IN THE SUPREME COURT OF FLORIDA

ANDREW WILLIAMS,)

Appellant,)

v.) Case No. 71.122

STATE OF FLORIDA,)

Appellee.)

_____)

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

BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

Appellee accepts appellant's Statement of the Facts but would add the following testimony which was omitted by appellant.

Ruth Speakman testified that when the taller of the two robbers approached he pointed a gun at her and then told her to give him her hundreds or she was dead. (R. 585) She identified appellant as the one demanding her hundreds and Myles as the one who actually took the money. (R. 587)

Hazel Wells, a customer in the bank during the robbery, testified that she did not (as opposed to could not) identify the appellant as the robber because the officers didn't ask her the question. (R. 660-661) She did, however, know the appellant prior to the robbery and knew it was he during the crime. (R. 652, 654, 657-659) She had identified appellant from a photograph five days after the robbery. (R. 676) Likewise, her boyfriend Theodore Day, had identified appellant from a photograph on September 25, 1986. (R. 815)

On cross-examination the Medical Examiner testified that the victim's death could have been almost instantaneous to a number of minutes from the wound but that generally death ensued very quickly. (R. 1025) Also, he said loss of consciousness could have occurred either instanteously or not for some minutes. (R. 1026)

SUMMARY OF THE ARGUMENT

I. The chief judge of the circuit court acted within his discretion in even repeatedly appointing county court judge Bonnano to hear certain criminal matters in the circuit court. Bonnano therefore possessed jurisdiction to conduct appellant's trial and appellant has failed to elucidate any instances where the judge's "inexperience" prejudiced him.

II. The Neil, infra, inquiry conducted by the trial judge comported with the law at the time of the trial. The judge questioned the state as to the reason they had exercised a peremptory challenge on one of the black jurors (51); his observances of the other black juror (25) satisfied him that the peremptory had been exercised for a non-racial, non-pretextual reason. The record further supports the excusal of juror 103 on a race-neutral basis.

Likewise, constitutionally acceptable bases for excusing jurors Hope and Whaley for their views on the death penalty are present in the record. Their words, coupled with the failure of defense counsel to rehabilitate them, establish the propriety of excusing these two jurors. Since the judge's finding that they should be excused for their views on the death penalty is fairly supported by the record, appellant is entitled to no relief.

A thorough reading of the record also renders invalid appellant's argument that the jury selection procedure was

fatally flawed. There is no evidence appellant was denied a fairly chosen jury.

III. The judge's inquiry into the circumstances surrounding the state's failure to provide the defense with the results of the trigger pull test satisfied the requirements of a Richardson, infra, hearing. Appellant is, therefore, entitled to no relief on this issue.

IV. None of the statements alleged by appellant to be hearsay were erroneously admitted since they were not hearsay. They were not admitted to prove the truth of the matter asserted but to prove the statements were made and acted upon by officers. In the alternative, any error in their admission was rendered harmless because they were duplications of otherwise admissible testimony. Detective Noblitt possessed sufficient intelligence and experience to testify in basic terms on fingerprints so the failure to declare him an expert does not merit relief.

V. Appellant received the standard jury instructions. The failure to establish they were erroneous or prejudicial precludes relief on the refusal to give specially requested penalty phase instructions.

VI. The evidence supports reliance by the judge on each of three aggravating circumstances for the imposition of the death penalty. The victim went for her weapon and was prevented from reaching it by the defendant. He then put the gun right up to

her chest and fired. The gun misfired twice before the fatal shot was fired. Because the victim was in terror of her impending death and she did not necessarily lose consciousness while she bled to death, the murder was properly found to have been heinous, atrocious or cruel.

Since it was highly likely or probable that at least seven or eight people were placed at great risk of being shot by appellant or his co-felon, the judge properly found the aggravating circumstance that the murder was committed in a manner putting many people at great risk. Appellant shot the victim partially to prevent retaliation but also to avoid arrest. There are no other explanations for the murder as firing three times precludes a finding the shooting was accidental. Additionally, the victim was the equivalent of a law enforcement officer in that bank so the burden of establishing the aggravating circumstances that the murder was committed to avoid arrest is met by proof of her status as an apprehending official.

In conducting a proportionality analysis it is important that five aggravating circumstances and only two mitigating factors were found to exist. The two mental mitigating factors were considerably lessened in weight because the appellant is well-educated in psychological tests and the manipulation thereof. Accordingly, the sentence should be affirmed.

VII. This Court and the federal courts have specifically or impliedly rejected each of appellant's arguments on the constitutionality of Florida's death penalty statute. This case does not require a different holding.

ISSUE I.

(Restated)

The appellant was not denied a fair trial when a county court judge, duly appointed to hear certain circuit court criminal cases, presided at his trial.

Appellant asserts that Judge Bonnano was without jurisdiction to preside over his trial. However, this argument is not supported by the case law and there is no evidence appellant was denied a fair trial.

At the time of this trial, Judge Bonnano, a county court judge, had been appointed an acting circuit court judge for approximately one year. He was appointed for a finite period but had been repetitively appointed. Bonnano had jurisdiction over only certain criminal matters before the circuit court. Since "[t]he chief judge may assign any judge to temporary service for which the judge is qualified in any court in the same circuit" Crusoe v. Rowls, 472 So.2d 1163 (Fla. 1985), appellant's contention does not warrant relief.

The question in this case necessitates examination of the definition of "temporary". In Crusoe this Court suggested 60 days for judges solely sitting in circuit court matters and six months for those conducting the business of both county and circuit court.

> We suggested these time periods because we recognize the need for giving the chief judges flexibility in order for them to effectively utilize available judicial labor, and we liberally construed the assignments in Crusoe with this in mind. (emphasis in original)

Payret v. Adams, 500 So.2d 136 (Fla. 1986) The chief judge here obviously felt that continued appointment of Judge Bonnano was necessary to effectively utilize the judicial labor available in his circuit.

In his order denying appellant's Motion to Disqualify Judge, Chief Judge Spicola found that such assignments (including Bonnano's) were temporary in nature, constantly reviewed to determine their necessity, effected to aid and assist the circuit criminal judges and would not exceed 60 days in the future. (R. 1852-1854) The chief judge was, therefore, acting within his discretion and the appointment of Judge Bonnano did not contravene the Constitution of the State of Florida.

Neither did the appointment of Judge Bonnano run afoul of Florida law. As in Crusoe, supra, the orders appointing Judge Bonnano were a proper use of the chief judge's jurisdiction. The county judge in Crusoe had been appointed to hear certain child support orders. Repetitive assignments in that circuit resulted in county judges hearing circuit court matters for two-and-one-half years. Judge Bonnano was appointed to hear only certain criminal cases and sat in the capacity of circuit judge for only

one year. This case is unlike Payret, supra, where the re-assignment of a county judge for five years to hear virtually all circuit court matters was found improper.

Not only is Judge Bonnano's appointment valid, but the fact that the case involved the death penalty does not militate reversal. The death penalty in White v. State, 446 So.2d 1031 (Fla. 1984) was affirmed in spite of the assertion that a county court judge was wrongly assigned to preside over the circuit court trial. County court judges may be assigned to perform any judicial service a circuit court judge can perform. Id. at 1034.

Lastly, the appellant enumerates no instances where the judge's lack of experience was manifest. A thorough reading of the record establishes the opposite, that Judge Bonnano carefully considered and ruled on matters unique to the death penalty. Besides there being no evidence to support an assertion that the judge's inexperience prejudiced the appellant, there is nothing in Florida law suggesting that a judge must acquire some threshold level of experience before being qualified to preside in a capital case. Brown v. State, 526 So.2d 903 (Fla. 1988) Therefore, appellant is entitled to no relief on this issue.

ISSUE II.

(Restated)

Appellant was not denied a fair trial by the voir dire, utilization of peremptory challenges or exusal for cause of certain members of the venire.

Appellant makes a three-pronged attack on the jury selected and the selection procedures utilized in this case. First, he challenges the utilization of peremptory challenges to excuse black jurors; second, he challenges the removal of jurors for their views on the death penalty; and third, he challenges the procedure of questioning the voir dire collectively. As will be shown below, the challenges and procedures utilized in this case, were proper and the resultant jury was fairly selected.

A. The exclusion of blacks from the jury.

Each defendant in this case had twenty peremptory challenges; the state had forty. After numerous challenges for cause and several peremptory challenges [1] the state removed Juror 51, Betty Byrd, a black woman. (R. 491) This peremptory challenge was not objected to by either defense counsel. After three more peremptory challenges the state sought removal of Juror 25, Arlene Williams, another black woman. (R. 492) Defense

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[1] Though appellant makes much of the fact that three black venire persons were excused for cause, that fact is of no import when analyzing the use of peremptory challenges to exclude potential jurors who are black. The three removed for cause were validly subject to excusal and the appellant does challenge the judge's findings in those instances.

counsel objected and requested a hearing dictated by State v. Neil, 457 So.2d 481 (Fla. 1984). After some confusion as to how many black venirepersons had been challenged, it was agreed that each side had exercised two peremptories on black jurors. (R. 494)

The court then clarified that defense counsel was requesting a Neil inquiry on jurors 25 and 51. The state explained that they'd exercised their peremptory on 51 because she had expressed reservations about the death penalty. (R. 495) The record supports this reason for removal. After being extensively briefed on the possibility of having to recommend the death penalty and the weight that recommendation would be given (R. 55-60), Juror 51 responded that the prospect bothered her and that she thought she'd have trouble sleeping. (R. 61) She later said she had mixed feelings and that she might be able to impose the death penalty. (R. 120) When defense counsel asked for some explanation as to Juror 25, the second peremptory exercised, the court elected to move on without questioning the state. (R. 495) Defense counsel did not renew its objection.

The trial court's procedure comported with the law at the time. The Neil opinion enunciated an initial presumption that peremptories are exercised in a constitutionally proper manner. Neil, at 486. Judges were allowed the luxury of determining whether a substantial likelihood that the peremptories were based

on race alone existed before requiring inquiry into the state's motive. Neil, at 486. The burden to explain the utilization of a peremptory did not shift to the state if the judge made no such determination. Neil, at 486.

Even the exclusion of a number of blacks by itself was thought to be insufficient to trigger an inquiry and the decision as to whether to inquire was largely discretionary. The Neil court foresaw the dynamic that was obviously at play in this case: the propriety of the challenge, while not obvious on the record, could be apparent to the judge. Neil, at 487, fn 10.

Judge Bonnano obviously did not feel the exclusion of Ms. Williams was based solely on race so his decision not to inquire was in accordance with the law at the time. Subsequent case law which severely restricts judicial discretion (Blackshear v. State, 521 So.2d 1083 (Fla. 1988), Tillman v. State, 522 So.2d 14 (Fla. 1988) and State v. Slappy, 522 So.2d 18 (Fla. 1988)) were not decided when appellant was tried.

Appellant also asserts that court erred in accepting the state's reason for exercising a peremptory to exclude Juror 103, Raynell Gainey. The state gave the explanation:[2]

> ...my recollection of his conversation with Mr. Ferlita was I just did not feel that he was really following some of the questioning,

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[2] While the presence of a black on the jury may not be dispositive of the issue of challenges based on race, it is relevant.

> no reflection on the man, He's a truck driver or something, but I just don't think he was able to comprehend some of the concepts of felony murder. And his responses to Mr. Ferlita were almost like leading questions for someone to say yes or no.
>
> THE COURT; You feel that he wouldn't be a good juror because of that?
>
> MR. LAVANDERA: Yes sir. And there are some complex legal issues involved here.

The state gave a reasonable, race-neutral and non-pretextual explanation for exercising this peremptory. It is the trial judge's primary responsibility to assess credibility. He accepted the proffered explanation as valid and truthful and it is not the function or prerogative of an appellate court to substitute its judgment for the trial judge's on the issue of credibility of the state's reasons unless the record reflects a clear abuse of discretion. McCloud v. State, ___ So.2d ____ (Fla. 1DCA, Nov. 11, 1988)[13 FLW 2478]. Where, as here, the judge questioned the prosecutor beyond his initial explanation, this court must affirm the judge's acceptance of the reason as valid and truthful. The record does not tell us whether, while answering appropriately, Mr. Gainey looked bewildered or otherwise unable to function as a juror. Also, we do not know the condition of the questionnaire Mr. Gainey had filled out. We must, therefore, accept the judgment of the trial judge who was present and charged with assessing credibility.

Because the state provided race-neutral, non-pretextual reasons for exercising peremptories against four of the five black jurors so excused and because the judge did not abuse his discretion in accepting those reasons and in refusing to inquire on the other peremptory, appellant is entitled to no relief on this point.

B. The excusal of jurors opposed to the death penalty.

Appellant contends that the state failed to establish constitutionally acceptable bases for the removal of two jurors. Specifically, appellant asserts that when questioning the venire as to whether they could impose the death penalty the state did not adequately ascertain whether jurors Hope and Whaley could set aside their opposition to the death penalty in deference to the law.

Great attention was paid in the voir dire in this case to jurors' ability to perform as jurors knowing they might be asked to render an advisory sentence of death. (R. 56-57, 59-60, 112-114, 240, 265, 274, 280-281, 369) In fact, so much emphasis was put on the question that appellant's defense counsel did not ask penalty questions of the jurors himself. They were repeatedly asked if they could, under the proper circumstances, vote to recommend a man be put to death. Juror Hope's circumstances and Mr. Whaley's answers made it clear that they more than generally opposed the death penalty, that their opinions on the death penalty would impair their performance as jurors.

After defense counsel objected to the removal of Juror Hope on his religious connections the judge responded "yeah, I got that on him." (R. 447) It is clear from this comment that he was convinced, either by the juror's actions, attitude or questionnaire, that Hope should be excused for cause. No comment on the excusal of Juror Whaley was necessary due to the answers he had given when questioned on his ability to function as a juror (R. 119, 121), so the judge promptly excused him for cause in the first batch offered by the state. (R. 467-468)

While the jurors were not made to say the magic words once required under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), there is no evidence that the standards for excusing them set forth in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) was not met. Witt and its progeny do not require that a juror's bias be proved with unmistakable clarity. Witt, at 852.

It is notable that neither defense counsel felt these juror's responses to the state's questions on death penalty considerations required rehabilitation. Their failure to try to establish whether these jurors could properly have served is evidence that all parties thought the jurors were subject to removal. Witt, at 859, Justice Stewart concurring. See also Mitchell v. State, 527 So.2d 179 (Fla. 1988)

Even if this Court cannot accept defense counsel's failure to rehabilitate these jurors as evidence they were properly excluded, deference must be paid to the trial judge's finding that they should be excluded. This is one of those cases where the trial judge was left with the definite impression that these prospective jurors would be unable to faithfully and impartially apply the law upon seeing and hearing their demeanor. See Witt, at 852-854 and Lambrix v. State, 494 So.2d 1143, 1145 (Fla. 1986).

The question before this Court is not whether you might disagree with the trial court's findings, but whether those findings are fairly supported by the record. Witt, at 858. The state asserts that the jurors' circumstances and answers to the comprehensive questions of the state and the court, coupled with the absence of rehabilitation by defense counsel, support the trial judge's decision to excuse Hope and Whaley.

C. Voir Dire In General

Appellant asserts that the manner in which the voir dire was conducted was fatally flawed. As support he enumerates three instances of "confusion" and "inaccuracy" on the part of defense counsel and the court. However, a thorough reading of the record does not support this contention.

While the judge did deny appellant's motions for individual voir dire or voir dire in small groups (R. 1846), he promised to

reconsider the motions if problems developed. (R. 72) The feared problems never developed. Well before the day voir dire began, defense counsel was supplied the list of prospective jurors and the questionnaires they had filled out. (R. 1583, 1618) The parties also worked out the logistics of the voir dire well before it started deciding how questioning would proceed and how the attorneys could best interact with the venire. (R. 1652-1654) When voir dire began the prospective jurors were asked to stand to respond to facilitate the attorneys actions. (R. 115) Those instances cited by appellant where either counsel or the court became confused were immediately corrected and resulted in absolutely no prejudice to the appellant.

The fears expressed by defense counsel were not borne out by the proceedings. The jurors did not learn and use the magic words to be excused for death penalty beliefs and no jurors blurted out what they had learned in pre-trial publicity. Fears that reticence of the jurors to be truthful and/or answer sensitive questions would not have been eliminated by questioning in groups of 12 to 20. As argued previously, no error was present in the excusal of jurors either for cause or by peremptory challenge and there is no evidence that the manner in which voir dire was conducted contributed to these asserted errors.

Lastly, criminal defendants are not entitled to the voir dire of their choice, rather, the conduct of the examination of jurors is within the judge's discretion. "The court may then examine each prospective juror individually or may examine the prospective jurors collectively." Rule 3.300(b), Fla.R. Crim.Pro. Accordingly, appellant is not entitled to relief on this question.

ISSUE III.

(Restated)

Appellant was not denied a fair trial when the lower court conducted the Richardson hearing requested by defense counsel.

Appellant contends that the trial court committed reversible error by failing to conduct the Richardson [3] hearing requested by his counsel. However, the record illustrates that the judge made the required inquiries and that the mandate of Richardson was satisfied.

Once requested, the court must inquire into the circumstances of a discovery violation and its possible prejudice to the defendant. The court is required to listen and evaluate the claim of prejudice. The very purpose of a Richardson hearing is to determine if the violation is harmless. Smith v. State, 500 So.2d 125 (Fla. 1986).

Contrary to appellant's contention, the hearing requirement is not rigid. Inquiry sufficient to establish that the violation neither surprised nor prejudiced the defense satisfies the requirement of Richardson and its progeny. State v. Hall, 509 So.2d 1093 (Fla. 1987).

In this case the judge established that the state thought they had provided defense counsel with the results of the trigger pull test (R. 966); that the name of the witness had been

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[3] Richardson v. State, 246 So.2d 771 (Fla. 1971)

provided but defense counsel did not depose or seek to obtain the expert's notes (R. 966, 967); and that they received the same report the state received (R. 967). The judge then sought to see how the violation might have prejudiced the defendant. (R. 967) The court delved into counsel's answer that his cross-examination was rendered inadequate by asking how he could cross-examine the results of a test the nature of the trigger pull test. (R. 968) Counsel answered only that he could have asked what type of weights and device the expert had used. (R. 968)

The trigger pull test was introduced to establish that the weapon would not easily misfire but required a deliberate motion to shoot. The type weights used in the test would not undermine the fact that the gun was hard to fire. Accordingly, the judge found there had been no substantial discovery violation requiring any action by the court. (R. 968)

The record illustrates that the judge inquired into the circumstances of the violation and found it was inadvertent, trivial and did not prejudice the appellant. See Hall, supra, at 1097. His close scrutiny revealed that the results of the trigger pull test had no bearing on petitioner's defense. See Smith, supra citing Wilcox v,. State, 367 So.2d 1020, 1023 (Fla. 1979). The judge, therefore, complied with the Richardson requirements and appellant is entitled to no relief.

ISSUE IV.

(Restated)

The judge did not admit any hearsay evidence or non-expert opinion testimony.

Appellant first contends that several incidents of hearsay evidence were erroneously admitted. However, none of the complained of statements were hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. 90.801(1)(c), Fla.R.Evid. None of these statements were offered to prove the truth of the matter asserted.

Det. Noblitt was testifying to his investigation of this crime and subsequent apprehension of appellant. His testimony as to what Speakman and Wells[4] told him was not offered to prove what they said was true but was offered to explain Noblitt's actions. Likewise, Grossi was testifying to the circumstances surrounding appellant's arrest and subsequent statement. Finding appellant's statement unbelievable, Grossi went to ask Officer Childers what, if anything, Sheri Napier had said about the weapon. What Childers told Grossi was not asserted to prove the matter asserted but to establish that the statement had been made

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[4] Appellant did not object to Noblitt's testimony as to Day's statement so his objection to it as hearsay is waived for appellate review.

and that the officers acted on it. Because this evidence was not hearsay it was not erroneously admitted.

Should this Court find the evidence was hearsay, its admission was harmless. Noblitt's testimony on Speakman's statement was duplicated. Speakman told the same story during her own testimony. Noblitt testified that Wells identified the appellant as the perpetrator; Wells said the same thing when on the stand. Though Napier did not testify about the origin of the gun, the appellant did. These statements were but brief duplications of otherwise admissible testimony. See Brunelle v. State, 456 So.2d 1324 (Fla. 4th DCA 1984). The nature of this testimony is such that the verdict would not have been different had it been successfully kept out so any error in admitting it is harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Appellant next takes exception to the admission of Detective Noblitt's testimony on fingerprints as he was not qualified as an expert. As conceded by appellant, Noblitt testified in basic terms that one could touch a surface and not leave a fingerprint. He did not testify on fingerprint comparison or to anything that inculpated the appellant.

This Court has often upheld the testimony of law enforcement officers on subjects in which they were not declared expert and

which was far more damaging to the defendant. E.g. Johnston v. State, 497 So.2d 863 (Fla. 1986) and the cases cited therein. Det. Noblitt has been an officer with his department for twelve years, five of which were spent as a detective. He was working the homicide squad at the time of this murder. (R. 834)

> The subject is one upon which an intelligent person with some degree of experience-qualifications possessed by the witness-may and should be permitted to testify...

Peacock v. State, 160 So.2d 541, (Fla. 1st DCA 1964), cert. denied, 168 So.2d 148 (Fla. 1965). Fingerprints have been used in detective work for many, many years and it defeats concepts of reality to think a detective of five years would not know enough about prints to give the opinion that sometimes people do not leave prints on the things they touch.

Because appellant has not shown that Noblitt's testimony invaded the province of the jury, and no obvious error was committed, this Court should not tamper with the trial judge's determination of admissibility. Jones v. State, 440 So.2d 570 (Fla. 1983).

ISSUE V.

(Restated)

The trial court did not err in refusing to the special penalty phase jury instructions.

The eight special penalty phase jury instructions requested by the appellant can be divided into two categories: the consideration of non-statutory mitigating circumstances (R. 1971, 1972, 1976) and the weight to be afforded the aggravating and mitigating circumstances (R. 1969, 1970, 1973, 1974, 1975). These requested instructions were not given; the appellant received the standard jury instructions. The Florida Standard Jury Instruction for the death penalty are constantly revisited and were recently found to adequately state the law. See The Florida Bar re: Standard Jury Instructions Criminal Cases, 477 So.2d 985 (Fla. 1985) and Grossman v. State, 525 So.2d 833 (Fla. 1988). The refusal to augment or restate them does not render the standard instructions erroneous and absent a showing of prejudice appellant is entitled to no relief.

In regard to the requested instructions on consideration of non-statutory circumstances, the court said, "among the mitigating circumstances you may consider...aspect of the defendant's character or record and any other circumstances of the offense." (R. 1468) The jury was adequately instructed to consider those things requested by defendant. The instruction on mitigating circumstances, when read in conjunction with the express limitation and consideration of aggravating

circumstances, advises the jury that the list of mitigating factors is not exhaustive. See Randolph v. State, 463 So.2d 186 (Fla. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 656 (1985).

In the instruction on the weight to be afforded aggravating factors the jury was told that if they found the aggravating circumstances did not justify the death penalty that they should choose life. (R. 1467) They were then told to determine whether mitigating circumstances existed that outweighed the aggravating ones. (R. 1467-1468) The jury was instructed on the lesser burden required to find the existence of mitigating factors (R. 1468-1469) and to give mitigating factors as much weight as they felt it should receive. (R. 1468) In summation the jury was cautioned not to act hastily and to carefully weigh and sift all the evidence. (R. 1469) The instructions requested on pages 1973 and 1974 were expressed in the instructions given.

The three other requested instructions: that a fact could only be considered in support of one aggravating circumstance; that mitigating circumstances had to be considered if one aggravating factor was found to exist; and that life is presumed to be the appropriate sentence are not supported by the case law. (See R. 1969, 1970, 1975) Even if they were, appellant cannot just pick a line out of a case and demand reversal of a sentence because that language was not included in the jury instructions.

Rather, appellant must prove the jury instruction is erroneous and prejudicial. Appellant does not meet this burden.

This Court has frequently held that it is adequate to instruct the jury according to the standard instruction under the statutes. There is no reason not to do so in the instant case. Peek v. State, 395 So.2d 492 (Fla. 1981), Mason v. State, 438 So.2d 374 (Fla. 1983).

ISSUE VI.

(Restated)

The evidence supports both reliance by the trial court on all the aggravating circumstances and the imposition of the death penalty in this case.

The evidence in this case supports all five of the aggravating circumstances presented to the jury and relied upon by the trial judge in imposing the death penalty. Appellant does not contest the propriety of two aggravating factors: that the crime was committed while defendant was engaged in a robbery and that the defendant had been previously convicted of three violent felonies. (R. 2002-2004) He erroneously contests the propriety of the following three aggravating factors:

A. Heinous, Atrocious or Cruel.

Appellant chooses to emphasize two facets of the judge's justification for relying on this aggravating circumstance to say his reliance was misplaced. First, that the victim was shot only once and second, that she may have died almost as soon as she was shot. However the focus is properly upon the fact that Pearl Fisher tried to protect herself and the customers in the bank but was prevented from doing so. Her assailant's gun was then put right to her chest. He pulled the trigger but the gun misfired. He pulled the trigger again but the gun misfired a second time and Pearl Fisher was still alive, waiting for her inevitable

death. It was not until that third shot that the gun worked. Mrs. Fisher then bled to death from the wound she received.

> In *Parker v. State,* 476 So.2d 134, 139 (Fla. 1985), we quoted the statement in *Adams v. State,* 412 So.2d 850, 857(Fla.), *cert. denied,* 459 U.S. 882(1982), that "fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony." Moreover, the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances. *Preston v. State*, 444 So.2d 939, 946 (Fla. 1984) ("victim *must have* felt terror and fear as these events unfolded")(emphasis added).

Swafford v. State, ___ So.2d ___(Fla. Sept. 29, 1988)[13 FLW 595, 597]. The victim must have felt fear and terror waiting for that fatal shot. Consciousness of impending death has long been held valid consideration for finding a murder especially heinous, atrocious or cruel. See Funchess v. State, 341 So.2d 762 (Fla. 1976); Knight v. State, 338 So.2d 201 (Fla. 1976); and Washington v. State, 362 So.2d 658 (Fla. 1978), and it was validly considered by the judge in this case.

Neither does the fact that the victim may have been rendered unconscious or dead in a short time preclude a finding that the murder was heinous, atrocious, or cruel. In Routly v. State, 440 So.2d 1257 (Fla. 1983) this same aggravating factor was upheld even where the victim died instantaneously. Her agony over the

prospect of when death would occur was found significant. In Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) this Court found that though the victim did not necessarily lose consciousness instantly, the awareness of what was happening to her rendered the murder heinous, atrocious or cruel.

The cases cited by appellant are inapplicable here since they do not involve the circumstances of two misfires at close range preceding the fatal shot.

> Aggravating circumstances must be proved beyond a reasonable doubt. *Johnson v. State,* 438 So.2d 774 (Fla. 1983), *cert. denied,* 465 U.S. 1051 (1984); *Williams v. State,* 386 So.2d 538 (Fla. 1980). Evaluating the evidence and resolving factual conflicts in a particular case, however, are the responsibility of the trial court judge. When a trial court judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent, substantial evidence to support it. *See Stano v. State,* 460 So.2d 890, 894 (Fla. 1984), *cert. denied,* 471 U.S. 1111 (1985). There is competent, substantial evidence in the record to support the trial court's finding that this murder was especially heinous, atrocious, or cruel.

Swafford, supra at 597. So too does the evidence in this case support a finding that the murder was heinous, atrocious or cruel.

B. Great Risk to Many People

Appellant attacks this aggravating circumstance on two grounds: the people in the bank did not constitute "many" and

that the mere possibility that they'd be harmed is insufficient to establish that appellant caused great risk.

While this Court has held that three people were not "many persons" as meant by the statutory factor, the record in this case supports a finding that many more than three people were endangered by appellant's actions. The record establishes that at least seven or eight people were in the Columbia Bank that Saturday morning: the victim, Fisher; the teller, Speakman (R. 580); the vice president, Fernandez (R. 1374); the customer Wells (R. 650); her boyfriend Day (R. 797); and either two or three customers in line with Ms. Wells. (R. 601, 651, 797) Not only were those people present, but any customer or employee in another area of the bank or who entered from outside was in danger of being shot by either appellant or his co-felon.

It was highly likely or probable that had these people not allowed themselves to be corralled by the appellant or had they been standing in the wrong place at the wrong time they would have been shot. This is strongly evidenced by the fact that once inside the bank the appellant and his co-felon felt underarmed and appropriated the victim's gun. This is not a case such as Scull v. State, ___ So.2d ___ (Fla. Sept. 8, 1988)[13 FLW 545, 547] where no person besides the intended victim was at risk of death - every person in that bank was at risk. Likewise, Lusk v. State, 446 So.2d 1038 (Fla. 1984) is inapplicable because the

people in a crowd are not as likely to be at great risk when the assailant has a knife as when he and his confederate have guns.

Because the record supports a finding that the actions of the appellant put many people at great risk, the judge properly found and relied upon this aggravating circumstance.

C. Avoid Lawful Arrest

Appellant asserts that there is insufficient evidence to support a finding that appellant committed this murder to avoid arrest. However, the case law, when applied to the facts of this case defeats this argument.

This is not a case like Jackson v. State, 502 So.2d 409 (Fla. 1986) where there are other possible explanations for the murder other than to avoid arrest. There is no way this shooting could have been the accidental result of a tussle, appellant pulled the hard-to-pull trigger three times. The evidence also establishes that appellant had his gun out, and indeed, physical control over the victim before she got to her gun. He could have held her at bay but since she was intent on doing her job -- preventing the loss of life and property -- he shot her. As in Bolander v. State, 422 So.2d 833 (Fla. 1982), where this aggravating factor was upheld, appellant killed the victim partially to prevent her retaliation but also to prevent arrest. Additionally, appellant's motive to avoid arrest was strong in that he had been involved in at least three other banks robberies that month.

Also, Pearl Fisher was the law in that bank. She was hired to apprehend wrongdoers until the police could arrive. She was equipped with a uniform and a gun. In Riley v. State, 366 So.2d 19, 22 (Fla. 1978) this Court refused to limit this aggravating circumstances to "cases where a police officer or other apprehending official is killed." In refusing to so limit the aggravating factor, this Court has continually reiterated that the circumstances is concerned primarily with the killing of law enforcement officers. See, e.g. White v. State, 403 So.2d 331 (Fla. 1981).

Pearl Fisher is the equivalent of a law enforcement officer and as such, the burden for proving the appellant killed her to avoid arrest is lessened. See Scull, supra at 547. This burden is met in that the inevitable end to Fisher's involvement would have been arrest. Accordingly, the trial court judge properly found this a valid aggravating circumstance.

Lastly appellant argues that since three of the five aggravating factors should be stricken, the mitigating evidence should have been found to outweigh the aggravating circumstances. Since the trial court properly found all the aggravating circumstances, this argument is unavailing. See Swafford, supra at 598.

As for a proportionality analysis, it must be remembered that the two mitigating factors found by the judge, to wit:

possibly under the influence of extreme mental or emotional disturbance and substantially impaired capacity to appreciate the criminality of conduct or conform conduct to the requirements of law, were pointedly reduced in stature by testimony. First, it was established that the appellant had studied psychology for some years in college, had worked in the mental health field for years, and had administered the psychological tests from which the expert formed his opinion. Appellant admitted he was familiar with these tests and the variables for manipulation. (R. 1441-1449) Second, the tests showed symptoms of biological brain disorder due to either genetic make-up or trauma. (R. 1387) None of the testimony suggested that appellant had been the victim of trauma to his head or brain.

These two mitigating factors, were given their due weight by the trial court, that is, insignificant weight as compared with the substantial and compelling weight of the aggravating circumstances. Accordingly, even if the Court finds one or two aggravating factors invalid, they still outweigh the mitigating circumstances and the sentence should be affirmed.

ISSUE VII.

(Restated)

The Florida Capital Sentencing Statute is constitutional on its face and as applied.

As admitted by appellant, this Court has specifically or impliedly rejected each of the challenges to the constitutionality of the Florida death penalty that he lodges. Not only that, but appellant's Motion to Vacate the Death Penalty contains only general objections to the statute. He has therefore failed to preserve these specific attacks on the sentencing scheme for appellate review. Accordingly, appellant is entitled to no relief on this issue. See Swafford, supra at 598.

Should this Court get to the merits of appellant's argument the following is submitted. This Court in State v. Dixon, 283 So.2d 1 (Fla. 1973) considered the constitutionality of the death penalty statute as well as the aggravating and mitigating factors. It was determined that 921.141, Fla. Stat. is constitutional, and the aggravating circumstances were reasonable and can be easily understood by the average person. The validity of these facts was also upheld in Lightbourne v. State, 438 So.2d 380 (Fla. 1983); Smith v. State, 424 So.2d 726 (Fla. 1982); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) and Songer v. Wainwright, 571 F.Supp. 1384 (M.D. Fla. 1983).

The aggravating circumstances, especially "heinous, atrocious or cruel" were upheld against vagueness challenges in Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984), reh. denied, 729 F.2d 1468, cert. denied, 469 U.S. 976, 105 S.Ct. 374, 83 L.Ed.2d 310 (1984). See also Dobbert v. Strickland, 532 F.Supp. 545 (D.C. Fla. 1982), affirmed 718 F.2d 1518, reh. denied, 720 F.2d 1294, cert. denied, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 887 (1984). The Florida Supreme Court defined "heinous, atrocious or cruel" in Dixon, supra, so it does not suffer from vagueness as decried in Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

The holdings in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), reh. denied, 429 U.S. 875, 97 S.Ct. 197, 97 S.Ct. 198, 50 L.Ed.2d 158 (1976) establish that the presumption and mitigating circumstances in the Florida capital sentencing scheme do not negate individualized sentencing.

Section 921.141 has been repeatedly upheld against arguments that it violates due process and equal protection. Ferguson v. State, 417 So.2d 639 (Fla. 1982) and Proffitt v. Florida, supra. The procedure for sentencing as outlined in the statute controls and channels discretion so that the sentence is a matter of reasoned judgment. Alford v. State, 307 So.2d 433 (Fla. 1975)

In Sireci v. State, 399 So.2d 964, 970 (Fla. 1981), this Court stated there was no requirement that the state notify the defendant by indictment or otherwise of the aggravating circumstances intended to be proven. Section 921.141(5) defines the only aggravating circumstances which can be considered in a capital case and satisfies the due process notice requirement. See also, Lightbourne v. State, supra.

In Thomas v. State, 456 So.2d 454 (Fla. 1984) and Thompson v. State, 389 So.2d 197 (Fla. 1980), the statute was upheld against attacks that the death penalty constituted cruel and unusual punishment.

The recommendation of death by a simple majority of the jury is constitutional. Fleming v. State, 374 So.2d 954 (Fla. 1979) Likewise, the death-qualification of jurors does not render capital trials fundamentally unfair. See Witherspoon v. Illinois, supra.

The rule established by Elledge v. State, 346 So.2d 998 (Fla. 1977) that death is the appropriate sentence where there are no mitigating factors even if the lower court erroneously found aggravating circumstances is never interpreted automatically by this Court. Even if it was, Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134, reh. denied, 464 U.S. 874, 104 S.Ct. 209, 78 L.Ed.2d 185 (1983) has held that resentencing is not required when courts find aggravating

circumstances in error. More importantly, this argument is inapplicable in appellant's case since mitigating circumstances were found to exist.

This Court has made it clear that Section 921.141, Fla. Stat. does not unconstitutionally mandate the death penalty for felony murder and that it comports freely with the constitutional requirements of equal protection and due process, as well as the prohibition against cruel and unusual punishment. Clark v. State, 443 So.2d 973, 978 (Fla. 1983). See also Toole v. State, 479 So.2d 731, 733 (Fla. 1985).

The fact that the Florida Supreme Court has not fashioned a rigid objective test for reviewing death penalty cases does not render the sentencing scheme unconstitutional on the theory that it will lead to the arbitrary and freakish imposition of the death penalty. Proffitt, supra. This Court follows its internal and external mandate and reassesses the propriety of the death penalty at every stage. In Proffitt v. State, 510 So.2d 896 (Fla. 1987) and King v. State, 514 So.2d 354 (Fla. 1987) the defendants had received new sentencing hearings. That this Court would reconsider the penalty is mandated and is a natural function of the evolution of law. Accordingly, appellant is entitled to no relief on this issue.

CONCLUSION

Based on the foregoing reasons, arguments and citations of authority, the judgment and sentence of the trial court 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 JAN K. DARGEL, P. O. Box 513, Tampa, Florida 33601 this 9th day of December 1988.

Lauren Hafner Sewell

OF COUNSEL FOR APPELLEE