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IN THE SUPREME COURT OF FLORIDA

DOMINICK OCCHICONE,

Appellant,

vs. Case No. 71,505

STATE OF FLORIDA,

Appellee.

______________________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY

BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

As to Issue I: The trial court did not abuse its discretion in overruling appellant's objection to the prosecutor's comment during opening statement and appellant has not established any entitlement to a new trial. There was no motion for mistrial presented to the trial court, appellant conceded shooting and killing both victims, the case outlined by the prosecutor in good faith was invited by the defense counsel's representations, the jury was fully informed that the arguments of counsel did not constitute evidence, the prosecutor's limited reference to the anticipated psychiatric testimony was followed shortly thereafter by the defense counsel's own version of the psychiatric evidence, the psychiatrist identified by the state did in fact testify during the penalty phase of the appellant's trial, and the jury's role was not compromised by virtue of the remark.

As to Issue II: As soon as the allegation of jury taint came to the attention of the trial court, the court conducted a hearing and received sworn testimony on this claim. No objection was made at trial to the adequacy of the trial court's inquiry and no limitation was placed on the defense counsel's questioning during voir dire relating to this allegation.

As to Issue 111: The state introduced, without objection, evidence that Occhicone verbally opposed and physically refused to take the atomic absorption test. Accordingly, because this testimony was admitted at trial without a timely objection, the

prosecutor could fairly comment on both the unobjected-to evidence presented at trial and the logical inferences derived from that evidence.

As to Issue IV: The right to testify need not be waived on the record.

As to Issue V: The trial court's finding of the cold, calculated and premeditated aggravating circumstance is supported by competent, substantial evidence. The appellant had been threatening to shoot Anita's parents for at least a week prior to the homicides, brought the murder weapon with him to the scene, pulled the telephone wires out from their house, then shot Mr. Artzner before breaking through a locked door and shooting Mrs. Artzner four times at close range. These facts clearly support the trial court's finding of this aggravating circumstance.

As to Issue VI: Appellant's death sentence is supported by a death recommendation and multiple aggravating factors, including heightened premeditation. A complete review of the circumstances surrounding this offense supports the conclusion that death is not a disproportionate sanction.

The state's rebuttal evidence was introduced to disprove the claim that appellant was so intoxicated he could not appreciate the criminality of his conduct. This evidence was admissible to rebut the testimony of Dr. Szabo that the symptoms of intoxication may not manifest themselves for several hours.

Even assuming the admission was error, the error was harmless as the mitigating factor of extreme mental or emotional

disturbance was found by the sentencing judge and the aggravating factor of cold, calculated and premeditated was well supported by the record.

As to Issue VII: A trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed.

As to Issue VIII: The penalty phase of appellant's trial was not impaired by prosecutorial insinuations that appellant had a more extensive criminal record. None of the instances cited by appellant could have caused jurors to believe that appellant had a criminal record above and beyond what had already been disclosed to them. Since the challenged cross-examinations did not suggest further criminal activity by appellant, he has not presented any error.

As to Issue IX: The trial court properly declined to strike testimony from Office Stoner about the details of appellant's prior conviction for resisting arrest with violence. Stoner's testimony that appellant had pushed him was necessary to establish the basis for the arrest that appellant resisted with violence. The facts of the instant case were properly tailored to include only the details necessary for the jury to understand the facts of the prior conviction.

As to Issue X: During the penalty phase, appellant sought to introduce a composite exhibit containing four photographs of his son Dominick.

Now, on appeal, Occhicone claims the four photographs of his son were relevant to rebut evidence that Occhicone abused Dominick by showing Dominick was healthy, alert and well groomed. This argument has been waived because it was not presented to the court below.

Further, the presentation of the photographs was cumulative and irrelevant as it focused on the character of the boy rather than Occhicone. Finally, in light of the evidence before the jury, error, if any, was harmless.

As to Issue XI: This issue has not been preserved for appellate review. Since the trial court did not find this aggravating factor [heinous, atrocious or cruel] to be present in imposing the sentence of death, no reversible error is present.

To the extent that appellant is now arguing that the aggravating factor is unconstitutionally vague under **Maynard v. Cartwright**, 486 U.S. __, 100 L.Ed.2d 372 (1988), this point has not been preserved for appellate review.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR'S COMMENT DURING OPENING STATEMENT.

The principle is well-settled that the trial court has broad discretion in controlling the arguments of counsel, and its ruling will not be overturned on appeal absent a clear showing of abuse of discretion. **Breedlove v. State, 413 So.2d 1, cert. denied, 459** U.S. **882, 103** S.Ct. **184, 74** L.Ed.2d **149 (1982); Robinson v. State,** 520 So.2d **1** (Fla. **1988).** For the following reasons, the trial court did not abuse its discretion in overruling appellant's objection during the prosecutor's opening statement; and appellant has failed to demonstrate any entitlement to a new trial.

The defense admitted at the outset of the trial that appellant, Dominick Occhicone, shot and killed both victims (R **225).** On the first day of trial, the defense was successful in defeating the state's Motion to Strike the Defendant's Insanity Plea, stating:

> [DEFENSE COUNSEL]: "... Our position is that, of course, the insanity issue is a jury question. That the testimony of the witnesses through either the State or the defense would be putting on the stand would provide sufficient evidence, either lay witnesses or the expert witnesses, to allow the jury to make a determination.
>
> As recently as last Thursday, no, I believe as recently as last Thursday, I had conferred with Dr. Fireman who has been

> listed as a defense witness and based upon by conversation with him and his assessment of Mr. Occhicone, I feel that the insanity defense notice has been filed in good faith.
>
> We do have a legitimate argument to present, and since it is a jury question it should be allowed to be presented in court.

(R 3-4)

Having represented to the trial court the continued viability of this claim, the defense could not credibly disavow or challenge the prosecutor's good faith reference to the testimony legitimately anticipated by the defense psychiatrist at trial. In fact, the defense mental health expert did testify during the penalty phase of appellant's trial.

The prosecutor's brief reference during opening statement to the legitimately anticipated testimony of the defense psychiatrist was not only invited by the defense but it was followed shortly thereafter by the defense counsel's own references to the anticipated testimony of the doctors, to wit:

> [DEFENSE COUNSEL]: You will hear testimony from a doctor telling you the effect this has on somebody's operation of his mind. You will also hear all the circumstances, some Mr. Halkitis [prosecutor] didn't bring out, most he did, that play into this situation. And you're going to hear from the doctors that there was no intent to kill Mr. or Mrs. Artzner.
>
> You're going to hear that this thing erupted and Dominick was struck on the head with that broomstick which everybody denies happened. But you're going to hear from the nurse at the jail and the records reflect the injury to the head. And you're going to hear from the doctor, and he's going to tell you

> that something like this will set somebody off, it's called a suicidal rage.
>
> And the doctor will tell you Dominick at this time would have shot Mr. Artzner if it was video-taped by the police department. And he's going to tell you that is not premeditated intent. You're going to learn about other definitions. The definition of murder in the second degree . . . .

(R 228-229)

* * *

> [DEFENSE COUNSEL]: ".... You will hear from the psychiatrist and the psychologist as to the affect of the alcohol. I suspect you'll be given statements by the Defendant to the psychiatrist and psychologist, and I ask you to look at those statements in light of all the other evidence."

(R 230)

In light of the defense representations to the trial court, it is clear that the trial judge did not abuse his discretion in denying the appellant's objection during the prosecutor's opening statement. It is uncontroverted that the opening remarks of counsel do not constitute evidence, **Whitted v. State,** 362 So.2d 668 (Fla. 1978) and the jury **at bar** was clearly informed of this fact at trial. The proper procedure when objectionable comments are made is to object and request an instruction from the jury to disregard the remarks. **Duest v. State,** 462 So.2d 446 (Fla. 1985); **Ferguson v. State,** 417 So.2d 639 (Fla. 1982). **No** such request was made in this case and no motion for mistrial was made by the defense at trial. In the absence of such a motion at trial, this issue has not been preserved for appellate review.

See, e.g., **State v. Cumbie**, 380 So.2d 1031, 1033 (Fla. 1980) [Issue of improper prosecutorial comment during closing preserved by motion for mistrial "at some point during closing or, at the latest, at the conclusion of the prosecutor's closing argument."]. Furthermore, appellant's due process and confrontation clause challenges are not properly before this Court since they were not the basis for appellant's objection at trial. **Glendeninq** v. **State**, 536 So.2d 212 (Fla. 1988).

Appellant relies, in part, on **Ricardo v. State**, 481 So.2d 1296 (Fla. 3d **DCA), rev. denied,** 494 So.2d 1152 (1986). In **Ricardo,** a motion for mistrial was made during opening statement, but the court found that the motion for mistrial was premature; it should have been made at the conclusion of the state's case. ~~See also~~, **Travieso v. State**, 480 So.2d **100**, 103 (Fla. 4th DCA); **rev. denied, Perez v. State**, 491 So.2d 280 (Fla. 1986) [Mistrial not warranted by reference made by prosecutor and co-defendant's counsel during opening statement to involvement of particular witness, even though witness never testified at trial]. In the instant case, there was no motion for mistrial; there was overwhelming, independent evidence of appellant's guilt; the case outlined by the state was invited by the defense counsel's representations and legitimately anticipated by the prosecutor, the prosecutor's limited reference to the psychiatrist was followed by the defense counsel's own version of the anticipated psychiatric testimony; the named psychiatrist did in fact testify during the penalty phase; and the jury's role was not compromised

by virtue of the now-challenged remark. Furthermore, even if the trial court's ruling was error, the error, if any, was harmless. 8924.33, Florida Statutes; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

<u>ISSUE II</u>

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MISTRIAL BASED UPON A COURTROOM SPECTATOR'S EXPRESSION OF HER OPINION THAT APPELLANT WAS GUILTY.

During <u>voir dire</u>, the appellant's niece and her companion were seated in the courtroom when they overheard another spectator, Lela Lochard, tell a prospective juror that appellant was guilty and he should go to jail for life (R **144, 158).** The prospective juror, Mr. Obeena, was excused after he disclosed on ~~voir dire~~ that his brother-in-law was murdered during a robbery and the killer was never apprehended (R **121-123; 143; 150).**

The trial court placed the courtroom spectator, Ms. Lochard, under oath, and the court and the attorneys for both the state and the defense questioned her. Mrs. Lochard testified that she didn't realize the gentleman with whom she spoke was a prospective juror; and, because she did not believe in that death penalty, she was certain that she did not say anything about the "chair" (R **149).**

After receiving the testimony from the appellant's niece and Mrs. Lochard, the court denied the defense motion for a mistrial, stating:

> THE COURT: Your motion is denied. I don't think we have any basis to believe that anybody is tainted at this point. It's disconcerting, obviously, to have this happen, but I don't think we can conclude at **this** point that anyone has been tainted.
>
> You have the right, of course, and you're going to conduct voir dire examination

> of everybody that is brought forward, and that is calculated to elicit from these people anything that they may have been exposed to which might taint them. And you may want to do that. You may want to ask these people if they have been privied to any conversation that occurred in the courtroom by anyone.
>
> You may want to name this lady which is all right, and ask them if they ever heard anything. And I'm sure that you will receive accurate and truthful responses, if you care to go that route. So, I don't think at this point there's any basis for me granting the motion for a Mistrial.

(R 155-156)

The defense next asked the court to inquire of the girlfriend of appellant's niece regarding the substance of the conversation which she overheard in the courtroom, and the court granted this request. This spectator also overheard Mrs. Lochard state that appellant was guilty and he should go to jail (R 158, 160).

The trial court fully complied with the defense request for an inquiry into the allegations of taint resulting from the unsolicited comments of the courtroom spectator. The trial court did not place any limitation on voir dire or preclude any questioning during voir dire regarding the allegations of taint. At the conclusion of the spectators' testimony, the trial court asked the defense if there was anything else they wanted to put on the record and no objection was made to the adequacy of the inquiry or sufficiency of the procedures employed by the trial court (See, R 162-163). Before resuming voir dire, the trial court specifically advised the defense:

> THE COURT: ..."You can feel free in your voir dire to ask some questions that might be appropriate, and elicit something that you feel would delve into anything further from this scenario for our consideration. Okay. Are we ready to go back in?

(R 163)

It is readily apparent from the foregoing excerpt that the trial court fully complied with the defense request for an inquiry into the allegation of jury taint and the defense was given free reign to conduct any additional inquiry if it deemed it appropriate.

Appellant now claims that the trial court's inquiry was inadequate. First of all, the failure to object to the adequacy of the procedure utilized by the trial court below procedurally bars appellant from presenting this argument on appeal. **Hill v. State,** 14 F.L.W. 446 (Fla. Case No. 70,444, Opinion filed Sept. 14, 1989) citing **Glendening v. State,** 536 So.2d 212 (Fla. 1988); **Tillman v. State,** 471 So.2d 32, 34 (Fla. 1985); **Steinhorst v. State,** 412 So.2d 332, 338 (Fla. 1982).

In addition, none of the appellant's cited Florida caselaw supports appellant's claim that the trial court's inquiry was inadequate. In **Ferrante v. State,** 524 So.2d 742 (Fla. 4th DCA 1988), the trial court refused a defense request to poll the jurors to determine whether the jurors had improperly considered prejudicial newspaper articles about the case in reaching their verdict. Here, the trial court conducted an indivudal inquiry of each of the spectators and the defense was given carte blanche to develop the record on this point.

In Scull v. State, 533 So.2d 1137 (Fla. 1988), the jury returned verdicts of guilty on two counts of first degree murder and the trial court granted the defense counsel's request for a six week continuance before commencing the penalty phase. The judge instructed the jury not to discuss the case with anyone in the meantime. After the jury was released, the jury foreman approached the victim's family and embraced the mother of one of the victims. Several jurors witnessed the embrace and a conversation between the foreman and the woman which followed. When the proceedings reconvened six weeks later, the defense moved to dismiss the entire panel. The trial court conducted an individual voir dire of the jurors, replaced the jury foreman with an alternate upon the motion of the state, and decided to retain the jury. Id. at 1138. Finding no error in the trial court's decision not to dismiss the jury panel, this Court stated:

> ". . . The next issue raised by Scull involves the alleged juror misconduct by the jury foreman in embracing Villegas' mother. We believe that any prejudice to Scull that may have occurred through this misconduct was cured by the dismissal of the foreman. While it is true several jurors witnessed this exchange and did not report it, we believe that the individual voir dire conducted by the trial court was sufficient to determine whether the jurors were improperly influenced by witnessing the embrace. The judge asked each juror whether he or she had witnessed the exchange and, if so, would he or she be influenced by it in rendering their sentence recommendation. Each replied that they would not be influenced in any way by witnessing the embrace.

> Scull urges this Court to hold that the trial court should have conducted a more extensive inquiry into whether the jurors had been improperly influenced. However, Scull makes no suggestions as to what the court should have done to insure that there was no impropriety, and we do not believe that a more extensive inquiry was required. Accordingly, we find no error in the trial court's decision not to dismiss the entire jury panel.

(533 So.2d at 1141).

In **Woods v. State**, 490 So.2d 24 (Fla. 1986), the defendant and his co-defendant, Leonard Bean, both inmates at Union Correctional Institution, stabbed four guards, one of whom died. A number of department of corrections employees attended Woods' trial dressed in their uniforms; and, just prior to closing arguments, the defense asked the trial court to clear the courtroom of the uniformed spectators. The trial court refused the defense request and Woods argued on appeal that the presence of the uniformed employees intimidated the jury and denied him a fair trial.

In rejecting Woods' argument, this Court recognized that "courts have the inherent power to preserve order in the courtroom, to protect the rights of the parties, and to further the interests of justice." **Id.** at 27, citing Miami **Herald** Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982). Finding no likelihood of prejudice or intimidation sufficient to demonstrate an abuse of discretion in the trial court's ruling, this Court found no indication that the jury failed to perform its duty properly. Here, as in **Woods**, on voir dire, the prospective

jurors indicated that they would follow the evidence and the law in their deliberations and would not be swayed by outside influences; and, as in **Scull,** there is no support for appellant's claim that a more extensive inquiry was required.

Lastly, in **Robinson v. State, 438** So.2d **8** (Fla. 5th **DCA 1983),** the trial court refused the defense request to make a threshold inquiry of the jurors as to the possibility of prejudice resulting from newspaper articles relating to separate criminal charges against the defendant. In the case sub judice, as soon as the allegation of misconduct during voir dire came to the attention of the trial court, the court conducted a hearing and received sworn testimony on this claim. **A** motion for mistrial is addressed to the sound discretion of the trial court and is appropriate only when the alleged error is so prejudicial to vitiate the entire trial. **Ferguson v. State, 417** So.2d **631, 641** (Fla. **1982); Salvatore v. State, 366** So.2d **745** (Fla. **1978); cert. denied, 444 U.S. 885, 100** S.Ct. **177, 62** L.Ed.2d **115 (1979); Palmore v. State, 486** So.2d 22 (Fla. 1st **DCA 1986).** The sufficiency of the trial court's inquiry was not challenged below and appellant has not demonstrated any abuse of discretion on the part of the trial court in denying this motion for mistrial.

ISSUE III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING APPELLANT'S OBJECTION DURING THE PROSECUTOR'S CLOSING ARGUMENT.

Appellant conceded shooting and killing both victims; his argument at trial focused solely on the element of premeditation. Appellant now argues that his motion for mistrial should have been granted when the prosecutor commented during closing argument regarding Occhicone's physical refusal to take the atomic absorption test and Occhicone's statements to the officer, i.e., "You're going to have to force me to [take the test]." When the defense objected and moved for a mistrial during the prosecutor's closing, the prosecutor responded:

> [PROSECUTOR]: "No, I'm commenting on things which the jury heard which are in evidence which are not objected to by defense counsel."
>
> THE COURT: Overruled.

(R 764)

The record shows that the testimony regarding the appellant's physical refusal and verbal response was indeed admitted at trial without objection and was, therefore, a permissible topic for comment by the prosecutor. During a bench conference prior to the admission of the testimony, the following exchange took place:

> BENCH CONFERENCE ON THE RECORD AS FOLLOWS:
>
> [DEFENSE COUNSEL]: Judge, I don't know where we're going at this time, but I did have, Your Honor, concerns last night, there

is authority hat i an insanity defense any testimony that the Defendant invoked any of his Miranda rights --

[PROSECUTOR]: I understand that, from Greenfield. I'm not intending to go into that area. I'm going into the area that this deputy went to Mr. Occhicone to get an atomic absorption tests, taking the hands and putting it on the kit, and that the Defendant pulled his hands away and said: You're going to have to fight me for it. And that's what he would be testifying to.

THE COURT: What is your objection?

[DEFENSE COUNSEL]: To that, nothing, Your Honor.

(R 528)

* * *

[PROSECUTOR]: I'm not going to get into the Defendant's refusal to talk or call a lawyer. This testimony would be confined to the Defendant was asked to take an atomic absorption test and he refused by pulling his hands away. He was going to have to fight me for it or do it.

THE COURT: Okay.

[DEFENSE COUNSEL]: No objection.

BENCH CONFERENCE CONCLUDED

(R 529)

At the conclusion of the bench conference, the following testimony was elicited without objection:

[PROSECUTOR]:

Q. So, were you going to take the swabs from the Defendant's hands?

[DEPUTY CORRIGAN]:

A. Yes.

> *Q.* Did you go over to him and attempt to do that?
>
> **A.** Yes, I did.
>
> *Q.* What happened?
>
> **A.** He physically would pull his hands back and said: You're going to have force me to.
>
> Q. You were going to have to force him?
>
> A. Yes.
>
> *Q.* Did you force him, did you take it?
>
> A. No, sir, I did not take the test.

(**R** 530)

The bullets recovered from the victims' bodies and the live **ammunition recovered from Occhicone were next admitted into** evidence without objection (R 532-533). Shortly thereafter, the defense counsel approached the bench and objected to the evidence just admitted and the defendant's refusal to submit to the absorption test (R 533). Because the trial court found that the prosecutor stated exactly what testimony he was going to elicit and that testimony was elicited without objection, the defense counsel's objection and request for a proffer came too late:

> [THE COURT]: . . . My ruling is that it comes too late because there was no objection to his specific question that was disclosed on the record prior to the time it was asked. That is the basis of the ruling.

(R 538)

Accordingly, because the testimony was admitted at trial without a timely objection, the prosecutor could fairly comment on both the unobjected-to evidence presented at trial and the logical inferences derived from that evidence. **See**, e.g., **Craig v. State**, **510** So.2d 857,865 (Fla. 1987) [Prosecutor's repeated references to defendant's testimony as untruthful and defendant as a "liar" were not improper, prosecutor was merely submitting conclusion which he argued could be drawn from the evidence.]

Appellant also relies, in part, on **Herring v. State**, 501 So.2d 19 (Fla. 1986) in support of his argument on appeal that reversal is warranted because "the state offered no evidence to show that Occhicone was ever warned that the test was mandatory and that his refusal could be used against him at trial.'' (Brief of Appellant at p. 18-19). This argument is not properly before this Court because appellant's objection and motion for mistrial did not raise this argument at trial. As stated in **Craig**, ~~infra~~,

> ". . . most of the challenges now made were not raised by timely objection in the trial court. A motion for mistrial based on certain grounds cannot operate to preserve for appellate review other issues not raised by specific objection at trial. Thus defense counsel's attempt, when he objected on the ground of repeated references to the defendant as having lied in his testimony, to have his motion apply to the whole argument thus preserving for review objections not specifically made to the trial court, must fail with the result that most of the objections argued are being raised for the first time on appeal. Therefore, all but two of appellant's thirteen asserted instances of prosecutorial misconduct are not properly before the court on appeal and will not be considered.

510 So.2d at 864.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN FAILING TO INFORM THE DEFENDANT OF HIS RIGHT TO TESTIFY IN HIS OWN BEHALF OR IN FAILING TO GET A WAIVER OF THAT RIGHT ON THE RECORD.

As appellant has acknowledged, this Court decided this issue in its well-reasoned opinion of Torres-Arboledo v. **State,** 524 So.2d 403, 409-411 (Fla. 1988). This court held the right to testify need not be waived on the record. Appellant has not advanced an argument which would require a revisit of this issue. This Court in **Torres-Arboledo** indicated while it would be advisable for a trial judge to inquire of a defendant, before the close of the defense case, if he understands his right to testify and waives same after consultation with counsel, the trial judge is not constitutionally required to do so. This Court further stated:

> Although we agree that there is a constitutional right to testify under the due process clause of the United States Constitution, we agree with the Wisconsin court that this right does not fall within the category of fundamental rights which must be waived on the record by the defendant himself. We view this right to be more like an accused's right to represent himself. Although such a right has been expressly recognized by the Unites States Supreme Court in ***Faretta v. California,*** 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), this right has not been considered so fundamental as to require the same procedural safeguards employed to ensure a waiver of the right to counsel is knowingly and intelligently made.
> (text at 524 So.2d at 410-411)

The same is true under the facts of this case. There is no indication that appellant wanted to testify and was denied the right to do *so.*

It seems abundantly clear that appellant, in fact, knew he had a right to testify in his own behalf. Counsel for appellant points out that the defendant testified at the penalty phase of the proceedings. (R1224-1235) It is interesting to note that during the course of his testimony there was some discussion during an objection concerning the reason the defendant testified in the penalty phase and not in the guilt-innocence phase. (R1231-1233) That the defendant and his counsel chose to have him testify at penalty and not otherwise is a matter which should not be addressed here.

Appellee further submits this issue is not raisable on this appeal since no objection was made in the trial court. Since the issue is not one which rises to the level of a fundamental constitutional right, it can only be raised on appeal if it has been preserved in the trial court via an objection. *Cf.* **Steinhorst v. State,** 412 So.2d 332 (Fla. 1982).

ISSUE V

THE TRIAL COURT'S FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Appellant asks this Court to reexamine the trial court's finding that Mrs. Artzner's homicide was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. However, it must be noted initially that evaluating the evidence is the responsibility of the trial court judge, and when the trial judge find that an aggravating circumstance has been established, such finding cannot be overturned unless there is a lack of competent, substantial evidence to support it. **Stano v. State**, 460 So.2d 890 (Fla. 1984), **cert. denied**, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

The appellant's argument that, "there is no evidence to show that Occhicone contemplated shooting Mrs. Artzner at any time before he shot Mr. Artzner," (Appellant's initial brief, p. 40), is soundly refuted by the record. The appellant had been threatening for at least a week prior to the homicides to kill Anita's parents in front of Anita (R 446, 466). He blamed Anita's parents for their breakup (R 466). The Sunday prior to the homicides, appellant had a gun and told William Anderson, "Maybe I should just blow them away," referring to Anita's parents (R 509-510, 513-514).

Appellant may have initially gone to Anita's house in the early morning of June 10th simply to discuss their relationship. He left when she told him there was nothing to discuss and that she would call the sheriff's office if he didn't leave (R 248). However, he returned about an hour later, with a gun, and destroyed the telephone wires outside the house (R 249, 250, 254, 407, 412, 418). After killing Raymond Artzner, appellant broke through glass to unlock the door leading into the house from the garage, and shot Martha Artzner four times at close range (R 255, 258, 387, 388, 597-599).

The advance procurement of a weapon is often cited as a factor supporting the finding of a cold, calculated and premeditated murder. **See**, Lamb v. State, 532 So.2d 1051 (Fla. 1988); Huff v. State, 495 **So.2d** 145 (Fla. 1986). In addition, prior threats to kill the victim is clearly indicative of the heightened premeditation required for this aggravating circumstance. See, Turner v. State, 530 **So.2d** 45 (Fla. 1988); Dufour v. State, 495 So.2d 154 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987).

In Swafford v. State, 533 **So.2d** 270 (Fla. 1988), this Court recognized that the fact that Swafford had to reload his gun sufficiently demonstrated more time for reflection, supporting this aggravating factor. In the instant case, the necessary reflection is demonstrated by the fact that appellant had to break through a locked door leading into the house before shooting Mrs. Artzner four times (R 255, 258-260, 387-388). The

Swafford decision also noted that this aggravating factor can be established by such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. 533 So.2d at 277. All of these factors are present in the instant case and clearly support the trial judge's finding that Mrs, Artzner's murder was cold, calculated and premeditated.

Appellant's attempt to characterize the shooting of Mrs. Artzner as "a spontaneous reaction," is not persuasive. Appellant had been threatening to shoot Anita's parents for at least a week, took a gun with him to their residence, disarmed their telephone, shot Mr. Artzner, and then broke through a locked door to shoot Mrs. Artzner. The fact that the Artzners may have dissuaded their daughter from seeing this violent and dangerous man does not provide legal or moral justification for appellant's actions.

Even if there is any doubt as to the existence of this aggravating circumstance, appellant has not challenged the evidence supporting the other two aggravating circumstances, and his death sentence should not be disturbed. **Hamblen v. State, 527** So.2d **800** (Fla. 1988) (death still appropriate sentence despite improper finding of cold, calculated and premeditated). However, the trial court's finding in this case that Mrs. Artzner's homicide was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification is amply supported by the record. Therefore, the appellant is not entitled to relief on this issue.

ISSUE VI

THE SENTENCE OF DEATH IS NOT DISPROPORTIONATE.

As appellant points out, the trial court found three aggravating circumstances applicable:

> **(1) cold, calculated and premeditated murder;**
>
> **(2) homicide committed during the course of a burglary;**
>
> **(3) prior conviction of a violent felony.**

Appellant relies on **Masterson v. State**, 516 So.2d 256 (Fla. 1987); the reliance is misplaced. There, the jury had recommended life imprisonment and under the test enunciated in **Tedder v. State**, 322 So.2d 908 (Fla. 1975), the particular facts presented, including honorable service as a Vietnam veteran, were not so clear and convincing that virtually no reasonable person could differ as to the appropriate penalty.

Appellant also relies on a number of other jury override cases such as **Amazon v. State**, 487 So.2d 8 (Fla. 1986); **Holsworth v. State**, 522 So.2d 348 (Fla. 1988); **Irizzary v. State**, 496 So.2d 822 (Fla. 1986), and **Fead v. State**, 512 So.2d 176 (Fla. 1987). We continue to believe as did the Fifth Circuit Court of Appeals in **Spinkellink v. Wainwright**, 578 F.2d 582 (5th Cir. 1978) that:

> ". . . reasonable persons can differ over the fate of every criminal defendant in every death penalty case."

(text at 605)

Appellant invites this Court to regard a seven to five death recommendation as equivalent to a life recommendation. Acceptance of this proposal would lead the next appellant with an eight to four death recommendation also to request **Tedder** consideration and eventually those with unanimous death recommendations also would rely on **Tedder**. The Court should decline the Alice-in-Wonderland appeal of appellant's logic and not extend **Tedder** to any further irrational extension than it presently occupies.

In Wilson v. State, 493 So.2d 1019 (Fla. 1986 , this Court reduced a sentence of death to life imprisonment finding the death sentence disproportionate where the murder:

> ". . . was the result of a heated, domestic confrontation and that the killing, although premeditated, was most likely upon reflection of a short duration.''
>
> (493 So.2d at 1023)

The instant case is dissimilar as appellant's planning was of long duration, telling people ahead of time what he planned to do.[1]

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[1] A week to ten days prior to the killings appellant voiced threats directed at Anita and her family (R 446). He said that he felt like shooting Anita's father, mother and kids and making her watch (R 446, 466). He blamed Anita's parents for their break up (R 466). Occhicone made these threats on several occasions around the bar (R 473) (Appellant's Brief p.10).

Also, Anita Gerrity testified about threats on numerous occasions to shoot her parents (R 264). And on the Sunday prior to the homicides, William Anderson observed appellant in the bar with a gun in his waistband (R 514-15) and at an earlier time had suggested blowing the parents away (R 509-510).

A complete review of the total circumstances of this offense would lead to the conclusion that death is not a disproportionate sanction. Appellant was previously convicted of a crime of violence [F.S. 921.141(5)(b)], the homicide was committed while the defendant was engaged in a burglary [(5)(d)], the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification[2] [(5)(i)]. While some evidence was presented with respect to mitigating factor 6(f), the trial court found that this was not fully established. Notwithstanding appellant's habit of drinking and other substance abuse, he was able to ambulate, converse and generally function without apparent symptoms of impairment. There was no reliable evidence to support a finding that he was to any significant degree more under the influence of alcohol or drugs at the time of the double murders than usual (R 1648). The presence of one statutory and one nonstatutory mitigating factor does not render this death sentence disproportionate.

If a death sentence supported by a death recommendation and multiple aggravating factors including heightened premeditation may not stand under this Court's disproportionality analysis, it is doubtful that any capital sentence can stand.

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[2] This issue is more fully developed in issue V and appellant's planning is described by the trial judge in the sentencing order at R 1647.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO PRESENT REBUTTAL EVIDENCE REGARDING APPELLANT'S LEVEL OF INTOXICATION.

During the penalty phase appellant presented the testimony of three mental health experts to support the mitigating factor of extreme mental or emotional disturbance and to negate the aggravating factor of cold, calculated and premeditated (R 1112, 1343, 1351).

Defense witness Dr. Fireman testified regarding appellant's emotional state and his alcoholic problems. Dr. Fireman felt that due to his alcoholic state appellant could not appreciate the criminality of his conduct and that the crime was "hot-blooded," not "cold-blooded." (R 1112). He also testified that alcoholics have the ability to mask the physical symptoms of intoxication (R 1111). Dr. Delbeato agreed that due to appellant's condition the homicides were not premeditated (R 1008, 1027).

Dr. Szabo testified that appellant was under extreme mental and emotional disturbance at the time of the crime because of problems with his girlfriend and the alcohol influence (R 1177-1178). Dr. Szabo admitted that there was evidence that appellant did not appear intoxicated at 2:30 a.m. when the bar closed, but, as the following excerpt shows, Dr. Szabo asserted he may not have felt the affects of the alcohol until later.

> Q. And I guess you're aware that it was her opinion that Mr. Occhicone was not

> intoxicated at 2:30 a.m. when he left the bar?
>
> A. I don't recall reading that. I looked over some of the depositions and scanned them when I was given them because I wanted to be sure that before I interviewed him -- and I don't recall that name or that specific testimony. But I am aware that there are witnesses that said that he was not intoxicated.
>
> Q. Doctor, if it was in fact true that a barmaid by the name of Lily Lawson who knew the Defendant and knew him well had said that the Defendant left at 2:30 in the morning. That between the hour he was there he had only two drinks and she didn't think he had anything to drink prior to that occasion. Would that change your opinion in anyway?
>
> A. Not a great deal. A person can have a pretty high alcohol content and it does -- alcohol metabolizes gradually over a period of hours. He could have loaded up a few hours before that and just not had anymore to drink.

(R 1203)

In rebuttal, the state presented evidence that appellant did not appear intoxicated a few hours later (R 1246, 1248, 1254, 1324). Appellant contends that this evidence was too remote in time to be relevant.

In general, a trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed. Jent v. State, 408 So.2d 1024 (Fla. 1982), citing Mikenas v. State, 367 So.2d 606 (Fla. 1978); Rodriquez v. State, 327 So.2d 903 (Fla. 3d DCA 1976); Coppolino v. State, 223 So.2d 68 (Fla. 2d DCA 1968), cert. denied, 399 U.S. 927, 90 S.Ct. 2242,

26 L.Ed.2d 794 (1970). **Sections 90.401** and **90.402, Florida Statutes** provide that evidence tending to prove or disprove a material fact is relevant and that all relevant evidence is admissible. Both direct evidence and circumstantial evidence may be relevant. **Ehrhardt, Florida Evidence 8401.1 (2d Ed. 1984).**

The state's rebuttal evidence was introduced to disprove the claim that appellant was so intoxicated he could not appreciate the criminality of his conduct. Even though the testimony concerned his condition a few hours after the murder it was admissible circumstantial evidence. Cf. **Carroll v. State, 353** So.2d 1268 (Fla. 1 DCA 1978) (evidence concerning defendant's condition **3** to 5 hours before accident admissible to show intoxication).

Further, this evidence was admissible to rebut the testimony of Dr. Szabo that the symptoms of intoxication may not manifest themselves for several hours.

Even assuming the admission was error, the error was harmless as the mitigating factor of extreme mental or emotional disturbance was found by the sentencing judge and the aggravating factor of cold, calculated and premeditated was well supported by the record. (See Brief of Appellee, Issue V).

ISSUE VIII

THE FAIRNESS OF APPELLANT'S PENALTY TRIAL WAS NOT IMPEDED BY PROSECUTORIAL INSINUATIONS THAT APPELLANT HAD A MORE EXTENSIVE CRIMINAL RECORD.

Appellant argues that the penalty phase of his trial was unfair because the prosecutor allegedly insinuated that appellant had a more extensive criminal record than had been disclosed to the jury. However, a review of the challenged cross-examinations refutes the suggestion that the jurors would infer from the prosecutor's questions that appellant had a more extensive criminal past. Since the prosecutor's questions were within the bounds of proper cross-examination, appellant has not presented any error in this issue.

Appellant first challenges the cross-examination of correctional officer William Belcher. The prosecutor asked Belcher if Belcher had checked appellant's records or rap sheet (R 922-924). On direct examination, Belcher and another correctional officer had implied that appellant was a peaceful, non-violent, and non-aggressive individual (R 910, 918-919). Belcher had testified that 50% of the "problem" inmates had been in and out of jail most of their lives (R 923). By bringing out Belcher's lack of knowledge as to appellant's history, the prosecutor was testing Belcher's ability to characterize appellant as a non-violent person, and demonstrating that Belcher was not aware of appellant's whole character. The prosecutor was

also bringing out any bias on Belcher's part, since Belcher admitted that he only checked up on the inmates he didn't like and implied that they were the ones who had been in and out of jail most of their lives (R 919, 923, 924).

At the time of Belcher's cross-examination, the jury had already heard that appellant had a prior conviction for resisting arrest with violence (R 888-890). Certainly, the jury would assume that if appellant had any additional prior convictions, they would have heard about those as well. It should also be noted that Belcher's response to the prosecutor was actually helpful to the defense -- Belcher testified that appellant was such a good prisoner, Belcher had not had the occasion to want to check his records or rap sheet (R 924).

Appellant's reliance on cases finding that a reference to a rap sheet or any suggestion of unrelated criminal activity in front of a jury considering whether a defendant is guilty of the crime is misplaced. As noted in the quote from appellant's brief, the danger recognized by those cases was that the accused would "be found guilty because of his being generally suspected of other offenses.'' **Messer v. State**, 120 Fla. 95, 162 So. 146 (1935). However, in the penalty phase of the capital trial, the fact that appellant had a prior conviction as indicated by the prosecutor's reference to a rap sheet is not only permissible, it is required by statute in assessing the propriety of the death penalty as a sentence. **Section** 921.141, **Florida Statutes.** Since the prosecutor in this case did not, in any way, insinuate or

suggest that the appellant's rap sheet would include a more extensive criminal record than had already been disclosed to the jury, the reference to the rap sheet was not error.

The prosecutor's cross-examination of Doctor Szabo was also proper. In asking Szabo preliminary questions about the information Szabo used in drawing his conclusions, the prosecutor asked if Szabo asked appellant about appellant's "criminal past.'' (R 1181). Szabo responded that this was included in the information that he had gotten from appellant, and certainly the jury could consider where Szabo had gotten his information in assessing the credibility of his ultimate conclusions. Once again, the prosecutor did not insinuate that appellant had a criminal past beyond what the jury had already heard.

Finally, appellant challenges the prosecutor asking him on cross-examination how many times he had been convicted of a felony or a crime involving dishonesty (R 1231). Although a defense objection to this question was sustained, it is clear that any defendant who testifies places his credibility in issue, and this was a proper question to impeach appellant's credibility. **Booker v. State,** 397 So.2d 910 (Fla.), **cert. denied,** 454 **U.S.** 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981). It is interesting that appellant objected to this question rather than simply responding that his only such conviction was the resisting arrest of which the jury was already aware. Since appellant was given the opportunity to preclude any jury speculation about the extent of his criminal record, but failed

to do so, he should not rely on the possibility of such speculation in requesting relief from this Court.

Appellant's argument that he was denied a fair penalty phase trial by insinuations of greater criminal activity on his part is not persuasive. The jury was properly aware of appellant's prior conviction for resisting arrest, and none of the prosecutor's questions on cross-examination implied that appellant's criminal record went beyond that conviction. Therefore, he is not entitled to relief on this issue.

ISSUE IX

THE TRIAL COURT DID NOT ERR IN FAILING TO STRIKE OFFICER STONER'S TESTIMONY RELATING DETAILS OF APPELLANT'S PRIOR CONVICTION FOR RESISTING ARREST WITH VIOLENCE.

Appe lant challenges the trial court's failure to strike th testimony of Officer Stoner regarding the details of appellant's prior conviction for resisting arrest with violence. Appellant argues that since he was tried for and acquitted of battery on a law enforcement officer, his actions in pushing Stoner, resulting in the arrest which appellant was convicted of resisting, should not have been admitted against him. However, for the reasons that follow, this argument is without merit.

The jury was entitled to hear of appellant's actions in pushing Officer Stoner prior to his arrest as a circumstance of his conviction for resisting arrest with violence. This Court has previously recognized that a jury must know the surrounding facts of a prior conviction in order to give proper weight to the aggravating circumstance of a prior violent felony conviction. King v. State, 436 So.2d 50 (Fla. 1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984). Certainly if Officer Stoner was not justified in arresting appellant, the jury would not place much emphasis on his conviction for resisting an improper arrest.

In order to present an intelligible case to a jury, the surrounding facts to the actual crime, even when prejudicial, are

admissible. **Tumulty v. State,** 489 So.2d 150 (Fla. 4th DCA 1986). Such prejudicial matters may constitute "inseparable crime" evidence that explains the crime being prosecuted and is admitted because it is relevant and necessary to "adequately describe the deed." 489 So.2d at 153. Just as testimony about appellant's actions was necessary in his trial on resisting arrest with violence, despite his acquittal for battery, it was necessary for his jury in the instant case to properly weigh his prior violent felony conviction as an aggravating circumstance.

The cases relied on by the appellant are easily distinguishable. None of the cases cited discuss other crimes as related facts which are inextricably intertwined with a crime that was properly disclosed to a jury. As in **Jackson v. State,** 498 So.2d 406 (Fla. 1986), some of the facts of appellant's prior conviction were excluded in that the prosecutor did not elicit information about the domestic violence which the police were responding to, giving rise to the battery and resisting arrest. Like **Jackson,** the prosecutor tailored the evidence so that only the information necessary to establish the conviction for resisting arrest with violence was disclosed.

Finally, it should be noted that any impropriety in the admission of this evidence was clearly harmless beyond any reasonable doubt. Giving appellant's violent and senseless acts in killing the victims in this case, the argument that the jury's recommendation of death was even partially based on the fact that appellant had pushed a police officer in an unrelated incident is

simply not credible. The appellant is clearly not entitled to relief on this issue.

ISSUE X

THE TRIAL COURT PROPERLY LIMITED INTRODUCTION OF IRRELEVANT AND CUMULATIVE MITIGATING EVIDENCE.

During the penalty phase, appellant sought to introduce a composite exhibit containing four photographs of his son Dominick (R 1225-6). The prosecutor objected to the introduction of more than one photograph as cumulative, irrelevant and in violation of discovery rules. He also stated he had no objection to the introduction of the one photograph that had been disclosed previously (R 1226-1230). The defense, however, did not seek to introduce the single photograph.

Now, on appeal, Occhicone claims the four photographs of his son were relevant to rebut evidence that Occhicone abused Dominick by showing Dominick was healthy, alert and well groomed. This argument has been waived because it was not presented to the court below.

> . . . Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. ***State v. Jones,*** 377 So.2d 1163 (Fla. 1979); ***State v. Barber,*** 301 So.2d 7 (Fla. 1974); ***Silver v. State,*** 188 So.2d 300 (Fla. 1966); ***Dukes v. State,*** 3 So.2d 754, 148 Fla. 109 (1941). Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below. ***Haager v. State,*** 83 Fla. 41, 90 So. 812, 813 (1922); ***Kelly v. State,*** 55 Fla. 51, 45 ***So.*** 990 (1908); ***Camp v. Hall,*** 39 Fla. 535, 22 So. 792 (1897); ***Black v. State,*** 367 So.2d 656 (Fla. 3d DCA 1979).
>
> Steinhorst v. State, 412 So.2d 332, 339 (Fla. 1982)

Even if the issue was properly before this Court, the trial court's ruling does not reach the level of reversible error for several reasons. Initially, the defense's stated purpose could have been achieved by the introduction of the single photograph and probably was achieved by Occhicone's pointing towards his son in the courtroom (R 1224-5).

Secondly, Occhicone's status as a father was presented to the jury. The photograph would have been of little mitigating value in light of Occhicone's treatment and attitude toward his son. In addition to the testimony that appellant abused his son, the defense presented evidence that Occhicone had told Ann Gerety that he had murdered the boy and his body was in the closet (R 282-288). It is not reasonable to assume that the jury would have overlooked this evidence because they were shown photographs of a "very nice looking boy".

Further, the presentation of the photographs was cumulative and irrelevant as it focused on the character of the boy rather than Occhicone. This Court has repeatedly held that the exclusion of mitigating evidence that focuses on another's character is within the trial court's discretion and will not be reversed absent a showing of abuse of that discretion. In Hill v. State, 515 So.2d 176 (Fla. 1987), this Court held that it was not error for the trial judge to exclude evidence of Hill's father's health and the number of children his mother cared for as the evidence focused more on the parents' character than on

appellant's. **Id.** at 178. Similarly, in Muehleman v. State, 503 So.2d 310 (Fla. 1987), this Court upheld the exclusion of mitigating evidence concerning Muehleman's grandmother. This Court agreed the evidence was irrelevant and cumulative in nature, and, therefore, the exclusion was well within the trial court's range of discretion.

The ruling in the instant case was well within the court's discretion and the decision to not introduce any of the photographs was appellant's. Finally, in light of the evidence before the jury, error, if any, was harmless.

ISSUE XI

THE TRIAL COURT'S PENALTY PHASE INSTRUCTIONS WERE NOT UNCONSTITUTIONALLY VAGUE.

a. In the first subsection, appellant complains about the trial court's instruction on **Section 921.141(5)(d)** [capital felony committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after any burglary].

Appellant now argues that he is entitled to a new penalty phase proceeding because the trial judge did not provide any definition of the crime of burglary during the penalty phase instructions. The trial judge was not asked to define burglary during the penalty phase instructions and the defense objected solely on the ground that "the facts, evidence and circumstances do not support that [aggravating circumstance] (R 1149). Since the argument now raised on appeal was not presented to the trial court, this issue is not properly before this Court. **Steinhorst v. State**, 412 So.2d 332 (Fla. 1982).

Appellant was charged with and convicted of first degree premeditated murder and appellant concedes that the state need not charge and convict him of a felony in order to use the felony as an aggravating factor under **§921.141(5)(d)**, **Ruffin v. State**, 397 So.2d 277 (Fla. 1981). Furthermore, appellant's reliance on **State v. Jones**, 377 So.2d 1163 (Fla. 1979) is misplaced. **Jones** involved a felony murder prosecution and challenge to the guilt phase instruction. In **Jones**, this Court determined that since

proof of the elements of robbery was necessary in order to convict the defendant under the felony-murder theory, the trial court was obligated to instruct on these elements. In Brown v. **State**, 521 So.2d 110 (Fla. 1988), the defendant was indicted for first degree murder and tried under theories of premeditation and felony murder based on robbery and trafficking in cocaine. Through an oversight, the jury was not instructed on the underlying felony of trafficking. The jury returned a general verdict of guilty of first-degree murder and this Court agreed with the Third District that the failure to instruct on the underlying felony of trafficking in cocaine was harmless. Thus, it is clear that the absence of an instruction setting forth the elements of the underlying felony during the guilty phase of a felony-murder prosecution may be harmless under the circumstances of a particular case. Here, there is even more compelling evidence that the absence of the now-requested penalty phase instruction was not error, much less harmful error. It was uncontroverted that Occhicone armed himself with an excess of ammunition before going to the victims' home, he disabled the telephone equipment at the residence beforehand. After gunning down Mr. Artzner, the appellant, while armed, smashed the glass in the door to the house, reached in and unlocked the door, entered the home; and, upon finding Mrs. Artzner, shot her four times. Accordingly, the trial court did not err in instructing the jury on this aggravating factor.

b. In this second subsection appellant complains about the trial court's instruction on **Florida Statute 921.141(5)(h)** (heinous, atrocious or cruel).

The trial court in its written findings concluded:

> Although the victim was shot four times, three of the shots may have been fired rapidly and more than one bullet was fatal. Although there was evidence in the record justifying the jury's consideration of the aggravating circumstances under §921.141(5)(h) (The capital felony was especially heinous, atrocious or cruel), it has not been established beyond a reasonable doubt when compared with the facts surrounding other murders. (R 1646).

Since the trial court did not find this aggravating factor [heinous, atrocious or cruel] to be present in imposing the sentence of death, no reversible error is present.

To the extent that appellant is now arguing that the aggravating factor is unconstitutionally vague under **Maynard v. Cartwright**, 486 U.S. __, 100 L.Ed.2d 372 (1988), this point has not been preserved for appellate review. Appellant objected below on the basis that the factor was inapplicable not unconstitutionally vague (R 1134-1145). Appellant may not change the basis for an objection at the appellate level. **Steinhorst v. State**, 412 So.2d 332 (Fla. 1982).

Even if the merits of the argument could be reached it has been rejected. **Smalley v. State**, 546 So.2d 720 (Fla. 1989); **Bertolotti v. Dugger**, 883 F.2d 1503 (11th Cir. 1989).

But, as noted above, appellant cannot complain about this aggravating factor since the trial court did not find it. See **Daugherty v. Dugger**, 533 So.2d 287 (Fla. 1988).

c. In the final subsection, appellant now objects to the standard instruction on cold, calculated and premeditated without pretense of moral or legal justification - **Florida Statute 921.141(5)(i).** Appellant acknowledges that this Honorable court has given an appropriate construction of the term in **Rogers v. State, 511** So.2d **526** (Fla. 1987), but again the objection below was that the factor was inapplicable not that the language of the instruction should be different (R 1145-1147). See **Steinhorst,** supra. Appellant did not request any different instruction.

Appellant's reliance on **Morgan v. State,** 515 So.2d 975 (Fla. 1987) is misplaced. There, the Court determined that under the facts of the case a **Lockett-Hitchcock** error would not be deemed harmless. Here, there is no error to begin with and the Court should reject the premise that a seven to five death recommendation is presumptively invalid.

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the judgment and sentence of death should be affirmed.

Respectfully submitted,

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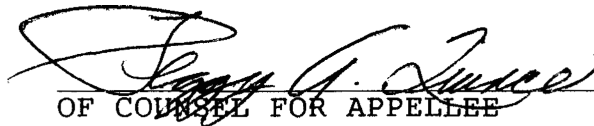
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to DOUGLAS S. CONNOR, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830, this 1st day of ~~October~~ November, 1989.



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