IN THE SUPREME COURT OF FLORIDA

ROGER LEE CHERRY,

Appellant,

v.

CASE NO. 71,341

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

Appellee concurs with appellant's statement of the facts for purposes of this appeal only, except for the following additions and corrections:

1. Cherry testified that after leaving Lorraine Neloms around midnight on the night of the Waynes' murder, he participated in a dice game with four or five others on Voorhis until two police officers arrived and told the participants to break it up (R 837). Cherry then left, but after going home and taking forty dollars from his girlfriend's purse (R 839), he found another dice game going on behind the Mars Bar on Spring Hill (R 842). He participated in that game, at which there were twelve others present, until 2:30 or 2:45 a.m. (R 843).

2. In addition to the bruise and abrasion on Leonard Wayne's right foot, further evidence of trauma to his body was a small hemorrhage in the white portion of his left eye (R 407). The medical examiner testified that in all likelihood, the hemorrhaging in the eye came from some form of a struggle (R 418). When Jack Wayne discovered his father's body, there was a coat hanger lying across Leonard Wayne's face (R 309).

3. Testimony of investigating officer, John Bradley, was that in addition to the pockets of Mr. Wayne's pants being turned inside out, it appeared that somebody had gone through and searched the house. Drawers were partially opened in the dressers, cabinets were open in other rooms, particularly in the room where the victims were found, and there were contents of the closet in the spare room laying on the bed (R 505). The closet

door in the spare bedroom was open and a couple of purses were lying on the bed (R 507).

4. Ronnie Chamberlain was not Lorraine Neloms' current boyfriend at the time of the trial (R 444, 447). Lorraine Neloms continued to see Roger Cherry for approximately two months after his arrest by visiting him in jail (R 443), and sent him several "love letters" (R 446-447, 1148-1164).

SUMMARY OF ARGUMENT

POINT I: The trial court did not abuse its discretion in not allowing the defense witness from the Department of Motor Vehicles to testify. That the witness had not been listed on appellant's witness list in violation of the rules of discovery, and that the proposed testimony of the witness was immaterial to anything at issue in the case are sufficient to support the propriety of the court's ruling. Any error in this regard would indeed be harmless since the lack of this witness's testimony did not contribute to the conviction.

POINT II: The procedural error of not preparing guidelines scoresheets for the two non-capital offenses was harmless in a case such as this and does not warrant reversal where appellant has demonstrated no actual injury resulting from the error. It is almost certain that the five year sentence imposed for the grand theft of the Waynes' automobile was not a departure sentence, and the concurrent life sentence imposed for the burglary with an assault, if it was a departure from the guidelines, would be supported without a doubt by the clear and convincing reason that appellant had contemporaneous convictions of two unscored capital felonies.

POINT III: Whether the aggravating circumstances that the murder was committed for pecuniary gain and in the course of a burglary refer to the same aspect of the crime is wholly dependent upon the facts of the case. Even if this was a double recitation of proven factors in this case, resentencing is not required where there were other statutory aggravating factors and

no established mitigating circumstances.

POINT IV: That the murders of Leonard and Esther Wayne were especially heinous, atrocious or cruel is supported by the evidence presented in this case, and the trial court properly found that aggravating factor to apply. The brutal and merciless killing of a helpless, elderly man and his wife at night in their own home for the primary purpose of pecuniary gain are circumstances which make this crime heinous, atrocious and cruel.

POINT V: A comparative analysis of this case to others in which this court has approved or disapproved the death penalty will show that the death penalty in this case is not disproportionate to the crimes. The trial court found four aggravating circumstances and no supported mitigating circumstances. Even if the only aggravating factors were the two to which appellant has raised no objection, death would still be the proper penalty where we know that the trial court found no factors in mitigation which would outweigh them.

POINT VI: Appellant's constitutional attacks on his death sentences were not preserved for appellate review and there has been no showing of fundamental error. Thus, the issue should be deemed waived. Furthermore, this claim has previously been rejected by this court as being without merit. It should be concluded that appellant's sentences of death were constitutionally imposed.

POINT VII: Appellant's claim that his sentences of death could not be imposed because the jury was not instructed on the statutory aggravating circumstances during the guilt phase is

entirely without merit in light of his conceding the facial validity of Florida's death penalty statutes. The aggravating circumstances are not elements of the crime of first degree felony murder, but are purely sentencing criteria on which the jury needs no instruction considering Florida's use of a bifurcated trial in capital cases.

POINT VIII: The words, "psychiatric reports," used by the trial court in its written findings of fact in support of the death penalty were a reference to things which may have existed in the old court records of Volusia County regarding Roger Cherry, and which were things the court should not have considered in making its sentencing determinations. The court was affirmatively stating that it did not consider anything which it should not have. That the trial court did consider the psychiatric report introduced by appellant at the penalty phase is clearly evidenced by additional language found in the findings of fact.

POINT IX: It has previously been found by this court that the legislature intended multiple punishments when both a murder and a felony occur during a single transaction. Therefore, it was not double jeopardy for appellant to be convicted of felony murder and the underlying burglary. Neither was appellant being punished twice for the same crime by the imposition of sentences for both burglary with an assault and felony murder where the assault could be committed prior to and without the murder.

POINT I

THE TRIAL COURT DID NOT DENY CHERRY DUE PROCESS AND A FAIR TRIAL BY PREVENTING A DEFENSE WITNESS FROM TESTIFYING.

The state objected to Mr. Laughter from the Department of Motor Vehicles testifying on the grounds that he had not been listed as a witness on the defense's witness list (R 813-814). In ruling on the objection, the trial court merely stated that it was not going to allow Mr. Laughter to testify and did not state a specific reason for the ruling (R 816). The trial court has wide discretion in areas concerning the admission or exclusion of evidence, and unless an abuse of discretion can be shown, its rulings will not be disturbed. Welty v. State, 402 So.2d 1159 (Fla. 1981).

The fact that the expected testimony of Mr. Laughter had no relevance to the issue for which its introduction was being sought was a sufficient basis for the court's ruling it inadmissible. Appellant claims that the testimony of Mr. Laughter was relevant for the purpose of impeaching Lorraine Neloms, the key witness for the state.

Although Lorraine testified that Roger Cherry came home late on the night of the murders and showed her a wallet, which she never examined, but in which she saw a license with an old man's picture on it and the name Wayne (R 434-435), the defense attorney informed the court, "it's my understanding that he [the witness] will testify not to as whether or not Mr. Wayne possessed a driver's license card but rather that he did not

have, in effect a driver's license . . . ." * * * "The driver's license as I understand, had not been reissued since 1970." (R 815-816)

As it turned out, Mr. Laughter could only testify that Mr. Wayne did not possess a valid Florida driver's license. The trial court questioned the materiality of this evidence (R 815), and as the state pointed out, the license viewed by Lorraine Neloms "might not have even been a license, it might have been some sort of I.D. card." (R 816) In fact, it wasn't until cross-examination, when defense counsel referred to the contents of the wallet as a "driver's license," that Lorraine Neloms also called it a "driver's" license (R 450).

Clearly, the testimony of Mr. Laughter would not have served to refute that Lorraine Neloms saw something at least resembling a driver's license with the name of Wayne and an old man's picture on it in the brown wallet showed to her by Roger Cherry. It is not unlikely that Mr. Wayne had retained his expired driver's license for identification purposes, and even if it had not been issued since 1970, the picture on it would have still been that of a 64-year-old Leonard Wayne, who would have undoubtedly looked like an old man to 24-year-old Lorraine Neloms (R 425).

Further, the inquiry conducted by the trial court was sufficient under Richardson v. State, 246 So.2d 771 (Fla. 1971) to determine the degree of fault attributable to the defense for the discovery violation as well as the prejudice to the prosecution. It is well-established that a court's failure to

call an inquiry a "Richardson" hearing or to make formal findings concerning each of the pertinent Richardson considerations does not constitute reversible error. See, Baker v. State, 438 So.2d 905 (Fla. 2d DCA 1983); Wilkerson v. State, 461 So.2d 1376 (Fla. 1st DCA 1985).

The trial judge inquired of both counsels and learned that from an investigation initiated by the defense earlier that week, they had just received the results that morning and it was about those that the witness was to testify. This investigation was no more involved than checking with the Florida State Department of Motor Vehicles as to whether Leonard Wayne had a driver's license (R 814). The defense, knowing earlier in the week that it was conducting this investigation, could have disclosed to the prosecution in advance that it may be calling someone from the Department of Motor Vehicles. Such discovery violation must be considered more than inadvertent. The prosecutor informed the court that the state, having never known that the proposed witness existed, was being placed in a position of having "no way to disprove or prove anything about the license" (R 816), which was to be the subject of Mr. Laughter's testimony. Forseeing the possibility that this witness might be allowed to testify, the prosecutor added that he would "at least like a short break to be able to talk to him [Mr. Laughter] and find out what his testimony is going to be before he does testify." (R 816) This should not be construed as a simple solution to the problem, but was the **least** that the state required in this situation and would certainly not have afforded the state the necessary opportunity

to obtain witnesses in rebuttal. The failure of the appellant to comply with the rules of discovery regarding this witness prevented the state from adequately preparing for trial.

> It may well be true that alternative sanctions are adequate and appropriate in most cases, but it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit prejudice to the State and the harm to the adversary process.
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> It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence; the interest in the fair and efficient administration of justice; and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.
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> * * *
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> It is .... reasonable to presume that there is something suspect about a defense witness who is not identified until after the eleventh-hour has passed.

Taylor v. Illinois, 108 S.Ct. 646, 655 (1988).

The Compulsory Process Clause of the Sixth Amendment does not create an absolute bar to the preclusion of the testimony of

the defense witness as a sanction for violating a discovery rule, and a defendant's right to offer the testimony of witnesses in his favor should extend only to **material** defense witnesses and **relevant** testimony.

Should the trial court's exclusion of Mr. Laughter be deemed error, it was harmless in view of the fact that the only thing to be proven by the witness's testimony was that Leonard Wayne's Florida Driver's License had expired, which was irrelevant to any issue in the case. Where the testimony of Mr. Laughter would not serve to refute Lorraine Neloms testimony, and the testimony of Leonard Wayne's son was that his father did possess a driver's license but allowed for the fact that it may have been invalid (R 313), there is no reasonable possibility that the lack of the evidence complained of might have contributed to Cherry's conviction. See, Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). Aside from Lorraine Neloms' testimony regarding the driver's license with Mr. Wayne's name and picture on it (R 435), Lorraine provided additional information about the bank cards and Cherry's profusely bleeding thumb (R 433-436, 450), which was substantiated by other evidence presented by the state, and all pointed to Roger Cherry's guilt of the burglary. Cherry's guilt was further proven by the testimony of the crime lab analyst that there was human blood on the bank card (R 635) and that the blood found on the towel in the Waynes' stolen vehicle and on a piece of paper found outside the southwest corner of the house was entirely consistent with Roger Cherry's blood and could not have come from either of the

Waynes (R 640, 647-648). That evidence coupled with the fact that Cherry's left palm print was found on a door frame in the Wayne's home (R 680), that his left thumbprint was found on the metal tray in the trunk of Leonard Wayne's automobile (R 692), and another left thumbprint was found on one of the panes of glass removed from the jalousie windows (R 693), is so overwhelming when compared to the proposed testimony of the excluded witness, that excluding it could not have possibly made any difference in the result of the trial. Therefore, any error in excluding the testimony of Mr. Laughter was indeed harmless.

POINT II

THE TRIAL COURT DID NOT ERR BY IMPOSING DEPARTURE SENTENCES FOR THE NON-CAPITAL OFFENSES.

Guidelines sentences are mandated by statute for non-capital offenses such as burglary with an assault and second degree grand theft for which appellant was convicted. However, the trial court is also permitted by Florida Rule of Criminal Procedure 3.701(d)(11) to depart from the guidelines up to the limit of the penalty provided by statute when imposing sentence if there is a clear and convincing reason for doing so. Appellant argues that his sentences for burglary with an assault and grand theft must be reversed and the matter remanded for resentencing for the sole reason that guidelines sentences were not imposed for those offenses. Appellee urges that since departures are permitted and there is an obvious clear and convincing reason to support the departure, appellant's sentences should be affirmed and no further judicial resources should be expended on resentencing where the outcome would inevitably be the same as it was in the original sentencing.

Recognizing that there were apparently no guidelines scoresheets prepared for the two non-capital offenses, appellee questions whether the sentences imposed were really departures. However, assuming arguendo that the sentences for the non-capital crimes were departures from the guidelines, the trial judge's failure to provide a written statement as to his reason for imposing the statutory maximum penalties should be considered

harmless error.

In State v. Jackson, 478 So.2d 1054 (Fla. 1985), this court rejected the assertion that a transcript of oral statements made by the judge during sentencing would be sufficient to justify the written statement requirement for departure under the guidelines relying upon the reasoning in Boynton v. State, 473 So.2d 703 (Fla. 4th DCA 1985). Among those reasons was that the absence of written findings would force appellate courts to search the record for findings and underlying reasons for departure. Id. at 706-707.

The Jackson court did not, however, specifically address the question of harmless error in adopting its per se reversal rule. The state respectfully submits that while the reasoning of Boynton and Jackson is persuasive and compelling in some cases, that is not the situation in a case such as this where a single departure rationale clearly and convincingly exists, i.e., contemporaneous conviction of an unscored capital felony. "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." McPhaul v. State, 496 So.2d 1009 (Fla. 2d DCA 1986); Torres-Arboledo v. State, 13 F.L.W. 229 (Fla. March 24, 1988).

To reverse and remand for a resentencing would involve nothing more than the trial judge having his secretary type the above quotation and him affixing his signature underneath. Reversal is unjustified because of errors in matters of procedure unless actual injury resulting from that error, not the error

alone, warrants reversal. Martin v. State, 100 Fla. 16, 129 So. 112 (1930); Whitten v. State, 86 Fla. 111, 97 So. 496 (1923). It cannot be said that the purported error has "injuriously affected the substantial rights of the appellant" especially given the statutory presumption against such a finding of prejudicial, as opposed to harmless, error. See, § 924.33, Fla. Stat. (1987); Perri v. State, 441 So.2d 606 (1983).

Where appellant has failed to claim actual injury as a result of the trial court's failure to state in writing that departure sentences were warranted by the fact that appellant had been convicted of two first degree murders which could not be scored as additional offenses at conviction, such deviation from Florida Rule of Criminal Procedure 3.701 is necessarily harmless. The sentences imposed by the trial court for the two non-capital felony convictions should be affirmed.

POINT III

IF IT WAS ERROR TO CONSIDER AS SEPARATE AGGRAVATING CIRCUMSTANCES MURDER FOR PECUNIARY GAIN AND MURDER DURING COMMISSION OF A FELONY (BURGLARY WITH AN ASSAULT), IT WAS HARMLESS.

The state concedes that it has been held in a number of cases that it was error to consider as separate aggravating circumstances that the crime was committed during the commission of a robbery and for pecuniary gain, since these findings "refer to the same aspect of the defendant's crime". Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert. denied 436 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977); Maxwell v. State, 443 So.2d 967 (Fla. 1983).

However, when the crime is burglary, rather than robbery, the two factors have been properly given separate consideration where the peculiar facts of the case show that they were separate characteristics of the crimes. See, Brown v. State, 473 So.2d 1260 (Fla. 1985) (Burglary had a broader significance than simply being the vehicle for a theft where victim was beaten, raped, and strangled.) In the instant case, where it was charged that an assault was committed during the burglary, the fact of that additional crime could support a finding that the burglary had a broader significance than merely as an opportunity for theft.

Even where the burglary is not found to have a broader significance than merely an opportunity for theft, it should not be error to consider the factors of murder for pecuniary gain and murder committed during a burglary as separate aggravating circumstances, and Provence, supra, should be distinguished as it

dealt with a murder committed in the course of a **robbery.** Whereas the robbery could not have occurred without a taking (theft), a burglary can be completed without any theft or taking having occurred. Separate consideration of these factors is not error.

Regardless, the double recitation of proven factors does not call the propriety of the sentence into question unless it interferes with the mandated process of weighing the circumstances. Hargrave v. State, 366 So.2d 1 (Fla. 1978). If there are no established circumstances mitigating against the death penalty, striking invalid aggravating circumstances does not necessarily mean that resentencing is required. Francois v. State, 407 So.2d 888 (Fla. 1981).

In Jones v. State, 449 So.2d 253 (Fla. 1984), the improper doubling of murder for pecuniary gain and murder committed while engaged in, or during flight after, commission of burglary and robbery was deemed a harmless error where other aggravating factors remained and there were no mitigating factors. See also, Vaught v. State, 410 So.2d 147 (Fla. 1982). Even though the aggravating factor of murder for pecuniary gain may have improperly gone into the weighing process in the instant case, the trial judge did not find any statutory mitigating factors, nor mention that he was attributing weight to any non-statutory ones, so here, as in Brown v. State, 381 So.2d 690 (Fla. 1980) and Bassett v. State, 449 So.2d 803 (Fla. 1984), "we can know" that the result of the weighing process would not have been different had the one impermissible factor not been considered.

There are ample other statutory aggravating circumstances (murder committed in course of burglary, three prior convictions of crimes involving threat or use of force against a person, and murders were especially heinous, atrocious, or cruel) to convince us that the weighing process has not been compromised, and that resentencing is not required. The death sentences should be affirmed.

POINT IV

THE TRIAL COURT PROPERLY FOUND THE MURDERS TO BE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, AS SUCH WAS SUPPORTED BY THE EVIDENCE.

Appellant contests the application of the aggravating factor, section 921.141(5)(h), Florida Statutes (1985), that the murders of Leonard and Esther Wayne were especially heinous, atrocious or cruel, and contends that such circumstance is not supported by any additional facts established in the case other than those stated by the trial court it its findings of fact in support of the death penalty (R 1241-1244). The state strongly disputes that contention and will discuss the facts and circumstances established by the evidence in this case which firmly support the application of the aggravating factor of heinous, atrocious or cruel. As appellent recognized in his brief, "It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather, it is the entire set of circumstances surrounding the killing." Magill v. State, 428 So.2d 649 (Fla. 1983).

In State v. Dixon, 283 So.2d 1 (Fla. 1973), the Court defined what was meant by heinous, atrocious, or cruel:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the

> capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id, at 9.

A. THE MURDER OF ESTHER WAYNE WAS PROPERLY FOUND TO HAVE BEEN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

That Esther Wayne's body was clothed in pajamas and the photographs of the crime scene show the bed in the Wayne's bedroom as being unmade, are evidence that Mrs. Wayne had gone to bed prior to appellant's breaking into her home. Esther Wayne, a seventy-nine year old woman, who had just recovered from a slight stroke a few months earlier (R 298-299), was roused from her bed in the night by Roger Cherry, an intruder within the sanctity of the Wayne's home. Upon confronting him, either on purpose or accidentally, Esther Wayne was then mercilessly beaten to death by Roger Cherry.

The medical examiner testified that the type of wounds found on the body suggested that they were caused by "blunt trauma" (R 393), such as a fist or any other instrument that has a rounded or flat surface (R 413), and that an instrument such as a club or bottle would not be ruled out (R 414). The type of trauma to Mrs. Wayne was also consistent with being stepped upon or kicked with a shoe (R 420). An examination of the body, according to the medical examiner's testimony, revealed that Mrs. Wayne's skin was intact for the most part, so what was seen were the "effects of crushing or tearing of the tissues with hemorrhage beneath the surface of the skin." (R 393)

One well-placed punch would likely have been enough to knock out a seventy-nine year old lady for a length of time sufficient to allow Roger Cherry to ransack the Wayne's house undisturbed. However, from the medical examiner's testimony that "more than five" blows were applied (R 416) to Mrs. Wayne's head and body, it can easily be determined that she unnecessarily suffered the pain of at least five blows. From the nature of the injuries sustained, it is clear that she was beaten severely which included being stomped on at least once.

Esther Wayne sustained multiple areas of contusion about the face and neck. Her eyes were both blackened, there were multiple areas of bruising over both sides of her jaw, and the right side of her lower lip was cut (R 391). There was an area of bruising over the fronts of both the right shoulder and collarbone and multiple areas of bruising over the left collarbone (R 392). On the back of Mrs. Wayne's pajama bottom was a dirty streak resembling a shoe print (R 529, 695) and on her right buttock was an area of bruising (R 392). The quote in appellant's brief of supposed testimony that this was consistent with her having been "stepped upon" is not the testimony of any expert in the trial, but is an incomplete quotation of a question put to the medical examiner by the prosecutor, and was a question <u>not</u> asked in the context of what caused the injury to the buttocks (R 419-420).

The most logical view of the evidence is that some force would have to have been applied to cause the bruise on the buttock. That such would have been the result had Cherry merely stepped upon Mrs. Wayne in his effort to flee, as is hypothesized

by appellant in his argument, is highly unlikely. That bruise and that footprint on the pajama bottom is strong evidence that Roger Cherry stomped on Mrs. Wayne after she had fallen to the floor.

The injuries suffered by the eldery victim were greater than mere bruises on the skin. An autopsy revealed multiple areas of bruising in the tissues below the skin, which were also significant of blunt force trauma. In addition, water had seeped from the vessels into the air spaces in the lungs, a condition called edema, that the medical examiner testified was a response to the severity of the injuries received by the victim (R 394). Partially digested blood found in the stomach was probably the result of Mrs. Wayne's swallowing blood that had accumulated in the nose and mouth (R 395), evidence that she was alive and conscious during the beating.

That Roger Cherry either pounded on the head of Esther Wayne with his fists or kicked her head with his feet once she fell to the ground is evidenced by the fact that both sides of her scalp, from the forehead region back to almost the tip of the skull or vertex, were covered with one large area of bruising (R 395), which indicated multiple blows in the same general area so that the bruises just began to merge (R 396). On the back left side of the skull, there was additional bruising (R 395).

Once the bone was removed by the medical examiner, the ultimate cause of death was revealed: a hemorrhage beneath the dural membrane that covered most of the brain (R 395) and a large area of hemorrhage on the left side of the brain in an area

called the subarachnoid space (R 1396). The medical examiner testified that the hemorrhage in the subarachnoid space belied a significant amount of force having been applied to the head and that the blows which caused that amount of hemorrhage would have to have been applied with "a lot of force." (R 397) That opinion is further substantiated by the fact that the left temporal bone of the skull was fractured and the juncture of the base of the skull with the spinal column was dislocated (R 397). Since the examination of the neck revealed that the thyroid gland, which overlies the airways, also bore multiple areas of bruising and that there was hemorrhage in the bed were the neck organs laid (R 398), it is not unreasonable to conclude that at some point Roger Cherry also attempted to strangle Mrs. Wayne.

The severe damage done to the head of Esther Wayne led to the hemorrhaging which eventually took up the small amount of space between the brain and the skull, creating pressure on the brain that interferred with the vital functions contained in the brain stem, such as control of heart rate and respiratory functions (R 399). As a result, Mrs. Wayne eventually died.

Esther Wayne lived for up to fifteen minutes (R 399) with the pain of these injuries that had been inflicted upon her, while struggling to breathe with blood in her nose and mouth. She had endured the continuing blows from Roger Cherry, likely knowing that with each one, death was nearer. She then suffered the further indignity of having this attacker stomp on her backside as she lay dying on her bedroom floor. Whether she was also aware that her husband of so many years lay nearby dying of

heart failure is the only thing about which we are forced to really speculate. At the very least, it must be acknowledged that the manner in which Roger Cherry killed Esther Wayne was designed to inflict a high degree of pain and showed an utter indifference to her suffering. Roger Cherry's stomping on or administering a blow to Mrs. Wayne's buttock, since it was, as appellant points out in his brief, a non-lethal area, could have been for no other reason than for the enjoyment of causing the old woman, who had attempted to interfere with his plans (R 437), further suffering.

The state will agree that because two of the three witnesses to the Waynes' murders are dead and cannot offer any testimony, there is an absence of evidence showing what actually transpired just prior to the deaths of the victims. We cannot know whether Esther Wayne pleaded for her life as Roger Cherry pummeled her, or whether Leonard Wayne died in an attempt to physically stop Roger Cherry from beating his wife, or whether Mr. Wayne begged Roger Cherry to call an ambulance once the old man felt the pain and grabbed at his chest (R 437). However, contrary to appellant's contention, there are facts established in this case, which in other cases have served to uphold a finding that a murder was especially heinous, atrocious, or cruel.

There are many cases in which the courts have recognized, as significant to the finding that a murder was heinous, atrocious or cruel, the age and helplessness of the victim, the length of time the victim continued to live after suffering fatal injuries, and the fact that the killing was perpetrated in the victim's own

home. Brown v. State, 473 So.2d 1260 (Fla.), cert. denied, ____ U.S. ____, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985) (81-year-old semi-invalid woman beaten, raped and killed by asphyxiation); Quince v. State, 414 So.2d 185, cert denied, 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed.2d 155 (1982) (severe beating, wounding, rape and strangulation of 82-year-old frail woman); Hardwick v. State, 13 F.L.W. 83 (Fla. Feb. 4, 1988) (medical examiner testified the victim was conscious as long as six minutes after initial wound was inflicted. During this time, he was repeatedly stabbed, shot and beaten). It has previously been held by this court in upholding a finding of heinous, atrocious or cruel that a vicious attack occuring within the supposed safety of the victim's own home is a factor which adds to the atrocity of the crime. Perry v. State, 13 F.L.W. 189 (Fla. March 10, 1988); Troedel v. State, 462 So.2d 392 (Fla. 1984); Breedlove v. State, 413 So.2d 1 (Fla.), cert. denied, 459 U.S. 882 (1982).

That the murder was effected by a beating, as opposed to another method, has not served to eliminate heinous, atrocious or cruel as an aggravating circumstance, despite the fact that athletes pummelling each other in boxing matches is routinely on television. (Initial Brief of Appellant p.27) Scott v. State, 494 So.2d 1134 (Fla. 1986) (Victim was brutally beaten into state of unconsciousness, and after regaining consciousness then beaten again into submission); Lambrix v. State, 494 So.2d 1143 (Fla. 1986) (Aggravating factor of heinous, atrocious or cruel applied to both murders; male victim died from multiple blows to the head and female died from manual strangulation); Thomas v. State, 456

So.2d 454 (Fla. 1984) (Finding of heinousness proper where victim died as result of severe beating).

Although appellant cites Rembert v. State, 445 So.2d 337 (Fla. 1984) as being very similar to his own case and states that "this Court disapproved a finding of an especially heinous, atrocious or cruel murder where a robber hit the victim in the head with a club as many as seven times" (Initial Brief of Appellant - p. 26), the actual evidence was that the victim had been hit "once or twice" and that the "victim could have been hit as many as seven times or as few as one time." Id. at 339. That attack on the victim took place during the day in the course of a robbery of the victim's bait and tackle shop, and the evidence was conclusive that the victim was not dead when Rembert left the shop. In contrast, the medical examiner's definite testimony in the instant case was that Mrs. Wayne had been struck with much force "more than five" times. That, in conjunction with the total circumstances surrounding the crime, placed the murder of Esther Wayne within the purview of State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

Appellant's analogy of the vicious beating of a 79-year-old lady to the "Saturday night fights" only serves to underscore the appalling brutality of this crime and the need to keep society from becoming complacent about atrocities such as the sensless murders of Esther and Leonard Wayne. By recommending the death penalty for both murders, the jury showed that the conscience of the community is fortunately still such that it will absolutely

not tolerate thieves breaking into the homes of elderly people in the night and murdering them for their meager possessions. To find that these murders were not especially wicked or evil would be telling the members of the jury who recommended the death penalty, as well as the rest of society, that their outrage was misplaced, that Cherry's treatment of the Waynes was no worse than a "boxing match in the Olympics", and that we should learn to tolerate such actions.

B. THE MURDER OF LEONARD WAYNE WAS PROPERLY FOUND TO BE HEINOUS, ATROCIOUS OR CRUEL.

It is well-accepted that criminals take their victims as they find them and appellant cannot be excused from guilt or punishment because Mr. Wayne was weak and could not survive the physical and mental trauma of the situation directly caused by Roger Cherry. The jury reasonably concluded that the intentional acts of the appellant caused or materially contributed to the death of Leonard Wayne, and so it was proper to find him guilty of the felony murder of Mr. Wayne and to sentence him accordingly.

Remembering that it is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious or cruel, but rather the entire circumstances surrounding the killing, the murder of Leonard Wayne can be considered no less torturous than that of his wife despite the fact that the 80 year-old-man died of heart failure. The elderly gentleman's heart attack was caused by Roger Cherry just as he caused the injuries of Mrs. Wayne that led to her death.

Even if the evidence did not prove that appellant did anything more than push Leonard Wayne, it did indicate that appellant witnessed Mr. Wayne grab at his chest in the initial throes of a heart attack (R 437). Appellant, doing nothing to aid him, exhibited the reckless indifference to human life required by this court in DuBoise, supra.

The mental suffering endured by Mr. Wayne is difficult to imagine. He was forced to submit to an ordeal during which time he undoubtedly contemplated his own death while agonizing over the fate of his wife and his inability to help her. See, Knight v. State, 338 So.2d 201 (Fla. 1976) (Victim "was continually under severe strain, not only thinking of his own life but that of his wife.") The mental anguish suffered by the victim is sufficient to support the trial court's finding that the crime was especially heinous, atrocious or cruel. See, Jackson v. State, 13 F.L.W. 146 (Fla. Feb. 18, 1988).

The evidence adduced at trial was that Mr. Wayne was lying on a pallet on the floor in front of the television in the living room prior to his encounter with Roger Cherry. That Mr. Wayne's body was found partially in the bedroom where his wife's body was found, and partially in the hallway outside the room (R 308, 340), would indicate that he had gotten up to investigate either the noise caused by the struggle between his wife and her assailant, or possibly in answer to his wife's screams or calls for help. If Mrs. Wayne had been unable to warn him that there was an intruder in their home, it is not unlikely that Mr. Wayne would go immediately to his wife without first groping for his

gun on top of the cabinet in the kitchen (R 316). All evidence points to the fact that Cherry entered through the jalousie window at the southwest corner of the house (R 360-361). Several panes of glass had been removed and the screen had been cut and pushed inward (R 358). One pane of glass had blood on it that was not inconsistent with that of the appellant (R 644-645). The windows led directly from a porch into Mrs. Wayne's bedroom (R 356-358).

The evidence supports that Cherry had come into contact with Mrs. Wayne first. It is most likely that Leonard Wayne entered the room to assist his wife, and encountered Cherry, who pushed the old man (R 437) and struck him in the eye (R 418). We are unfortunately left to speculate how the coat hanger ended up on Mr. Wayne's face (R 309), but even if Cherry had not cruelly dropped the coat hanger on the dying man's face as he rummaged through the closets, which is most plausible considering the position of the body and the state of the closets (see, state's exhibit 11) (R 1189), it can only be concluded that in Mr. Wayne's dying attempt to help himself he pulled the hanger down on top of his face, or that Roger Cherry struck Mr. Wayne with it and then dropped it on him after he fell to the floor.

It was the medical examiner's opinion that Leonard Wayne was involved in some form of a struggle (R 420), although he testified that either the physical exertion of a struggle or even the severe psychological shock of the situation could have caused Mr. Wayne to suffer abnormal cardiac rhythm. A diseased heart such as Mr. Wayne's would have been beating so rapidly that it

would no longer function as a pump, but would go into a spasm and just cease to contract (R 408). Due to the position of the bodies and the fact that Cherry admitted to his girlfriend that he pushed the old man (R 437), it is clear that Leonard Wayne knew an intruder had broken the sanctity of his home and had already done something horrible to his poor wife. The circumstances surrounding the murder of Leonard Wayne were caused by Roger Cherry. Appellant and the situation he created caused 80-year-old Leonard Wayne to suffer cardiac arrest and its attendant pain, which ws evidenced by the fact that he grabbed at his chest (R 437). This was in addition to the severe mental anguish of seeing his wife lying on the floor, and knowing that she may be dead or dying and that he was powerless to help her or himself, all while he listened to their murderer roam through their house in search of valuables. To lay painfully dying, knowing that there is another human being nearby, who could help you, but who will not, must be the ultimate frustation and surely Mr. Wayne died in anguish.

Regardless of whether the circumstances surrounding Leonard Wayne's murder take it out of the norm for felony murders in order to find that it was heinous, atrocious or cruel, there are at least two other aggravating circumstances which attach to this crime and make the death penalty the appropriate sentence. If the trial court's finding of heinous, atrocious or cruel was error, it is harmless in light of the fact that there were no statutory mitigating circumstances and the trial court found non-statutory mitigating factors to have little, if any, weight.

The lack of record support for the non-statutory mitigating factors which Cherry claims exist in his family and drug histories is discussed in Point V herein. As to his employment history that he was never fired from a job, very little mitigation can be found in this considering his extremely limited employment background. The psychiatric report of Dr. Barnard introduced by the defense in mitigation reveals that Cherry's "longest job was about 11 months . . . ." (R 1167). Cherry's testimony during the guilt phase of the trial contained several references to the fact that he was unemployed and got his money either from his girlfriend, or from gambling (R 830, 832, 838-839).

It is within the trial court's discretion to determine whether sufficient evidence exists of a particular mitigating circumstance and, if so, the weight to be given it. Daugherty v. State, 419 So.2d 1167, 1071 (Fla. 1982). Clearly, nothing could be found in the record to lend any weight to the non-statutory mitigating evidence. Therefore, even if the aggravating factor of heinous, atrocious or cruel is stricken from the murder of Leonard Wayne, we know that the trial court still would have imposed the death penalty upon weighing the two aggravating factors, that appellant was previously convicted of a felony involving the use or threat of violence to the person and he murdered Leonard Wayne while in the commission of a burglary, against the virtually non-existant mitigating factors. Elledge v. State, 346 So.2d 998 (Fla. 1977); White v. State, 446 So.2d 1031 (Fla. 1984).

POINT V

THE DEATH PENALTY IS NOT DISPROPORTIONATE TO THE FACTS OF THIS CASE.

Calling this case "a simple burglary gone bad" is a vast understatement. Two innocent, elderly people were roused from their sleep by appellant as he burglarized their home, only to face painful deaths at appellant's hands.

Appellant's argument that even though the deaths occurred during the commission of a burglary, "an obvious lack of premeditation to murder exist[ed]" rendering the death penalty unwarranted in this case is an argument without merit. Certainly death cannot be found to be a disproportionate punishment for these felony murders especially in light of the fact that the death penalty has been upheld numerous times in cases where the appellant did not even actually commit the subject homicide. DuBoise v. State, 520 So.2d 260 (Fla. 1988); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987); Jackson v. State, 502 So.2d 409 (Fla. 1986).

The death penalty has been held befitting of the crime where the defendant was simply a major participant and possessed a mental state which was one of reckless indifference to the value of human life. Tison v. Arizona, ____ U.S. ____, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). The evidence presented in the instant case can be found to support at least that conclusion, and in all reality, it is clear that from the circumstances of the crime that appellant most likely formed the intent to kill as soon as

he realized that Mrs. Wayne was awake. Appellant could have easily completed the intent of his burglary (theft) and could have also escaped from the house without killing the victims. However, from appellant's testimony that he had previously been hired by Mr. Wayne to do yard work and wash windows for the old couple (R 859-860), and that Mrs. Wayne was sitting outside on the porch while appellant was at the house (R 887), it becomes clear that both of the Waynes were likely to have been able to identify the appellant since they had both seen him two to three weeks earlier (R 856). Therefore, a finding that appellant intentionally caused the Waynes' deaths would be supported by the record. In Lightbourne v. State, 438 So.2d 380 (Fla. 1983), this court cited the fact that the defendant admitted knowing the victim as proof of the requisite intent to avoid detection and held that such evidence supported the aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. In that same case, it was held that the trial court could properly find that the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification due to the facts that defendant cut phone lines, entered the house at a time when others would most likely not be present, and effected an execution-style killing using a pillow between the murder weapon and the victim's head. Id. at 391.

In the instant case, it cannot be considered a coincidence that Roger Cherry chose the Waynes' house to burglarize or that it was near midnight when he performed the burglary. That he

stated to Lorraine Neloms that he was going over by the Armory to get some money (R 431-432) shows that Cherry had premeditated his design to prey on the two elderly people, whom he knew lived by the Armory, and who he knew were no physical match for him, at a time of day when neighbors would likely be asleep and unavailable to render assistance to the victims. Like Lightbourne, Cherry had also cut the telephone wires going to the house (R 496-497).

Appellant argues that "Mrs. Wayne was evidently still alive when Cherry fled from the Wayne residence," and therefore Cherry did not intend or know that he had killed her. It is just as evident that Cherry was still ransacking the house for valuables by the time the Waynes died and that he knew they were dead before he left the house. Cherry's self-serving statement to his girlfriend that he hadn't killed anyone is not proof that he was unaware of the consequences of his actions or that he did not form an intent to eliminate the witnesses who could identify him.

The state is not arguing that two more statutory aggravating circumstances - section 921.141(5)(e) and (h), Florida Statutes (1985) - be applied to the capital felonies in this case, but does contend that the above refutes appellant's claim that there was an absolute lack of intent which should have been considered as an applicable non-statutory **mitigating** circumstance. As quoted by appellant, the court in White v. State, 403 So.2d 331 (Fla. 1981), held, "a defendant remains free to argue as a mitigating circumstance that he did not intend to kill the victim

. . . ." In the case at bar, Roger Cherry never made such an argument or presented his lack of intent to the jury or judge as a non-statutory mitigating factor, and it should not be considered as such on review.

In arguing that the death sentences imposed for the felony murders of Leonard Wayne and Esther Wayne are disproportionate to the facts of this case, appellant cites Swan v. State, 322 So.2d 485 (Fla. 1975) and Norris v. State, 429 So.2d 691 (Fla. 1983) as being the most factually similar to the case sub judice and points out that the death penalty was not imposed in those cases. In Swan, the victim, like Mr. Wayne, suffered from various physical infirmities such as arteriosclerosis and a weak heart, which may have contributed to the victim's inability to survive the attack by the defendants. That is where the similarities end. Swan was nineteen years old and his co-defendant was only sixteen at the time of the murder; there were two aggravating circumstances (capital felony committed in the course of burglary or robbery and heinous, atrocious or cruel). Upon consideration of the total record, this court held the opinion that there were insufficient aggravating circumstances to justify imposition of the death penalty and that the jury's recommendation of life should be followed. In Norris, the appellant was also nineteen years old and suffered from a drug abuse problem and claimed to have been intoxicated at the time of the crime. In overriding the jury's recommendation of life, the trial judge voiced a concern that Norris could possibly be paroled someday, which was an improper consideration for

sentencing. The death sentence was vacated because the higher standard required for a jury override - the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ - was not met.

Both Swan and Norris are distinguishable from the instant case primarily because the death penalties were imposed in an override of the juries recommendations of life. Just as a jury's recommendation of life should be given great weight, reflecting as it does the conscience of the community, so too should its advisory sentence of death; and where it is clear from the sentencing order that the court reviewed the evidence and found valid justifications for following the jury's recommendation, that sentence of death should not be reversed.

In a comparison of the circumstances of the killing of Esther Wayne in this case to the facts of other cases ruled upon by this court, the state avers that Johnston v. State, 497 So.2d 836 (Fla. 1986) is the most similar, and as this court did in Johnston, so too should it affirm in the instant case the sentence of death imposed. The following demonstrates a simple, but complete, comparison between the circumstances with their supporting facts as cited in this court's affirmance of the death penalty in Johnston with those same or similar facts and circumstances existing in Cherry:

JOHNSTON V. STATE	CHERRY V. STATE
Aggravating Factors Applicable:	
1. §921.141(5)(d), Fla. Stat. (1983), capital felony committed while defendant was engaged in commission of burglary.	1. §921.141(5)(d), Fla. Stat. (1985), same. Record contains ample support to conclude that Cherry unlawfully entered victims' house with intent to commit at least a theft.
2. §921.141(5)(h), Fla. Stat. (1983), murder was especially heinous, atrocious or cruel. In support: a. Victim was "an 84-year-old woman, who had retired to bed for the evening." b. "strangled and stabbed three times" c. "it took the helpless victim 3-5 minutes to die"	2. §921.141(5)(h), Fla. Stat. (1985), murder was especially wicked, evil, atrocious or cruel. In support: a. Victim was 79-year-old woman who had retired to bed for the evening. b. Beaten and attempted strangling, bashed with fists or blunt instrument more than five times and stomped on with shoe. c. It took 10-15 minutes for helpless victim to die.
3. §921.141(5)(b), Fla. Stat. (1983), previously convicted of a felony involving the use or threat of violence to the person.	3. §921.141(5)(b), Fla. Stat. (1985), previously convicted of two felonies involving the use or threat of violence to some person; also convicted of another capital felony - the murder of Leonard Wayne.
Mitigating Factors Applicable: None	No mitigating circumstances
Jury's Advisory Sentence: Death	Death 9 to 3

497 So.2d at 871-872.

Johnston argued, as does Cherry, that the finding that he was previously convicted of a felony involving the use or threat of violence to a person is insufficient to support a sentence of death because neither of the two cited felony convictions resulted in harm to the intended victim. This court held in Johnston that such argument fails because "the resultant harm, or lack thereof to the intended victim of a violent felony is an irrelevant consideration." 497 So.2d at 871.

As further support for this aggravating circumstance in the

instant case, "previous conviction of another capital felony" can be added. The conviction for the murder of Leonard Wayne aggravates the murder of Esther Wayne and vice versa. See, Correll v. State, 13 F.L.W. 271 (Fla. April 13, 1988). (In sentencing for each of four murders, it was found that Correll had already been convicted of the three other capital felonies even though all four murders were committed in one episode. Therefore, the aggravating factor that he previously had been convicted of another capital felony was properly applied to the murders of all the victims.)

Johnston and Cherry also presented similar evidence of mitigating factors, and in each case, the trial court ultimately found no mitigating circumstances to exist. In Johnston, appellant's contention was that sections 921.141(6)(b) and (f), Florida Statutes (1983) were applicable: The capital felony was committed while he was under the influence of extreme mental and emotional disturbance, and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired. In support of both of these mitigating circumstances, Johnston cited to his own admission that he took LSD on the night of the murder and that he suffered from mental disorders. It was held that the trial court did not err in refusing to find that the taking of LSD warrants mitigation in light of the fact that Johnston's credibility was rightfully questioned. Johnston also argued as a non-statutory mitigating circumstance that he had been abused by his parents, but this court found that the trial court did not err in failing

to find that appellant's history of being abused rose to the level of a non-statutory mitigating circumstance. Johnston, supra, at 872.

In the instant case, the trial court reviewed in its Findings of Fact order the mitigating circumstances on which Cherry requested instruction (R 1242). The same two statutory mitigating circumstances that were presented in Johnston were requested by Cherry, as well as the additional one that he had acted under extreme duress or under the substantial domination of another person. § 921.141(6)(e), Fla. Stat. (1985). Although the court charged the jury with these statutory mitigating circumstances, the defense presented no evidence in support of them during the penalty phase, nor did anything that came out during the guilt phase support them. The defense did introduce a psychiatric report prepared by Dr. Barnard (R 1166-1169), which included a family history that Cherry's father had a bad temper and beat the defendant severely, but there was no testimony to substantiate or elaborate on that family history, not even from Cherry. Neither was there any expert testimony as to whether the claimed beatings had any lasting detrimental effect on Cherry. As in Johnston, the trial court did not err in failing to find that the appellant's unattested-to history of being beaten by his father rose to the level of a non-statutory mitigating circumstance. See also, Rogers v. State, 511 So.2d 526 (Fla. 1987) (No testimony on the effects produced by alleged childhood traumas. Record could not factually support conclusion that "childhood traumas produced any effect upon [defendant] relevant

to his character, record or the circumstances of the offense so as to afford some basis for reducing a sentence of death.")

Neither did the trial court err in failing to find that appellant's history of drug abuse was a mitigating circumstance. The alcohol and drug history portion of the psychiatric evaluation (R 1168) was no doubt compiled based on information supplied to Dr. Barnard by Roger Cherry, and without anything more, was merely hearsay. Further, Roger Cherry's own testimony during the guilt phase was somewhat inconsistent with the information in this report. Cherry testified that in 1986 before the time he was arrested he "decided to leave [crack cocaine] alone" and was trying to get his girlfriend to stop using it (R 828-829). They had discord between them because he did not approve of her use of drugs, but preferred that she use marijuana instead of cocaine (R 829, 834). Cherry testified that on the evening of the murders he refused an offer of cocaine (R 833) and refused another invitation to smoke crack cocaine the next morning (R 852). Cherry did admit to smoking a marijuana cigarette with Lorraine's uncle, Woody, around 12:00 noon on the day after the murders (R 852). There was no testimony that Cherry smoked marijuana on the day of the crime.

From Cherry's testimony and the drug history, which included the statement that Cherry had "tried crack on six to seven occasions" (R 1168), it would appear that Cherry's use of cocaine was so minimal that the trial court was correct in not finding that it had any bearing on the crimes for which Cherry was convicted. Dr. Barnard's report concludes with his opinion that

Cherry "has no indication of a thought disorder and specifically no loosening of associations, delusions, or flight of ideas." * * * "It is my medical opinion that . . . at the time of the alleged crime [the defendant] would have known the nature and quality of his acts and the wrongfulness of them." (R 1168-1169) No evidence to the contrary was presented to the trial court.

Even evidence of alcohol and marijuana use by a defendant just shortly prior to the comission of a murder does not compel a finding of the mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. See, Cooper v. State, 492 So.2d 1059 (Fla. 1986); Simmons v. State, 419 So.2d 316 (Fla. 1982). Interestingly, although appellant claims in his Point VIII that the trial court failed to consider in mitigation certain things from appellant's family and drug history, appellant does not specifically argue that the court erred in failing to find that any of that mitigating evidence had weight.

A comparative proportionality review of appellant's death penalties will show that the sentences are not disproportionate to the crimes or to the death sentences that have been approved or disapproved by this court statewide. In determining an appropriate sentence, the trial court is required to consider and weigh the aggravating and mitigating circumstances surrounding the crime and the perpetrator. The trial judge in the instant case found four aggravating circumstances and no mitigating

circumstances. If, for the sake of this argument, two of the aggravating factors -- the murder was committed for pecuniary gain and the murder was especially heinous, atrocious or cruel -- were eliminated, on a comparison basis appellant's sentences would still not be disproportionate to those approved or disapproved by this court in other cases since two valid aggravating factors (the murder was committed in the course of a burglary and Cherry was previously convicted of a felony involving the use or threat of violence) remain and there are no mitigating circumstances. Compare the case of Rogers v. State, supra. There the court agreed that three of the five aggravating circumstances found by the trial court were not present. The two remaining, which were supported by the record, were "that the murder occurred during flight from attempted robbery" and the defendant had been "previously convicted of a felony involving the use or threat of violence." Rogers, at 533-534. Although mitigating evidence that Rogers was a good husband, father and provider was presented, this court held that there was no reasonable likelihood that the trial court would have concluded that the two aggravating circumstances were outweighed by the single mitigating factor and the sentence of death was affirmed. On comparison, Cherry, having the same two aggravating factors as existed in Rogers, and presenting no supported mitigating evidence, should also have his death sentences affirmed.

Compare too, Huff v. State, 495 So.2d 145 (Fla. 1986). The trial court found three statutory aggravating factors and one

statutory mitigating factor. On review, it was determined that one aggravating factor and the mitigating factor had to be stricken. Left with two aggravating circumstances -- murders were cold, calculated and premeditated without any pretense of justification, and were especially heinous, atrocious or cruel -- and no mitigating circumstances, this court affirmed both sentences of death. Compare also, Maxwell, supra and Torres-Arboledo, supra. (Two aggravating circumstances: capital felony committed while attempting to commit robbery with a firearm and previous conviction of violent felony. No mitigating circumstances. Override sentence of death affirmed.)

In light of the above and on the comparative basis that appellant is urging be used, the death penalty would be demanded in the instant case. "Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances." White v. State, supra.

POINT VI

THE FLORIDA DEATH PENALTY STATUTES DO NOT VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. THE STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES AS APPLIED BY THE TRIAL AND APPELLATE COURTS DO NOT RENDER THE DEATH PENALTY SUSCEPTIBLE TO UNDUE ARBITRARY AND CAPRICIOUS APPLICATION.

None of the alleged constitutional infirmities raised in this issue were ever presented to or ruled upon by the trial court. It has been made clear by this court that absent an allegation and showing of fundamental error, an appellate court will not consider an issue unless it was first presented to and ruled upon by the trial court. Grossman v. State, 13 F.L.W. 127, 131 (Fla. February 18, 1988); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Brown v. State, 381 So.2d 690 (Fla. 1980). Even alleged constitutional violations can be waived if not timely presented. See, Trushin v. State, 425 So.2d 1126, 1129-1130 (Fla. 1982); Ray v. State, 403 So.2d 956 (Fla. 1981).

In Grossman, this court noted that the appellant's various constitutional challenges to the capital sentencing statute had been raised in various motions to dismiss. In the instant case, there were no such motions and thus no ruling by the trial court on the issue. Appellant's failure to raise these claims results in a procedural default which bars appellate review since appellant does not allege or demonstrate any fundamental error justifying extraordinary relief from that procedural default.

Furthermore appellant's claim that Florida's death penalty statutes violate the sixth, eighth, and fourteenth amendments has

been previously rejected by this court. See, e.g., Smith v. State, 457 So.2d 1380 (Fla. 1984); Martin v. State, 455 So.2d 370 (Fla. 1984); Henry v. State, 377 So.2d 692 (Fla. 1979). The rejection of this claim was recently done again in Remeta v. State, 13 F.L.W. 245 (Fla. March 31, 1988). The argument that was made by Remeta to support this constitutional challenge does not differ significantly from the argument made here by Roger Cherry.

Appellant concedes that the United States Supreme Court has already determined that Florida's death penalty statute is facially constitutional and that the statutes and procedures had been constitutionally applied. Proffit v. Florida, 428 U.S. 242 (1976). However, appellant suggests that this court's body of decisional law regarding the death penalty demonstrates a pattern of inconsistent application of the death penalty statutes rendering those statutes unconstitutional as applied. The appellant also claims that Florida's death penalty can never be constitutionally applied because this Court does not review cases that concern persons convicted of first degree murder, but who have received a life sentence. Appellant also draws the same conclusion from this court's practice to review the trial court's findings regarding mitigating circumstances based on an abuse of discretion standard. These arguments are legally and logically defective and this claim should again be rejected.

Appellant discusses three aggravating circumstances which he claims have been inconsistently applied: Capital felony being especially heinous, atrocious, or cruel; capital felony being a

homicide committed in a cold, calculated and premeditated manner; and the defendant knowingly creating a great risk of harm or death to many other persons. Since only one of the above three aggravating circumstances was found to exist in appellant's case, appellant has no standing to challenge the constitutionality of those portions of Florida's death penalty statutes which did not affect him. Clark v. State, 443 So.2d 973, n.2 (Fla. 1983). Appellant only specifically challenges one of the four aggravating factors found to apply to him, i.e., that the murders were committed in an especially heinous, atrocious, or cruel manner. Whether that factor was properly applied in this case is discussed in Points IV and V herein. However, appellant supplies no logical argument here to support that the factor was unconstitutionally applied in his case.

The appellant misapprehends the law when he concludes that this court's consistency in applying its own decisional law is paramount. The appellee respectfully submits that this court's analysis of its own decisional law is only a vehicle by which this court can review each sentence of death on a case-by-case basis. An individual review of each death sentence is bound to produce some variance in decisional law. The appellee submits that such a variance is attributable to the uniqueness of each case and does not demonstrate an arbitrary and capricious imposition of Florida's death penalty statutes. Contrary to the appellant's view, this court is not lost in the wilderness of capital punishment constitutional law. With its prior decisions as its compass, this court can chart a clear course to apply

Florida's death penalty statutes logically, faithfully, and constitutionally. Thus, the appellant's claims under this issue should be rejected and the imposition of his sentences of death should be affirmed as constitutional.

POINT VII

THE DEATH PENALTY WAS NOT IMPOSED AGAINST THE APPELLANT IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS OF DUE PROCESS AND TRIAL BY JURY SIMPLY BECAUSE THE JURY DID NOT CONSIDER THE EXISTENCE OF AGGRAVATING FACTORS WHEN IT RENDERED ITS VERDICT.

The state agrees that a jury finding of guilty of premeditated or felony murder does not necessarily include a factual finding to support the aggravating circumstance that the murder was committed in a heinous, atrocious or cruel manner, but adds that such finding is unnecessary to support either the verdict or the death penalty ultimately imposed. The criteria enumerated in section 921.141(5), Florida Statutes (1985) is strictly sentencing criteria on which the jury needs no instruction during the guilt phase or prior to rendering its verdict. Appellant's argument is that the aggravating circumstances enumerated in section 921.141(5) are actually essential elements of the crime of "capital first-degree murder" as defined by section 782.04(1)(a), Florida Statutes (1985), and he therefore contends that since the jury was not instructed on these aggravating circumstances before rendering their verdict, they could not return a verdict of guilty for "capital first-degree murder." Appellant concludes that the imposition of a sentence of death violates his rights to a jury trial and to due process since the jury did not consider the aggravating factors in rendering the verdict.

Since appellant has conceded the facial validity of

Florida's capital sentencing procedure, a procedure that does not require that the jury be instructed regarding aggravating circumstances during the guilt phase of the trial, see, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 960, 49 L.Ed.2d 913 (1976), this court should, as it has in the past, deem this argument without merit. See, Remeta v. State, supra, and Wright v. State, 473 So.2d 1277 (Fla. 1985). Appellant acknowledges that this identical issue was raised in Remeta.

Appellant's argument appears to be made with a blindness and deafness to Florida's use of a bifurcated trial in a capital case. The very basis of bifurcation is to separate the issue of guilt of the crime of first-degree murder from the issue of deciding the appropriate sentence. Since there is no such crime in the State of Florida as "capital first-degree murder", but only first-degree murder for which the basic elements are always the same, to instruct the jury as to aggravating circumstances during the guilt phase would serve to eliminate the bifurcated trial and create the crime of "capital first-degree murder" for which a death sentence would be automatic. Such a procedure would surely be unacceptable for if the state were forced to prove during the guilt phase of the trial that statutory aggravating circumstances exist, the state would also have to be entitled to the relaxed rules of admissibility authorized under section 721.141(1). Any relevant evidence that pertained to the aggravating circumstances would then be admissible during the guilt phase of the trial--something that would have detrimental consequences for a defendant's case, and would deprive a

defendant of "an informed, focused, guided and objective inquiry into the question whether he should be sentenced to death." Proffitt, supra, at 96 S.Ct. 2970.

Appellee further asserts that the decisions of this court holding that the aggravated circumstances need not be alleged in the indictment or included in the bill of particulars, also serve to implicitly reject the appellant's argument here. Sireci v. Stat, 399 So.2d 964 (Fla. 1981); Tafero v. State, 403 So.2d 355 (Fla. 1981); Medina v. State, 466 So.2d 1046 (Fla. 1985); Dufour v. State, 495 So.2d 154 (Fla. 1986). If aggravating circumstances need not be alleged in the indictment, they cannot be elements of the crime of first-degree murder and the jury need not be instructed on them.

In enacting section 921.141, the Florida legislature was setting forth sentencing criteria, which need not be considered by a jury during a trial on the issue of guilt because they are the very essence of a separate penalty phase proceeding. Therefore, the appellant was not deprived of due process or of his right to a trial by jury. See, McMillan v. Pennsylvania, 477 U.S. ___, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), citing Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Appellant's argument on this issue should be rejected for the above reasons and also because the issue was not preserved for appellate review.

Appellant argues here that the aggravating factors should have been presented to the jury for their findings prior to the rendering of its verdict in the guilt phase. However, appellant

never proposed this procedure to the trial judge and so there was no ruling on it in the lower court. It has been made clear by this court that absent an allegation and showing of fundamental error, an appellate court will not consider an issue unless it was first presented to and ruled upon by the trial court. Grossman, supra; Steinhorst, supra.

POINT VIII

THE TRIAL COURT DID NOT FAIL TO CONSIDER A PSYCHIATRIC REPORT INTRODUCED INTO EVIDENCE BY DEFENSE COUNSEL DURING THE PENALTY PHASE OF TRIAL.

> It is not lightly to be concluded that the trial court disregarded the law, under which he was required to consider any matters presented that were relevant to any reasonable ground of mitigation, statutory or nonstatutory. Indeed, an appellate court presumes that a trial court judge followed the law.
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> The defense was freely allowed to present evidence and argument to the judge and the jury based on both statutory and nonstatutory mitigating circumstances. This indicates that the judge did not exclude nonstatutory mitigating factors from his consideration. Middleton v. State, 465 So.2d 1218, 1226 (Fla. 1985).

Thomas v. Wainwright, 495 So.2d 172 (Fla. 1986). The same facts, reasoning, and presumption apply to the instant case.

The psychiatric report of Dr. Barnard was introduced by defense counsel and admitted into evidence by the court (R 1037-1038). It should be presumed that the court read the report before admitting it into evidence. That the trial judge read the report would have been clear to appellant and defense counsel, and would explain why appellant filed no motion for rehearing regarding the sentencing in which he could have asserted his belief that the trial court had failed to consider all evidence in mitigation and brought the psychiatric report to the court's

attention if it had indeed overlooked it. Appellant has pointed out that the only evidence of any nonstatutory mitigating circumstances presented by the defense was the psychiatric report of Dr. Barnard. In its findings of fact, the trial court set forth its reasons for why each **statutory** mitigating circumstance would not apply. However, it should be noted that rather than merely conclude that there were **no** mitigating circumstances, the trial judge wrote, "It is the opinion and determination of the Court and the Court further finds that the aggravating circumstances far outweigh mitigating circumstances in this cause . . . ." (R 1243). Having previously ruled out statutory mitigating factors, the only mitigating circumstances that were left to be weighed against the aggravating ones were those contained in the psychiatric report regarding Cherry's family, drug, and employment histories. See, Elledge v. State, 346 So.2d 998 (Fla. 1977). (In order to have weighed the aggravating circumstances against the mitigating circumstances, the court must have found some of the latter.) This is strong evidence in support of the presumption that the trial judge considered all evidence introduced in mitigation, as was his duty under the law. That the sentencing order did not specifically mention the nonstatutory mitigating evidence was, at most, merely inartful drafting of the sentencing order. See, Davis v. State, 461 So.2d 67 (Fla. 1984).

The issue here is not based on an affirmative statement by the trial court that the psychiatric report was not considered, but on a statement included in the final paragraph of the court's

findings of fact, which the appellant is refusing to read within the context it was written. In an effort to avoid any sentencing issues on appeal, such as the one in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the trial court conscientiously certified that in reaching its decision it did not consider certain things related to appellant's past convictions in Volusia County (which the judge was necessarily aware of because he had previously sentenced Cherry in 1968, 1971, and 1972), and which appellant had no opportunity to deny or explain at this trial. Although it is true that "psychiatric reports" was listed along with presentence investigations and juvenile case files, these documents are all described in the court's findings as "information which the Defendant, ROGER LEE CHERRY, had no opportunity to deny or explain." (R 1244) The psychiatric report of Dr. Barnard introduced during the penalty phase of the trial certainly does not fall into that category.

In Gardner [v. Florida], supra, the Supreme Court vacated the death sentence imposed by the trial court because the trial court, in making its sentencing decision, had relied in part on a presentence investigation report which contained portions not disclosed to the defendant and which he therefore did not have opportunity to deny or explain. In the case at bar, the trial court's final paragraph (R 1243-1244) was an effort to assure all concerned that he had not considered anything improper when reaching his decision and that Cherry's due process rights had not been violated.

In Gardner v. State, 480 So.2d 91 (Fla. 1985), there was

error in sentencing where, before giving its advisory sentence, the jury was presented with and considered inadmissible and prejudicial evidence based on a statement of an accomplice who did not testify at trial, and whom Gardner did not have a chance to confront or cross-examine. This court cited its decision in Engle v. State, 438 So.2d 803 (Fla. 1983), cert. denied, U.S. ____, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984), where it "held that a new sentencing hearing would be required where the trial court considered the incriminating . . . statements of a codefendant before sentencing the defendant to death." Gardner, 480 So.2d at 94. This was because the defendant had no opportunity to cross-examine and confront the codefendant, and consideration of such evidence during sentencing by the judge would violate the due process rights of the defendant.

It is most important to note that the court's findings of fact also state, "The Court after carefully studying, considering, reviewing and weighing **all** of the evidence in the case at the trial of this matter **and of the separate sentencing proceeding** makes the following findings of fact: . . . ." (R 1241) (emphasis added). Thus, it must not lightly be concluded that the trial court failed to consider all evidence presented in mitigation, and his statement that his decision was not based on any psychiatric report must be read in the narrow context in which it was written in order to discern its meaning. It is quite likely that the files in the Felony Court of Record of Volusia County regarding Roger Cherry, to which the trial judge referred, contained old psychiatric evaluations, and it was

proper for the trial judge not to consider them.

POINT IX

IMPOSITION OF SANCTIONS FOR BOTH BURGLARY WITH AN ASSAULT AND FIRST DEGREE FELONY MURDER DOES NOT PUNISH DEFENDANT TWICE FOR THE SAME OFFENSE AND IS NOT UNCONSTITUTIONAL.

Appellant's request that the burglary conviction be reversed as a necessarily lesser included offense of the first-degree murder should be denied. The burglary was completed as soon as Cherry entered the home of the Waynes with his intent to steal from them, and was a separate and distinct act from the beating of Mrs. Wayne and the battery of Mr. Wayne that caused their deaths. The burglary may simply be viewed as the **enhancement** which makes the killings murders-of-the-first-degree in the absence of premeditation, but it is not a necessarily lesser included offense of murder. Convicting and sentencing appellant for the two distinct evils of murder and burglary does not raise a problem of double jeopardy such as that found in Carawan v. State, 515 So.2d 161 (Fla. 1987).

It is this court's holding in State v. Enmund, 476 So.2d 165 (Fla. 1985) that controls this point. There it was "conclude[d] that the underlying felony is not a necessarily lesser included offense of felony murder" and "the legislature intended multiple punishments when both a murder and a felony occur during a single criminal episode." Id. at 167. "Therefore, we hold that a defendant can be convicted of and sentenced for both felony murder and the underlying felony." Id. at 168. See also, Mills v. State, 476 So.2d 172 (Fla. 1985) (Death sentence for murder

and conviction and sentence for burglary as the underlying felony both affirmed).

Likewise, the sentence for burglary with an assault should be affirmed. Section 810.02(2)(a), Florida Statutes (1985) provides that "[b]urglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . if, in the course of committing the offense, the offender: (a) Makes an assault or battery upon any person." Appellant was charged in the indictment with committing a burglary and in the course thereof making an assault on Esther Wayne (R 1070). He was subsequently convicted and sentenced for that enhanced burglary as well as the first degree felony murder of Esther Wayne. It was the battery on Mrs. Wayne, and not the assault, that caused her death and resulted in Cherry being convicted of first degree felony murder. It was not necessary that Esther Wayne be killed, or even touched, for the burglary with an assault to be completed. That assault used to enhance the burglary classification was a separate and distinct crime which attaches to the burlgary, and therefore, Cherry is not being punished twice for the same crime. Cf., Averheart v. State, 358 So.2d 607 (Fla. 1st DCA 1978), (sentence for burglary with assault was set aside because the aggravated circumstance of the assault was not alleged in the information despite the fact that sexual battery was charged in a separate count and proven; Assault could not be inferred from other counts of the information.) In Averheart, it must be assumed that if the information had specifically alleged that an assault had

occurred, it would have been proper to sentence Averheart for the aggravated burglary as well as the sexual battery even though the actions of Averheart causing the assault would carry into the sexual battery.

Imposition of sanctions for both first degree murder and burglary with an assault is not unconstitutional.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgments and sentences of death, as well as the sentences for the non-capital offenses, in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished to Larry B. Henderson, Assistant Public Defender for appellant, at 112 E. Orange Avenue, Suite A, Daytona Beach, Florida 32014, by delivery, in his basket at the District Court of Appeal, Fifth District, this 23rd day of May, 1988.

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