating factors. Even if this Court were to conclude that clarification is appropriate, a remand rather than a reversal is appropriate in light of the multiple valid unchallenged factors in aggravation.

Point VI: The lower court did not err in departing from the sentencing guidelines on the non-capital counts.

POINT I

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN FINDING AS AN AGGRAVATING FACTOR THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

ARGUMENT

The prosecutor correctly argued below,

> The sixth aggravating circumstance that applies in this case is was the crime especially wicked, evil, atrocious, or cruel. And here you have to look at two things in deciding if it was or wasn't what we call heinous, atrocious, and cruel. You have to look at what the defendant did and you have to look at the effect that had on the victim, on Mr. Hunick.
>
> You have the right to look at what he was going through, what he may have been thinking, what sort of mental anguish or mental cruelty that he was experiencing because of the actions of Mr. Hallman.
>
> You have an elderly man in his sixties, and we don't know, I don't think there was any testimony as to how familiar he was with these type of situations, whether he'd even gone through a situation like this before, whether he had ever had the occasion to have to try to pull his gun or to apprehend a suspect in the past.
>
> But you've got an elderly man who was there simply I think as one of the tellers from the bank said, more as a deterrent than anything else, who was suddenly confronted with a situation; was suddenly confronted with someone coming out of the bank; carrying a bag obviously having robbed the bank; pulling a gun; and Mr. Hunick is trying to decide, well, what am I supposed to do? Do I try to apprehend him, do I let him go his way, what do I do?
>
> And then you think to yourself, well, he feels that he's a security guard and his job is to try to protect the bank, so he better

try to do something, he better not just stand around and do nothing because his job is to -- is to do what is necessary to protect the bank.

So, he sees this man pulling a gun, he pulls his gun, and obviously we don't know what's going through his mind. But obviously I think as a common -- as common sense or in common ordinary people, you have to believe that he was experiencing himself some type of fear or apprehension as to what's going to happen to him.

Then he gets behind the cab, he fires one or maybe more shots towards Mr. Hallman, and he sees that that has no effect. The shots that he fires do not fell Mr. Hallman, do not result in Mr. Hallman's apprehension, do not result in Mr. Hallman throwing down his bag and holding up his arms and say I give up.

Mr. Hallman is still standing there with his gun even after Mr. Hunick had fired his first one or two shots. And then Mr. Hunick is standing there and he sees the gun coming up and he sees the gun being pointed at him and he's fired upon and he falls to the ground and he does not die immediately. He lays there at the -- initially still alive. He tries to get off some shots. And the next thing that happens is Mr. Hallman comes walking over to him, kneels down, and points the gun at him.

Now, Mr. Hunick has no way of knowing what's going to happen next. He has no way of knowing if he's going to die from the bullet wound he's already received, if another shot is about to be put into him, he doesn't know what's going to happen to him. And that is what makes this crime heinous, atrocious, and cruel, the fact of the mental pain and anguish that would have to have been going through this man before he died, the fear, the not knowing what's going to happen to him next. That's what sets this crime apart and makes it as the legislature has indicated especially wicked, evil, atrocious, or cruel. (R 1580-1583).

The trial court agreed this factor was present (R 1705-1706).

This Court has upheld an "HAC" finding where the victim was alive and conscious and aware of defendant's actions which created mental anguish on the part of the victim. Cf. Melendez v. State, 498 So.2d 1258 (Fla. 1986) (gunshot wound to head would have caused instantaneous death but accompanied by victim's knowledge of impending doom when throat slit); Scott v. State, 494 So.2d 1134 (Fla. 1986) (victim undoubtedly suffered stark terror from awareness of likelihood of death); Cooper v. State, 492 So.2d 1059 (Fla. 1986); Francis v. State, 473 So.2d 672 (Fla. 1985); Harvey v. State, 529 So.2d 1083 (Fla. 1988); see also Mendyk v. State, __ So.2d __, 14 F.L.W. 303 (Fla. 1989).

While it may be true that appellant did not fire a second shot execution-style to the head of the victim after the initial disabling wound, it is nonetheless also true that appellant put the victim in apprehension of imminent death by pointing the gun at the guard after the shooting (R 702, R 721).

Finally, even if this Honorable court should reject the trial court's finding with respect to §921.141(5)(h), Florida Statutes, nevertheless the sentence of death should stand as there are multiple aggravating factors and no mitigating factors. See Clark v. State, 443 So.2d 973 (Fla. 1983) (when there are four valid aggravating circumstances and no mitigating circumstances, reversal of sentence not warranted). In this appeal, appellant does not challenge the following aggravating factors found by the trial court:

(1) the capital felony was committed by a person under a sentence of imprisonment - F.S. **921.141(5)(a);**

(2) the defendant was previously convicted of a felony involving the use or threat of violence to other persons - F.S. **921.141(5)(b).**

(3) the capital felony was committed while defendant was engaged in the commission of or flight after committing a robbery - F.S. **921.141(5)(d).**

(4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody - F.S. **921.141(5)(e).**

Thus, even if the Court finds error here, it must be deemed harmless.

POINT II

WHETHER THE LOWER COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT APPELLANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

ARGUMENT

The trial court's order recites:

> 3. The defendant knowingly created a great risk of death to many persons, to-wit: knowingly discharging a firearm and causing Lewis Hunick to discharge a firearm in an area where numerous persons were, to-wit:
>
> Gloria Strahan - in the bank
>
> Malcolm Fox - in the bank parking lot
>
> Faye Alexander - in the bank
>
> Terry LeFever - in the bank
>
> Rose Wood - in the bank
>
> Carolyn Haller - in the bank
>
> Mark Harrell - in a nearby field
>
> Claude Williams - in a nearby field
>
> Pamela Harrell - parked on road next to bank defendant started towards her.
>
> Beatrice Harrell - parked on road near bank defendant started towards her.
>
> and numerous motorist, drivers, passengers, and passing-byers on the heavily travelled Highway 98 North in north Lakeland.

(R 1705)

The prosecutor had cogently argued in support of this aggravating factor:

> He put the people in the bank, there were I think testimony seven or eight people that were in the bank that were scurrying for cover. Now, obviously none of them were shot but they didn't know that. The people in the bank certainly felt they were in danger when they were ducking behind counters and going into the back rooms. But there was no way for them to know a stray shot's not going to come through the window and hit one of them.
>
> Mr. Fox who was driving through the parking lot certainly felt he was in danger because he decided to get out of there fast enough that he didn't even see the end result he was so concerned for his well-being.
>
> We have two young men who were mowing the lawn across the road that were in danger of being hit by stray shots.
>
> We had Mrs. Harrell and her daughter who were driving down the road next door to the bank who were in danger.
>
> We had untold people driving down Highway **98**, a very heavily traveled, busy road in the north part of Lakeland. Any of them could have had one of these bullets going through their car window.
>
> So, Mr. Hallman's actions put a great many people in danger of possible injury, and that was considered by the legislature to be an aggravating circumstance. Whether he killed his victim out in a remote area where nobody else was around, where nobody else was in any harm of danger or whether he did it in a circumstance like this where other people conceivably could have been hurt, injured, or even killed.
>
> **(R 1578-1579)**

The record supports the finding. Cab driver Gloria Strahan heard the gunshots from her position in the back of the bank (R 675). Afterwards, she observed the back window of the cab was

completely blown out as was the left rear window (R **679**). Malcolm Fox, while driving in the parking lot had to put on his brakes to avoid hitting the victim bank guard (R **693**). When he saw what was going on he started to pull out of there - he was almost in the line of fire - and he was trying to save himself (R **699**).

Bank teller Faye Alexander, started to head for the back of the bank when she heard gunshots. Hallman returned to the front of the bank to get back in after shots were fired but the door was locked (R **735-736**).

Terry LeFever, another bank tell r, was warned by Mrs. Alexander to get down and get to the back of the bank and heard her cry out that appellant was trying to get back in (R **760-761**). She heard shots and began to cry (R **761-762**).

Bank employee Rose Wood stooped down at her station when appellant left (R **766**). She heard Faye say that he was coming back and heard gunshots (R **767**).

Carolyn Haller hit the bank alarm when she saw the weapon (R **777-778**). When appellant went out the front door, she left her office and went to the back (R **778-779**).

Mark Harrell was mowing grass at a nearby bowling lane and heard gunshots (R **801**). He saw the guard laying on the ground (R **807**). He was not closer than **25-30** yards away (R **809**).

Claude Williams, mowing the lawn with Mr. Harrell, followed the gunman until he got into the brown vehicle (R **815**).

Pamela Harrell was parked on the road next to the bank, saw appellant shoot the guard (R 822). When the guard was on the ground, the victim fired four or five shots (R 825-826).

Beatrice Harrell observed appellant walking towards them after the shooting - she was afraid (R 845)

This Honorable Court upheld a finding of this aggravating factor in Suarez v. State, 481 So.2d 1201 (Fla. 1985), which involved a shoot-out between the defendant and law enforcement officers, not unlike the instant case. (There, the defendant fired in the area of a migrant labor camp even though there was no evidence the police returned fire.) As in Suarez, it seems it was an act of providence that more were not injured.

Moreover, even if the Court were to reject this aggravating factor, affirmance would still be appropriate as there are multiple aggravating factors and no mitigating factors (even where there has been a jury recommendation of life . See Johnson v. State, 393 So.2d 1069 (Fla. 1980).

POINT III

WHETHER THE JURY COULD HAVE REASONABLY GIVEN LITTLE WEIGHT TO THE AGGRAVATING FACTOR THAT THE CAPITAL FELONY WAS COMMITTED TO AVOID LAWFUL ARREST.

ARGUMENT

Appellant notes at page **59** of his brief that he "has decided not to challenge the legal sufficiency of the trial court's finding that the capital felony was committed to avoid lawful arrest. This was a case of felony murder, in which the shooting presumably could have been avoided if appellant had simply surrendered when approached by the guard." Appellee agrees.

But, appellee does not share appellant's suggestion that the homicide victim was the aggressor. Certainly appellant was not impelled to engage the victim in a shoot-out.

Appellant argues that the jury may have given little weight to this factor; the contention is necessarily speculative and yet it is an apodictic truism that the jury may have thought anything. Since under Florida law a jury at the penalty phase does not make any findings, we can never know why a jury makes the recommendation that it does.

As stated in Echols v. State, **484** So.2d **568, 576** (Fla. **1985)**:

> "In determining whether the override was based on facts *so* clear and convincing that virtually no reasonable person could differ, we look to the trial court's sentencing order."

Here, the trial court's order finding six aggravating factors (four of which are unchallenged) and no mitigating factors demonstrates that death is the appropriate penalty. The override was appropriate. See Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988).

POINT IV

WHETHER THE TRIAL COURT IMPROPERLY OVERRODE THE JURY'S RECOMMENDATION OF LIFE.

ARGUMENT

Appellee recognizes that in Tedder v. State, 322 So.2d 908 (Fla. 1975), this Court created the standard that in order to sustain a sentence of death following a jury recommendation of life the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. Appellee also recognizes that the Tedder rule has come under criticism. See, e.g., the concurring opinion of Justice Shaw in Grossman v. State, 525 So.2d 833, 846-851 (Fla. 1988) and Combs v. State, 525 So.2d 853, 858-860 (Fla. 1988), and his dissenting opinion in Burch v. State, 522 So.2d 810, 814-815 (Fla. 1988). See also, Spinkellink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978) (". . . reasonable persons can differ over the fate of every criminal defendant in every death penalty case . . . such is the human condition") And since Florida law does not provide for specific factual findings by the jury, at the appellate level some speculation is essential.

Appellant argues that the trial court articulated no compelling reason for overriding the life recommendation; appellee disagrees. First of all, the trial court in its written order acknowledged the due deference to be given the jury's recommendation under Tedder. Secondly, the trial court articulated findings of the presence of six aggravating factors,

four of which are not challenged by appellant' and found no mitigating factors (R 1704-1707).

Appellant argues that the override was improper because this was not a premeditated killing but only a homicide committed in the perpetration of a robbery and in response to the guard's efforts to apprehend him. Appellee responds by observing that the legislature has made a legislative determination that a homicide committed in the perpetration of a robbery is an aggravating factor meriting the death penalty. F.S. **921.141(5)** (d). It is therefore more egregious than a mere premeditated killing. Moreover, it is inaccurate to consider this an accidental homicide as Hallman admitted his intent prior to the incident "that I wasn't going to prison again" (R 1532). The intervention of the armed guard certainly would have impeded the appellant's goal.

Appellant next contends that the jury's recommendation could have been based on extensive evidence of nonstatutory mitigating circumstances. He points to testimony concerning a traumatic childhood. Mitigating against that, however, is the fact that the father was abusive to all the children and appellant's four sisters presumably did not choose a career of successive armed robberies. Additionally, appellant testified that his foster parents were kind and mean "at the same time" (R 1514).

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[1] The four unchallenged aggravating factors are F.S. **921.141(5)(a), (b), (d), (e).**

This case is unlike Holsworth v. State, 522 So.2d 348 (Fla. 1988). There, the defendant in addition to being physically abused by his alcoholic stepfather, was a borderline personality with paranoid and schizoid features. His use of alcohol and PCP on the night of the murder would cause an extreme emotional reaction diminishing his capacity to appreciate the nature and consequences of his acts. 522 So.2d at 353. Moreover, there is a rational nexus between suffering abuse as a child and becoming abusive to others later as an adult. (In Holsworth two women were attacked in their mobile home). The instant case, on the other hand, involves no history of drug abuse and presents a defendant who apparently prefers to commit premeditated armed robberies from time to time. Cf. Rogers v. State, 511 So.2d 526, 535 (Fla. 1987) (record did not support conclusion that childhood traumas produced effect relevant to his character, record or circumstances of the offense so as to afford basis for reducing sentence of death).

Appellant recognizes at page 69 of his brief that his childhood experiences were not a totally negative experience since he was able also to produce witnesses who could describe him as a kind, gentle person (R 1488, R 1495). The relationship between appellant and his father did not then inhibit the ability of appellant to be a decent human being.

It is understandable that appellant's relatives would be willing to testify that a criminal defendant is a nice person whom they would prefer not be electrocuted; indeed if their views

prevailed there would be no capital punishment in the country. Similarly, the testimony of Father O'Dorte does not suffice as a predicate for a life recommendation. While it may be commendable that appellant was interested in studying Catholicism (R 1501), the witness had to admit that he was unaware the defendant had previously committed an armed robbery and admitted that an armed robbery required a degree of premeditation (R 1503-04).

Significantly, appellant does not urge that the trial court erred in failing to find as a mitigating factors. F.S. 921.141 (6) (b), (e) or (f) and thus reliance on cases which involved extreme emotional or psychological deficits are inapposite.[2]

The claim that appellant exhibited good conduct and would be an exemplary prisoner based on his prior prison experience is belied by the undeniable truth that upon his early release from prison Hallman chose to resume his practice of armed robbery, on this occasion with fatal consequence.

Nor does appellant's employment record meaningfully warrant reversal of the trial court's order. Appellant concedes that he lost his job; his decision to seek a new start by retrieving money from the bank at gunpoint hardly merits an award by the sentencer.

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[2] For example, Ferry v. State, 507 So.2d 1373 (Fla. 1987) involved overwhelming evidence of extreme mental illness; see also Fead v. State, 512 So.2d 176 (Fla. 1987) (extreme mental and emotional disturbance and duress with alcohol consumption); Amazon v. State, 487 So.2d 8 (Fla. 1986) (history of drug abuse and extreme mental or emotional disturbance).

As in Torres-Arboledo v. State, 524 So.2d 403, 413 (Fla. 1988), the weak testimony concerning potential for rehabilitation is not "of such weight that reasonable people could conclude that they outweigh the aggravating factors proven."

Since reasonable persons could not differ that death is the appropriate sanction in the instant case, this Court should affirm the lower court.

POINT V

WHETHER THE TRIAL JUDGE'S ORDER FAILS TO STATE WHAT MITIGATING CIRCUMSTANCES WERE CONSIDERED AND FOUND.

Appellee disagrees with Hallman's contention that the trial court failed to state what mitigating circumstances were considered. The lower court's order recites:

> In considering the mitigating circumstances, the Court reviews the statutory circumstances.
>
> a. No significant history of prior criminal activity - the evidence indicates that although the defendant does not have a lengthy history he has a significant history in the prior Armed Robbery.
>
> b. No evidence to determine or establish that defendant was under the influence of extreme mental or emotional disturbance.
>
> c. Not applicable. Since no evidence that victim was a participant in defendant's conduct.
>
> d. Not applicable. No accomplice involved in the capital felony.
>
> e. Not applicable. Defendant did not act under the extreme duress or under the substantial dominance of another person.
>
> f. No evidence to establish that the capacity of defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired.
>
> g. Age of defendant at time of crime is not applicable. Defendant is thirty-one years of age - was thirty years of age at time of crime.
>
> There are no statutory mitigating circumstances.

> In considering nonstatutory mitigating circumstances and all other circumstances of mitigation, the Court has reviewed the entire list submitted by defendant: Defendant's good prison record, defendant's good parole record, defendant's family history and background, defendant's work record, defendant's non use of illegal drugs and all the other circumstances listed by the defendant. These do not outweigh the aggravating circumstances in this case.
>
> (R 1706-1707)

In short, the trial court considered everything that was submitted by appellant.

In Echols v. State, 484 So.2d 568, 576 (Fla. 1985), this Court observed:

> . . . One of the unfortunate side effects of admitting any and all nonstatutory mitigating evidence is that it encourages the introduction of evidence which, in the context of the case, carries very little weight. As we said in *Porter v. State*, 429 So.2d 293, 296 (Fla.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983):
>
> > The only requirement is that the consideration of mitigating circumstances must not be limited to those listed in section 921.141(6), Florida Statutes (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 u. State*, 414 So.2d 185, 187 (Fla. 1982).
>
> *Id.* Part of the difficulty is semantic. Technically, a trial judge does not reject evidence which is considered in mitigation. Instead, the trial judge finds that its

> weight is insufficient to overcome the aggravating factors.

In Rogers v. State, 511 So.2d 526 (Fla. 1987), the court added:

> There appears to be some confusion over the concept of mitigation as set forth in our death penalty statute, which requires "specific written findings of fact based upon [aggravating and mitigating] circumstances . . . and upon the records of the trial and sentencing proceedings." §921.141(3), Fla.Stat. (1985). However, a "finding" that no mitigating factors exist has been construed in several different ways: (1) that the evidence urged in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved.

(text at 534)

And in Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988), the Court repeated:

> Lamb also introduced nonstatutory mitigating evidence that he would adjust well to prison life; that his family and friends feel he is a good prospect for rehabilitation; that before the offense he was friendly, helpful, and good with children and animals; that he had seen a psychologist and a psychiatrist concerning drug abuse and emotional problems; and that he had consumed alcohol and smoked cannabis in the hours preceding the capital felony. The trial court concluded that the record did not support the notion that his behavior was affected by alcohol or drugs. In considering the other factors, the court concluded that none rose "to the level of a mitigating circumstance to be weighed in the penalty decision." This statement gives us pause.

We have previously recognized the semantic ambiguities which result from reviewing and considering any and all nonstatutory mitigating evidence. ***Echols u. State,*** 484 So.2d 568, 576 (Fla. 1985), ***cert. denied,*** 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986). More recently, we stated:

> There appears to be some confusion over the concept of mitigation as set forth in our death penalty statute, which requires "specific written findings of fact based upon [aggravating and mitigating] circumstances . . . and upon the records of the trial and the sentencing proceedings." §921.141(3), Fla.Stat. (1985). However, a "finding" that no mitigating factors exist has been construed in several different ways: (1) that the evidence urged in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved.

Rogers u. State, 511 So.2d 526, 534 (Fla. 1987), ***cert. denied*** , **U.S. __,** 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Mindful of the admonition that a trial court could not refuse to consider any relevant mitigating evidence, we found that

> the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability of the crime committed. If such factors exist in the record at the time of sentencing,

> the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

It is unfortunate that judges must be semanticists as well as judges. Here, the trial court articulated that he had considered everything (prison record, parole record, family history and background, work record, non use of illegal drugs, etc.) and none of it outweighed the aggravating. So little weight can be ascribed to such things as appellant's work record and so unrelated to the criminal offense is Hallman's family record[3] - see Rogers v. State, supra - that appellant should not be permitted to disagree with the weight given by the trial judge. Porter v. State, 429 So.2d 293, 296 (Fla. 1983); Quince v. State, 414 So.2d 185, 187 (Fla. 1982).

Should this Court agree with appellant, a remand for clarification would be more appropriate than reversal in light of the multiple aggravating factors present and the paucity of mitigating presented.

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[3] For example, evidence from family members that appellant was abused as a child might help explain his conduct in the context of a brutal rape-murder but certainly adds no insight to a premeditated bank robbery. See Rogers, 511 So.2d at 535.

POINT VI

WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES ON THE NON-CAPITAL COUNTS.

ARGUMENT

The trial court sentenced appellant to life imprisonment on count 2 - robbery with a firearm, to life imprisonment on count 3 - armed kidnapping, to life imprisonment on count 5 - armed kidnapping and five years imprisonment for grand theft, a lesser included offense on count 4 (R 1689, R 1696-1700, R 1707).

First of all, the Court should affirm on the authority of Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), wherein the Court declared that:

> "the fact that a defendant has been convicted of first degree murder, a capital felony which cannot be scored as an additional offense at conviction, may serve as a clear and convincing reason for departure."

(text at 414).

The trial court's written reasons for departure articulated evidentiary premises which were embraced in the capital murder:

> 1. Defendant induced a minor (Scott Anderson) to participate in acts of juvenile delinquency, to-wit: taking or staling a firearm from his parents.
>
> 2. The offense for which defendant was sentenced was committed in a premeditated, and calculated and preplanned manner without pretense of moral or legal justification.
>
> 3. In committing the offenses for which defendant was sentenced he knowingly created a great risk of injury or death to a large number of persons.

> 4. Defendant committed the offense for which he was sentenced for the purpose of avoiding or preventing a lawful arrest or effecting an escape, to-wit: armed kidnapping, armed kidnapping, grand theft, first degree murder.
>
> The Court retains jurisdiction for one-third (1/3) of defendant's sentence to review any release order to assure public safety in that the defendant will not soon return to the free society.

(R 1703).

Moreover, the reasons given in the trial court's order for departure have been found valid by the appellate courts. For example, in the second reason, above the court refers to the premeditated nature of the offense. See Lerma v. State, 497 So.2d 736 (Fla. 1986); Traver v. State, 502 So.2d 1009 (Fla. 2d DCA 1987). As for reason number one - the inducement of minor Scott Anderson to facilitate his criminal activities - that too is a valid reason. Cf. Santana v. State, 507 So.2d 680 (Fla. 2d DCA 1987).

Reason number three - knowingly creating a great risk of injury or death to many - also is a valid reason justifying departure. See Webster v. State, 500 So.2d 285 (Fla. 1st DCA 1986); Staten v. State, 500 So.2d 297 (Fla. 1986).

As to reason number four, appellant concedes that the reason is "factually true as to the Warren kidnapping and theft" but contends that it is not a sufficient basis for departure. We disagree and believe it is a sufficient basis.

This Court should affirm.

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the judgment and sentence of death 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. Mail to Steven L. Bolotin, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, Florida **33830**, this 20th day of July, **1989**.

OF COUNSEL FOR APPELLEE