(served 2 days late)

IN THE SUPREME COURT OF FLORIDA

ERNEST FITZPATRICK, JR.,

Appellant,

CASE NO. 70,927

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Ernest Fitzpatrick, Jr. was the defendant below and will be referred to herein as "Fitzpatrick" or "Appellant". The State of Florida was the prosecution below and will be referred to herein as "The State" or "Appellee". All proceedings took place before Circuit Court Judge M. C. Blanchard. The Record on Appeal will be designated by the symbol "R" followed by the appropriate page number in parenthesis. The original opinions in Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983) and Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986) will be referred to as Fitzpatrick "I" and Fitzpatrick "II".

STATEMENT OF THE CASE

Appellee accepts these statements of the case set forth in the initial brief of Appellant.

STATEMENT OF THE FACTS

Appellee agrees that the facts surrounding the offense were accurately set forth in the court's first opinion. Fitzpatrick v. State, 437 So.2d 1072, 1074-75 (Fla. 1983). However, Appellee very strongly rejects the statement in the initial brief of Appellant at page nine (9) that "the bullet fragment that killed the victim was not fired by Appellant but by another police officer". There was no dispute in the testimony of Mary Helen Blake that Fitzpatrick shot Officer Doug Heist and killed him before any other officer fired their gun.[1] (R. 594). Mary Blake Spann testified that:

> I believe he said, "Freeze, this is the police," or, "Freeze, this is the sheriff's department," or something, but that the gentleman that was here with the gun moved the gun up and shot him in the head.
>
> **Q.** Did you actually see him shoot the deputy?
>
> **A.** Yes, I did.
>
> **Q.** Okay. Had the deputy fired a shot?
>
> **A.** No. He had not.
>
> **Q.** Had anybody fired a shot at that point?
>
> **A.** No. They had not.

(R. 594).

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[1] Appellee would point out for benefit of the Court that Mary Helen Blake has married since the time of the original trial and is now known as Mary Helen Spann. (R. 585).

Eric Shaw testified that he didn't actually see the shot that struck the deputy. (R. 620). However, Paul Parks testified that Deputy Heist put his gun through the little opening there and said, "Freeze, police and the young man swung his gun around and shot him point-blank". (R. 631). Parks immediately then grabbed the Defendant's arm which was holding the gun and started wrestling him to the floor. (R. 632). Officer Tom Lewis testified that the police reconstruction of the crime scene was in error. (R. 1037). The error occurred because there was no test done on the bullet lodged in the wall and the bullet found in Officer Heist's head. The new reconstruction of the crime would be that the bullet struck Officer Heist in the head, passed through his head and then lodged in the wood frame.

During voir dire the State peremptorily challenged Dale Anita Jackson and Francis McCarty Jackson and McCarty were black. Ms. McCarty stated on voir dire that she didn't know whether she could vote to impose the death penalty. (R. 173). Phyllis McGorvey and Priscilla Rease were allowed to remain on the jury. McGorvey and Rease are black.

SUMMARY OF ARGUMENT

I,II,III Appellant has twice received a death recommendation from a jury and the sentencing judge has twice imposed death. The trial court found five aggravating factors. This Court had previously approved the trial court's finding of aggravating factors in the initial appeal. The trial court therefore properly weighed the jury recommendation of death and the aggravations and mitigating factors and concluded death was the appropriate penalty. There was no improper doubling of aggravating circumstances.

IV Evidence of Appellant's juvenile history was properly brought before the court on cross-examination of a defense expert witness. This Court has held the admission of such evidence is proper.

V Appellant complains that the introduction of his testimony from the original sentencing proceeding violated his privilege against self-incrimination. This argument is fatuous. There has never been a determination that this statement was given involuntarily. The cases relied upon by Appellant involve the use of illegally obtained statements or confessions.

VI The State properly challenged two black jurors and allowed two other black jurors to remain on the jury. Therefore,

Appellant is unable to demonstrate the prosecutor's actions were racially motivated.

VII Appellant cannot claim the trial court erred in failing to strike a juror for cause where there were still peremptorily challenges remaining which could have been used to strike her. This was the finding of the trial court below.

VIII Great deference must be given to the factual findings of the sentencing court and the imposition of the death penalty. Appellant complains that the trial court did not consider that the crime was of short duration. The evidence showed defendant planned the crime. Moreoever, the jury, in the guilt phase, found the defendant guilty of premeditated murder. The third trial court found three statutory mitigating factors going to the mental and emotional state of the defendant. Fourth, there was a clear criminal design. Fifth, Appellant had two prior juvenile criminal escapades. Sixth, there was no testimony Appellant was reared in conditions which would excuse his conduct. Seventh, Appellant's intelligence was considered as part of the statutory mitigating circumstances of age. Finally, there was no doubt as to who shot the victim.

IX The trial court correctly sustained the prosecutor's objection which was based on the fact that the State was not allowed to argue the murder was cruel or cold and calculated.

X The prosecutor's remark, "Why not put him on the stand", falls short of being a comment which is fairly susceptible as a comment on silence. This comment did not draw a timely objection.

XI and XII The jury was adequately instructed to consider all evidence presented by the Appellant either as statutory or nonstatutory mitigating evidence.

XIII The admission of photographs of the victims of a crime are not victim impact statements. The fact that a picture of Paul Parks was shown to his friend Harriet Majors was due to the failure of Appellant to exercise a peremptory challenge to that Majors. Trial court did not abuse this discretion in admitting the photograph.

XIV There is no basis for the argument that the prosecutor improperly delegated the decision to seek the death penalty to the victim's family.

XV This juror did not sit on the panel and Appellant has alleged no prejudice arising from the trial court's failure to strike him for cause.

XVI It is proper to cross-examine and expert witness on the matters used to formulate his expert opinion.

ARGUMENT

ISSUE I

DEATH IS THE APPROPRIATE PENALTY ON THE FACTS OF THIS CASE.

Appellant argues that this court's proportionality review of the death sentence below mandates reversal to "guarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case". State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Poffitt v. State, 510 So.2d 896 (Fla. 1987).

This case bares no resemblance to the facts established in in Poffitt, supra. Here the defendant had a highly detailed plan which he implemented to disastrous results including armed kidnapping, attempted first-degree murder and premeditated murder. This court rejected the proportionality argument in the original appeal.

Moreover, the cases relied upon by appellant involved unanimous jury recommendation of life, Jones v. State, 332 So.2d 615 (Fla. 1976) or the imposition of the death sentence for child rape, Huckaby v. State, 343 So.2d 29 (Fla. 1977), cases where the defendant was initially found incompetent to stand trial, Miller v. State, 373 So.2d 882 (Fla. 1979); Mines v. State, 390 So.2d 332 (Fla. 1980) or a jury override, Ferry v. State, 507 So.2d 1373 (Fla. 1987). Mr. Fitzpatrick has presented what he

considers an ample record of mitigating circumstances to two jurys and received two death recommendations. The original jury found Fitzpatrick guilty of premeditated and felony murder in the first degree. See Record on Appeal, Fitzpatrick v. State, Case No. 60,097, p. 1281.

The fact that the trial court found three mental mitigating factors represents proof that the facts and circumstances of the offense and the defendant's character were carefully considered and weighed by the judge and jury. This is consistent with the fact that the Court agreed to instruct the jury that the Court would be required to and would give great weight and serious consideration to your recommendation in imposing sentence. (R. 1067, 1128). This is the Caldwell v. Mississippi, 105 S.Ct. 2633 (1985) instruction discussed in Card v. Dugger, 512 So.2d 829, 831 (Fla. 1987); Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987).

ISSUE II

THE TRIAL COURT'S FINDINGS THAT AGGRAVATING CIRCUMSTANCES EXIST IS SUPPORTED BY SUBSTANTIAL CONFIDENT EVIDENCE IN THE RECORD.

A. THE FINDING OF GREAT RISK OF DEATH TO MANY PERSONS.

Appellee agrees that this court does not apply a strict law of the case analysis where resentencing results in another death sentence, King v. State, 12 F.L.W. 502 (Fla. September 24, 1987). However, King involved application of a newly involving standard of review to the aggravating factor involving great risk to many persons. King's original death sentence was reviewed in King v. State, 390 So.2d 315 (Fla. 1980) which was prior to this court's opinion in White v. State, 403 So.2d 331 (Fla. 1981). Fitzpatrick has already had his sentence reviewed under the White test and affirmed. This court is bound by the law of the case given this procedural history. This raging gun battle was not mere speculation and involved high risk of injury and actual injury to others. Mr. Fitzpatrick's planning included taping the gun to his hand so that it could not be taken away from him and he also brought six additional bullets in case of a shootout. This finding is consistent with presence of this factor in Delap v. State, 440 So.2d 1242 (Fla. 1983); Delap v. Dugger, 12 F.L.W. 517 (Fla. October 8, 1987).

B. PECUNIARY GAIN

This aggravating factor was approved by this court in the original appeal and appellant has presented no changing legal authority for his argument that this court erred in its original opinion.

C. PREVENTING LAWFUL ARREST

This aggravating factor was also approved by this court in the original opinion and appellant has likewise failed to present any argument or involving standard of review which would require this court to recede from its original opinion.

D. PREVIOUS CONVICTION OF A FELONY

This aggravating factor was approved by this court in the original appeal and appellant concedes that Wasko v. State, 505 So.2d 1314 (Fla. 1987) permits the use of contemporous convictions where there was more than one victim. In this case we have multiple victims. Appellee would also note that Wasko was a jury override.

E. CAPITAL FELONY WAS COMMITTED WHILE INGUAGED IN THE COMMISSION OF AN ENUMERATED FELONY.

Appellant has presented no argument on this point and apparently concedes the validity of this aggravating factor. The trial court's sentencing order and factual findings do not

involve doubling aggravating factors based on a similar aspect of the offense. Once again this argument was thoroughly briefed and argued and decided and Fitzpatrick I and appellant has presented no basis under this court's evolving standard of capital review which compels a second determination of the validity of the aggravating factors.[2] Fitzpatrick at 1076-1077.

[2] Appellee asks this Court to take judicial notice of the Initial Brief filed by P. Douglas Brinkmeyer in the file of Fitzpatrick v. State, case no. 60,097 at p. 38-55.

ISSUE III

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF APPELLANT'S JUVENILE HISTORY ON CROSS-EXAMINATION OF DEFENSE EXPERT WITNESS.

It is axiomatic that certain forms of evidence which would be inadmissible in the state's case-in-chief may be admissible on cross-examination to impeach a defense witness or establish a basis of an expert opinion. See Harris v. New York, 401 U.S. 222 (1971) where the supreme court allowed statements obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966) to be admitted to impeach a criminal defendant's credibility. Similarly this court has allowed the state to inquire into the case history of the defendant when cross-examining a defense expert witness even where the defense offered a written waiver of intent to rely on the mitigating circumstance of no significant prior criminal activity. Parker v. State, 476 So.2d 134, 139 (Fla. 1985). This position has been reaffirmed in Muehleman v. State, 503 So.2d 310 (Fla. 1987). It is also worthwhile to note that Justice Ehrlich, the author of Parker and Muehleman dissented in Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986). The opinions in Parker and Muehleman are tacit recognition by this court that a capital sentencing jury should not be forced to analyze a defendant's character in a vacuum when charged with the awsome responsibility of determining whether death is the appropriate penalty. This is the logical extension

of Skipper v. South Carolina, 106 S.Ct. 1669 (1986) which announced an open door policy on the admission of character evidence in capital cases. Therefore, appellant's statement that the prosecutor defied this court's opinion in Fitzpatrick II mischaracterizes the state's position.

Appellant also argues the evidence was too remote in time and violated subsection 39.10(4) and 39.10(6), Fla. Stat. Even though this court has never placed a time limitation on the use of prior felony convictions to impeach a witness, this argument misses the mark. Fitzpatrick was not being cross-examined but rather it was Dr. Barnard, an expert witness who was being cross-examined. The prior record was not being used to establish Fitzpatrick was a criminal hence a liar but rather to inform the jury of the information upon which Dr. Barnard relied to reach his expert opinion.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN ALLOWING THE INTRODUCTION OF APPELLANT'S PRIOR TESTIMONY IN THIS SENTENCING PROCEEDING.

Appellant argues that his tactical choice to testify at his original sentencing proceeding bars the use of this testimony in subsequent sentencing proceedings because he was somehow compelled to testify. This argument is without merit.

In Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979) trillogy, the statements were held to be the illegal product of a coerced confession. Coercion was based on the interrogation techniques of the law enforcement officers involved. Obviously that was not the case here and the trial court has never held that testimony was involuntary. In any event, the opinion in Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1982) was not properly decided and has no precedental value. The Hawthorne court attempted to side step Harris v. New York, supra and in so doing clearly misapplied its intent. The district court in Hawthorne ignored the presumption in Miranda v. Arizona, 384 U.S. 436 (1966) that all statements made without warnings are involuntary or coerced, and thus unreliable. Otherwise there would be no need for the warnings in the first place. Hawthorne mistakenly assumed that Harris v. New York, applied only where the statements were voluntary and not coerced. In other words only where the statements were not obtained in violation of Miranda. There was no error in admitting the prior testimony of Mr. Fitzpatrick.

ISSUE V

THE STATES USE OF PEREMTORY CHALLENGES WAS NOT RACIALLY BIASED.

Appellant challenges the state's striking of two black women, Anita Jackson and Frances McCarty. The state provided an explanation and did not strike two remaining black women jurors, Phyllis McGorvey and Priscilla Rease, even though Ms. McGorvey had a relative who had been convicted and Priscilla Rease's ex-husband had been convicted of robbery. (R 73; R 366).

In State v. Neil, 457 So.2d 481 (Fla. 1984) this court did not address the question of what constitutes an adequate proffer to justify a peremptory challenge. However, the court did require the complaining party to show that there is a strong likelihood that the strike was racially motivated. A racially biased prosecutor would hardly agree to leave any blacks on the jury much less these particular women. Appellant has failed to meet the threshold test of Neil and cannot show how he was prejudice.

The prosecutor's explanation indicated he struck Jackson for her uncertainty about the death penalty. This court can not adequately place itself in the prosecutor's shoes and infer a racially biased motive from an action which is peculiar to a seat of the pants professional judgment without resorting to mind reading and speculation. The kind of conduct which demonstrates

bias is clearly in the eyes of the beholder and the prosecutor's reaction to Ms. Jackson's candor and demeanor on the witness stand during venire is best determined at the trial level. The fact that the prosecutor thought that this juror was uncertain about the death penalty is similar to a trial judge's determination that a witness or veniremen is biased. See State v. Williams, 465 So.2d 1229 (Fla. 1985) where this court expressly rejected the notion of an implied bias on the face of the record. See also Wainwright v. Witt, 105 S.Ct. 844 (1985). Hence the prosecutor's opinion that McGorvey and Rease would be better for the state "as far as black people go" reflects the state's use of peremptories in a racially neutral manner, otherwise the removal of all blacks from the jury would have been the state's goal. See Batson v. Kentucky, 90 L.Ed.2d 69, 90 (1986) where the court noted that the defendant objected to "the removal of all black persons on the venire". Indeed, the high court noted in a later case that the same prosecutor who removed all the blacks from Batson's venire was the same prosecutor involved in striking all blacks from another venire. See Griffith v. Kentucky, 93 L.Ed.2d 649, 661 (1987). Batson and Griffith require the black defendant to show that all blacks were removed from the jury solely because of their race. Fitzpatrick has failed to demostrate the state's use of peremptories was based solely on an intent to remove all blacks from the venire. Parker v. State, 476 So.2d 134, 138 (Fla. 1985). This is similar

to the factual situation present in Morris Brown v. State, Case No. 68,690 argued in this court in December 4, 1987.

Appellant relies on Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987) where then Circuit Judge Kogan was found to have violated Neil by accepting the prosecutor's explanation at face value. Slappy is also pending in this court, State v. Charles Slappy, Case No. 70,331 and hopefully the trial courts will receive some guidance in this matter. Appellee will note that the opinion in Slappy appears to be bottomed on cases decided by the California Supreme Court during the tenure of the now reputiated and former Chief Justice Rose Bird. The California cases offer little precedental value for in Florida jurisprudence due to the dissimilarity with the Neil standard.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN REFUSING TO STRIKE JUROR HARRIETT MAJORS FOR CAUSE.

Appellant argues that Harriett Majors should have been struck for cause because of her long friendship with state witness Paul Parks. However, attempting to couch this argument in terms of judicial error is misplaced. The record showed the trial court found that Fitzpatrick could have peremptorily challenged Ms. Majors and removed her from the jury. (R 759-760). Furthermore, he also ignores the salient fact that in discussing her views on the death penalty Ms. Majors stated "I would certainly believe in the death penalty under some circumstance, but if at all possible I would lean in the other direction" (R 460) especially if the defendant had mental problems. (R 464-465). It is clear that there was a valid tactical choice not to remove Harriett Majors from the panel due to her tenuous view of the death penalty. The state could have removed Harriett Majors for cause under Wainwright v. Witt, supra. Majors also told defense counsel during voir dire she would be fair and impartial regarding Paul Parks "To the best of my ability". (R. 466). Fitzpatrick is unable to demonstrate any prejudice on this record.

ISSUE VII

THE TRIAL COURT IS NOT REQUIRED TO FIND NON STATUTORY MITIGATING FACTORS IN EVERY CASE.

Porter v. State, 429 So.2d 293 (Fla. 1983) this court held:

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

Id. at 296.

It is within the province of the trial judge to decide whether a particular mitigating circumstance has been proven and the weight to be given that factor. Toole v. State, 479 So.2d 131 (Fla. 1985); Smith v. State, 407 So.2d 894, 901 (Fla. 1981); Card v. State, 453 So.2d 17 (Fla. 1984). Reversal is not warranted simply because Fitzpatrick draws a different conclusion. Stano v. State, 467 So.2d 890, 894 (Fla. 1984).

ISSUE VIII

TRIAL COURT DID NOT UNFAIRLY PROHIBIT APPELLANT'S CLOSING ARGUMENT AS TO CERTAIN ALLEGED NONSTATUTORY MITIGATING CIRCUMSTANCES.

Appellant argues that he was not allowed to argue to the jury that two statutory aggravating factors, cruel, heinous and atrocious and cold and calculating, were not present after the prosecutor's objection. (R. 1126). Of course, the reason the trial court sustained the objection was because the State was prohibited from arguing the existence of these two aggravating factors. The trial court stated, "I think it's improper unless you want to permit the State to argue those ones that you have weighed". The term weighed appears to be a typographical error and should be waived. (R. 1126-1127). Furthermore, this argument took place after Appellant had exceeded his time limitation thirty minutes and there has been no complaint that his argument was arbitrarily limited by the time constraint. (R. 1125).

ISSUE IX

PROSECUTOR DID NOT IMPERMISSIBLY COMMENT ON THE APPELLANT'S RIGHT TO REMAIN SILENT.

Appellant argues that the prosecutor's remark, "Why not put him on the stand to evaluate him? He's testified that he considered the things that the defendant told him." constitutes a comment on the Appellant's right not to testify. (R. 709). The quoted portion of the trial transcript is an obscure reference to the Appellant's right to silence at best and may possibly be directed at Dr. Barnard's ability to testify. Appellant has not demonstrated the remark satisfies the "fairly susceptible" test set forth in State v. Kinchen, 490 So.2d 21 (Fla. 1985). In any event, the Appellant did not timely object to the comment and move for mistrial which would have been the proper method to clarify or preserve this point for appellate review. Clark v. State, 363 So.2d 331 (Fla. 1978). The purpose of an objection by counsel is to ferret out, possible prejudice, and correct it at the time of trial and not years later. Castor v. State, 365 So.2d 701 (Fla. 1978).

ISSUE X

THE STATE DID NOT MISREPRESENT THE DEFINITION OF MENTAL MITIGATING CIRCUMSTANCES.

This argument pertains to Issues XI and XII as set forth in the initial brief of Appellant.

Fitzpatrick argues that the State should not have been allowed to argue to the jury that mental mitigation evidence must rise to a level of extreme or substantial impairment before it is sufficient to overcome an aggravating factor in favor of death. These clarifying adjectives come from the death penalty statute and the standard jury instructions. This Court has already rejected this argument in Johnson v. State, 438 So.2d 774 noting that:

> The list of mitigating circumstances set out in Section 921.141(6), Florida Statutes (1981), contains modifying terms such as "extreme", "significant", "relative" and "substantial". Johnson claims that these modifiers have the effect of improperly instructing the jury to disregard all mitigating evidence if the threshold defined by the limiting words is not met. As this Court has previously commented, the statutory mitigating circumstances,
>
> > When coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his or her entitlement to a sentence less than death.

Id. at 779.

Fitzpatrick also argues that the prosecutor improperly argued to the jury that he had to prove insanity to establish statutory mental mitigation. Trial court instructed the jury that "a psychological disturbance at the time of the capital felony may be relevant in mitigation even though it is not sufficient grounds for invoking the insanity defense". (R. 1130). Counsel was free to argue this point and had the benefit of the above instruction to sustain his position. Appellant cannot show that there is any reasonable possibility the jury misunderstood the jury instructions.

ISSUE XI

TRIAL COURT DID NOT ERR IN ADMITTING PHOTOGRAPHS OF THE VICTIM.

Photographs of the victim and crime scene are admissible if they properly depict the factual conditions relating to the crime and if so, they aid the judge and jury in finding the truth. Here they corroborated how the death was inflicted. Straight v. State, 397 So.2d (Fla. 1981). A picture of the victim is not a victim impact statement. The United States Supreme Court prohibition against victim impact statements involves the giving of testimony by the victim's family to inflame the jury in favor of death. Booth v. Maryland, 107 S.Ct. 2529 (1978).

ISSUE XII

THE STATE ATTORNEY DID NOT DELEGATE ITS AUTHORITY TO SEEK THE DEATH PENALTY.

This argument is without merit. The decision to seek the death penalty is and was the prosecutor's alone. This Court has no authority to review that decision. State v. Bloom, 497 So.2d 2 (Fla. 1986).

ISSUE XIII

TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE THE JUROR BENTHOWSKI.

The record reflects that juror Benthowski was peremptorily challenged by Appellant and did not sit on the jury. Appellant has not argued that he was prejudiced by the use of this peremptorily and has not argued that trial court erred in denying his motion for additional peremptories. Therefore, any error would be harmless or invited by Appellant.

ISSUE XIV

TRIAL COURT DID NOT ERR IN DENYING THE STATE TO ASK THE APPELLANT'S EXPERT WITNESS IF HE READ THE PRESENTENCE INVESTIGATION IN REACHING HIS OPINION.

This is a variant of the issue raised in Appellant's issue IV regarding the use of his juvenile history during cross-examination of Dr. Barnard. The logic of Parker, supra and Muehlemann, applies with equal force to deny relief on this claim.

ISSUE XV

WHETHER THE SENTENCE OF DEATH MUST BE VACATED BECAUSE OF ALLEGED PROSECUTORIAL MISCONDUCT.

Prosecutor's conduct during cross-examination of defense witnesses was not so outrageous as to amount to a denial of a fair and reliable sentencing proceeding. Darden v. Wainwright, 91 L.Ed.2d 144 (1986). This Court recognizes that the rules of evidence are relaxed during a penalty phase hearing to allow an analysis of a defendant's character. Fitzpatrick's real complaint is that the State conducted a more in depth analysis of his character than he would have preferred. The trial court allowed the State to use the juvenile history during cross-examination of Dr. Barnard and this Court has approved this procedure. Parker, supra. Therefore, the prosecutor's reliance on the ruling of the trial court could not be deemed misconduct. In any event, the jury was specifically instructed not to consider the juvenile record for any reason. (R. 1070, 1132).

Moreover, the alleged impropriety of the prosecutor's cross-examination of Fitzpatrick's neurologist and the reference to the reports of Doctors Marshall and Gilgun was conducted prior to the court's ruling on the admissibility of the reports and there was no request for a curative instuction. These remarks or questions are nowhere near the level of misconduct cited in Keen v. State, 504 So.2d 396 (Fla. 1987) and Teffeteller v. State, 439 So.2d 840

504 So.2d 396 (Fla. 1987) and Teffeteller v. State, 439 So.2d 840 (Fla. 1983). Here, the jury was presented with sufficient proof of five statutory aggravating factors justifying the imposition of the death penalty. The prosecutor's conduct did not unfairly contribute to the recommendation of death as the facts and circumstances surrounding the juvenile history were consistent with his position that there was ample mental mitigation to justify a recommendation of life if only the jury would ignore the aggravating factors present.

ISSUE XVI

THE JURY INSTRUCTIONS GIVEN IN THIS CASE DID NOT UNFAIRLY SHIFT THE BURDEN OF PROOF TO THE DEFENDANT TO ESTABLISH THAT MITIGATION OUTWEIGHED AGGRIVATION.

Appellant argues that §921.141 and the jury instructions in capital cases impermissibly shifts the burden of proving mitigation outweighs aggravation. This argument is without merit. See Ford v. Strickland, 696 F.2d 804, 817-819 (11th Cir. 1983).

ISSUE XVII

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON FITZPATRICK'S RESIDUAL DOUBT.

This court has repeatedly rejected the so-called lingering or residual doubt argument. Aldridge v. State, 503 So.2d 1257 (Fla. 1987) and the cases cited therein. Here there was no basis for even requesting the instruction given the eyewitness accounts of the shooting by state witnesses Paul Parks and Mary Helen Spann.

CONCLUSION

Fitzpatrick was given a second chance to litigate the propriety of his death sentence before a fairly constituted jury and failed. Given the obvious premeditation, danger to others and other circumstances surrounding this crime, death is the appropriate penalty. Fitzpatrick has failed to demonstrate reversible error. Appellee would note that the initial brief of appellant contains no argument on Issues 20 and 21 set forth in the contents of the brief and appellee asks that this court waive any consideration of these points. This court should affirm the sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Edward S. Stafman, Esq., 317 East Park Avenue, Tallahassee, Florida 32301 on this 23rd day of December, 1987.

Gary L Printy

GARY L. PRINTY
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