IN THE SUPREME COURT OF FLORIDA

ANTONIO M. CARTER,

Appellant,

v. CASE NO. 71,714

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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AUTHORITIES CITED

OTHER AUTHORITIES

STATEMENT OF THE CASE

Appellee accepts and adopts the recitation of the statement of the case contained in the initial brief of appellant with the following additions:

On August 17, 1988, subsequent to the filing of the initial brief of appellant, a supplemental initial brief of appellant and motion to accept supplemental initial brief of appellant were served upon the appellee. By order of this Court dated September 1, 1988, appellant's motion was granted and the supplemental initial brief was accepted with directions that the answer brief of appellee be served on or before October 6, 1988.

Appellee's Answer Brief

STATEMENT OF THE FACTS

Appellee accepts and adopts the recitation of the statement of the facts contained in the initial brief of appellant with the following additions and clarifications. In some instances facts contained in appellant's initial brief have been repeated for purposes of clarity and completeness. In addition, to facilitate this Court's identification of factual disputes, the format presented in the initial brief of appellant is utilized by appellee herein.

Competency Determination

Three of the four mental health experts who examined the appellant determined that appellant was competent to stand trial and did not meet the statutory criteria for involuntary hospitalization (R **410, 477, 485, 489-90, 492, 804, 812, 820).** Only Dr. Krop believed appellant to be incompetent and qualified for involuntary hospitalization (R **428, 802).**

Dr. Krop initially evaluated the appellant on August 12, **1986** (R **425, 800).** Due to appellant's "general resistance to participate in the evaluation process,'' little information regarding appellant's criminal or psychiatric history was obtained at that time (R **800).** However, after reviewing a packet of legal and medical information supplied by appellant's counsel, Dr. Krop opined that appellant was incompetent to stand trial due to the existence of a thought disorder which manifested itself through extreme hostility, uncooperativeness and irrationality (R **428, 800, 802). As a** result of the perceived inability on the part of appellant to answer the interviewer's questions regarding

the offenses charged, no opinion with respect to the issue of appellant's sanity at the time of the alleged offenses was offered (R **428, 802).**

Based upon his reading of the reports submitted by Drs. Mhatre and Davis, Dr. Krop opined that appellant had been the most uncooperative in the evaluation conducted by himself, although appellant was reportedly also extremely uncooperative in Dr. Barnard's initial interview (R **428).** Dr. Krop elected to interview appellant a second time on April **13, 1987,** due to perceived inconsistencies in the various findings of the evaluating experts as well as defense counsel's continuing difficulty in conferring with his client (R **426-27, 473).** No written report was generated by the second interview; however, Dr. Krop's opinions remained unchanged (R **427, 473).**

Although Dr. Krop acknowledged that appellant's legal plight would be improved by an incompetency determination and that appellant in all probability understood the nature and purpose of the evaluation, he did not perceive appellant to be malingering as a result of appellant's ability to "respond fairly well'' in certain structured situations (R **429, 431, 455).** Moreover, Dr. Krop's opinion that appellant was incompetent was not predicated on appellant's limited intellectual functioning (R **445).** In reaching his opinion, Dr. Krop did not utilize the Competency Screening Inventory because appellant refused to respond to the questions (R **435-36, 802).** Nevertheless, appellant correctly identified the author of "Hamlet" and the United States President during the Civil War (R **442).** Clearly, appellant's willingness

t respond differed from test to test (R 444).

Dr. Krop was unable to completely rule out the hypothesis that appellant's lack of response was simply due to the fact that appellant is a hostile, uncooperative criminal (R 446). Appellant had made it perfectly clear that he did not wish to be evaluated and that he considered himself to be competent (R 431-32). Moreover, Dr. Krop acknowledged appellant's capacity to exhibit appropriate courtroom behavior some nine months and two months subsequent to his evaluations as indicated by appellant's conduct during the competency hearing (R 451).

Dr. Mhatre first evaluated appellant on February 27, 1987 (R 810). Like Dr. Krop, Dr. Mhatre found appellant to be "extremely uncooperative" (R 810). When asked about the circumstances surrounding an injury to his foot, appellant initially claimed to have broken it while playing basketball (R 811). Upon being confronted with the interviewer's knowledge that appellant had been shot in the foot during an escape attempt, appellant became enraged, reluctantly acknowledging that Dr. Mhatre knew "all about it" (R 811).

Dr. Mhatre concluded that appellant was highly motivated to help himself, as evidenced by his conscious efforts to misconstrue the facts, and possessed the ability to relate to and assist counsel if appellant so chose (R 411, 813). Appellant was able to impart a great deal of information about himself unrelated to pending charges (R 416). However, in Dr. Mhatre's opinion, appellant probably would not choose to confide in counsel as a result of his expressed belief that he would not be

held accountable for the crimes of which he was accused (R 413-15).

Although appellant was probably appropriately classified as borderline mentally retarded, no mental illness was found to be present (R 412, 812). Dr. Mhatre further concluded that appellant was "very much competent to stand trial," and was probably malingering in terms of his sanity through obstructive, passive-aggressive behavior (R 410, 417). A second interview conducted on May 29, 1987 strengthened Dr. Mhatre's confidence in his original evaluation (R 419). At that time, appellant furnished "consistently inconsistent responses" which confirmed the interviewer's suspicions concerning appellant's malingering (R 420). Dr. Mhatre opined that the best method for resolving others' doubts with respect to the issue would be hospitalization while at the same time indicating continued confidence in his own diagnosis (R 418).

Dr. Barnard first attempted to evaluate appellant on October 29, 1986 (R 488, 808). Ten minutes into the interview the evaluation was terminated when appellant abruptly walked out of the room (R 489, 808). Appellant was quite cooperative during a second interview conducted on May 29, 1987 (R 489, 497). At that time, appellant indicated that on the morning of the murders he grabbed a pistol which he had recently purchased and intended to go job-hunting (R 817). When asked why he took the pistol, appellant indicated that he was "possessed" (R 817). Although appellant claimed to be under the domination of a voice which told him what to do before he did it, appellant was unable to

describe the voice and reported inconsistent time frames for its onset (R **817).** Furthermore, the interviewer found no indication that hallucinations had been reported in the past **(R 493, 498).** Even if appellant's purported hallucinations were confirmed to be real, Dr. Barnard's competency determination would not have been affected, since it was appellant's ability to recall and describe the events surrounding the crimes, including the shooting of victim Patel, which influenced the witness' diagnosis that appellant was competent to stand trial and did not meet the criteria for involuntary hospitalization (R **489, 492, 501, 506, 820).** In addition, Dr. Barnard judged appellant to be of dull normal intelligence and not to be retarded as represented by appellant **(R 820).** See, Initial Brief of Appellant, page **7.**

Dr. Davis initially examined the appellant on October 21, **1986 (R 477, 804).** Appellant remained standing throughout the entire interview, refusing to discuss pending charges and merely indicating that his attorneys had pled him innocent **(R 804, 806).** However, memory for recent and past events was assessed to be excellent, as appellant was able to discuss events immediately preceding and following the alleged offenses and to correct Dr. Davis when dates or sequences were inaccurate **(R 805, 841). No** evidence of hallucinations was present (R **805).**

Dr. Davis diagnosed appellant to be a sociopath whose documented antisocial behavior emerged in his youth **(R 479, 805).** As early as the age of eight, appellant had already been charged with arson, grand larceny, petit theft, shoplifting and a sex offense **(R 806).** Dr. Davis noted that appellant had been

involved in a total of eight processed disciplinary reports and nineteen correctional consultations during his incarceration spanning approximately five years (R **806).** In addition, Dr. Davis noted that appellant was accused of attempted first-degree murder in an incident arising out of an attempted armed robbery alleged to have been committed on the same day as the instant offenses (R **806-7).**

Concluding appellant to be of average intelligence, although deliberately vague and evasive, Dr. Davis found appellant to be competent to stand trial, sane at the time of the alleged offenses, and unqualified for involuntary hospitalization **(R 477, 804-5).** Like Dr. Mhatre, Dr. Davis opined that appellant had the ability, if not the willingness, to assist counsel in the preparation of his defense (R **478, 482, 805).**

A second evaluation performed on May 18, **1987,** produced similar findings with the singular exception that appellant was assessed to be of average or above-average intelligence (R **814-15).** On this particular occasion, appellant informed the interviewer that he (appellant) was not competent to stand trial **(R 814).** Concluding that appellant "is well aware of the consequences if he goes to trial, and he is doing everything in his power to avoid it," Dr. Davis characterized appellant's lack of rapport with counsel as "a deliberate attempt to...make a mockery of the legal system" **(R 815).**

Conviction Phase

In addition to the shot which Leland Perry heard as he pulled into the parking lot of Nil's Grocery at the time of the

murders, Perry also heard a shot as he was leaving the premises after having his life spared by the appellant (R 122-26). When Officer Lester arrived on the scene, the fatally wounded bodies of appellant's victims were still warm (R 20). Dr. Botting determined that victim Haberle was lying on the ground at the time appellant fired the shot to the abdomen (R 77). This shot was believed to be the first, with the fatal wound to the head probably following in less than a minute (R 97, 100, 106-7). The wound to the abdomen would not have rendered Haberle unconscious (R 88-89). Victim Patel suffered a total of four gunshot wounds to the right side of his body (R 80). His survival time was thought to be somewhere between five to ten minutes (R 88).

SUMMARY OF ARGUMENT

POINT ONE: The trial court did not abuse its discretion in finding appellant to be competent to stand trial and denying appellant's request for additional evaluation. Three of the four mental health experts who examined appellant determined that appellant was competent to stand trial and did not meet the statutory criteria for involuntary hospitalization. Only one expert reached a contrary conclusion; however, due to appellant's lack of cooperation, this expert felt that further evaluation was required in order to completely rule out malingering. There is no requirement that experts appointed for competency determinations succeed in examining their subject. All experts with one singular exception believed that appellant's lack of cooperation during their evaluations was deliberate. The trial court had no duty to order a futile attempt at further evaluation in view of appellant's persistent attempts to thwart the process. Moreover, the unequivocal finding of competency by at least one expert in the instant case renders the trial court's consistent determination on these facts a sound exercise of discretion.

POINT TWO: The trial court did not err in failing to find as a circumstance in mitigation appellant's purported mental defect at the time of the murders. In the first instance, appellee would take issue with appellant's assertion that there was competent, substantial evidence of any mental impairment for the trial court to allegedly overlook. Moreover, there is no record evidence to support appellant's contention that the trial court failed to

consider all available evidence in mitigation. The mere failure of the trial judge to address, in conjunction with a finding of a single non-statutory mitigating circumstance, that evidence which it rejected does not demonstrate that such evidence was not considered. Moreover, utilizing the analysis employed by the trial judge in reaching the determination that appellant's deprived childhood did not counterbalance strong evidence supporting the application of three statutory aggravating circumstances, it is clear that any error with respect to this issue should be deemed harmless by this Court.

POINT THREE: The trial court did not err in failing to instruct appellant's jury upon two statutory mitigating circumstances pertaining to appellant's mental status at the time of the murders. Because no such instructions were requested by counsel, the instant claim of error was not properly preserved for appellate review. Moreover, the trial judge correctly informed the jury that it could consider essentially anything in mitigation which was established by the evidence. "his instruction has expressly been held to provide the minimum adequate guidance for a jury's determination of mitigating evidence. In addition, a trial judge is only obligated to charge a jury with the law applicable to a given case and to give only those instructions with respect to statutory mitigating circumstances for which evidence has been presented. The testimony of a state witness during the conviction phase of appellant's trial does not supply the quantum of evidence required to be presented to support appellant's allegation of

entitlement to the unrequested instructions. Similarly, neither does the incompetent, albeit unrefuted, lay opinion penalty phase testimony of a biased defense witness. Moreover, appellant cannot bootstrap the significance of the aforementioned testimony by reference to the trial judge's awareness of certain evidence which was never presented to appellant's jury in either the conviction or penalty phase of trial.

POINT FOUR: Appellant's sentence is not disproportionate to the severity of his crime or to other similar cases in which the ultimate sanction has been upheld by this Court. Contrary to the assertions of appellant, his crimes are significantly more egregious than the simple robbery "gone bad". Appellant's jury specifically found premeditation to kill with respect to appellant's murder of Rohit Patel. In addition, both victims suffered multiple gunshot wounds. Moreover, appellant's attempt to minimize the comparative severity of his crime must fail because two of the three statutory aggravating circumstances justifying a sentence of death relate to matters wholly independent of the particular facts of the instant crime. Likewise, appellant's reliance upon cases in which the trial judge elected to override a jury's recommendation of life imprisonment is misplaced since such cases are not analogous to the case sub **judice** wherein appellant's jury recommended a sentence of death by a majority of eleven to one.

POINT FIVE: Florida's death penalty has not been unconstitutionally applied to this appellant as a result of the state's rejection of appellant's plea offer. In the first

instance, appellant has failed to properly preserve this issue for appellate review by advancing the claim for consideration in the trial court. In addition, appellant's claim is predicated upon conjecture concerning what effect circumstances not applicable to the instant case might have had upon the prosecutor's decision to pursue his original lawful intention of seeking the death penalty for appellant's crimes by rejecting a plea offer initiated by appellant. This record affirmatively demonstrates that the circumstances surrounding the prosecutor's rejection of appellant's plea offer did not function as an impermissible (non-statutory) aggravating factor with respect to appellant's judge or jury. In view of the fact that three strong statutory aggravating circumstances were known to be applicable to appellant's crimes, as evidenced by appellant's offer of a plea whose sole advantage would permit avoidance of the electric chair, any unpreserved error gleaned from the record with respect to this issue should be deemed harmless by this Court.

POINT SIX: The trial court did not err in overruling appellant's objection to the standard penalty phase jury instruction on certain aggravating circumstances. A portion of this claim of error was not properly preserved in the trial court by appropriate objection prior to jury deliberation and, hence, should not be entertained by this Court. However, this Court has previously noted that the standard penalty phase jury instructions accurately inform a capital defendant's jury of the law to be applied to the facts presented. Without such instruction, a jury recommendation of death could be subject to

the justifiable speculation that statutory aggravating circumstances erroneously found to be applicable contributed to an unreliable advisory sentence. Given the fact that appellant does not presently contest the finding of the subject aggravating circumstances by the ultimate sentencer in the instant case, no reversible error with respect to this issue has been demonstrated.

POINT SEVEN: Appellant's voluntary absence from a non-crucial stage of trial following a waiver of his presence by counsel, which waiver occurred in appellant's presence, does not constitute fundamental error. Arguably, appellant's presence was not even required under Florida Rule of Criminal Procedure 3.180 during a proceeding which was ancillary to voir dire and transpired before appellant's jury had either been selected or sworn. However, even if appellant's presence were deemed to have been required, the only equitable conclusion which may be drawn from the record is that counsel waived appellant's presence and appellant acquiesced in such a decision as indicated by appellant's silence when the waiver was announced. Finally, there is no suggestion of actual prejudice arising from appellant's forfeited opportunity to witness the trial judge administering precautionary instructions to prospective jurors for appellant's benefit. Hence, appellant's convictions must be affirmed.

POINT EIGHT: This Court has consistently and repeatedly held that the standard penalty phase jury instructions initially approved by this Court in 1976 and utilized in virtually every

death penalty case, including this one, since that time correctly characterize the significance of the jury's advisory role in Florida's capital sentencing scheme. Furthermore, appellant failed to properly preserve this issue for appellate review through objection to the proposed instruction prior to jury deliberation. Hence, consideration of the issue on the merits is inappropriate, and appellant is entitled to no relief in any event.

POINT NINE: The trial court did not err by affording undue weight to the jury recommendation of death. Appellant should not be permitted to extrapolate error with respect to one sentence from presumably proper disposition of another. A jury recommendation of death, like one of life, is entitled to great weight. Moreover, the sentencing order reflects the exercise of a reasoned and independent judgment as opposed to mere deference to the jury's advisory recommendation.

POINT TEN: Florida's capital sentencing statute is constitutional on its face and as applied. This Court should decline to entertain what it has previously characterized as a "grab bag'' of summarily-presented, previously-rejected and, in this case, unpreserved challenges to the constitutionality of Florida's capital sentencing scheme.

POINT ELEVEN: Florida's capital sentencing statute is not unconstitutional as applied to this appellant upon the purported basis that appellant is mentally retarded. In the first instance, this claim was not properly preserved for appellate review by objection or motion in the trial court. Moreover,

record evidence of appellant's purported mental retardation is far from clear and convincing. The evidence presented by the record is at best equivocal with respect to appellant's borderline mental deficiency. Finally, to whatever extent this Court finds appellant's arguments with respect to this unpreserved claim of error persuasive, appellant is at most entitled to a remand for further factual determinations consistent with this Court's opinion.

POINT ONE

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING APPELLANT TO BE COMPETENT TO STAND TRIAL AND DENYING APPELLANT'S REQUEST FOR ADDITIONAL EVALUATION.

Appellant concedes that it is the trial judge, and not the experts, who determines a defendant's competency to stand trial in Florida. Moreover, a determination of competency will not be disturbed in the absence of a demonstrated abuse of discretion. Fowler v. State, **255** So.2d **513** (Fla. **1971);** see, Initial Brief of Appellant, pages **19-20.** Appellant argues that such an abuse is revealed by the record in the instant case or, alternatively, that denial of a request for additional evaluation constitutes reversible error. This claim is totally without merit.

Four mental health experts (three psychiatrists and a forensic psychologist) evaluated appellant on two separate occasions each, spanning a total period of in excess of seven months (R **404-514, 799-820).** Three of the four experts determined that appellant was competent to stand trial and did not meet the statutory criteria for involuntary hospitalization (R **410, 477, 485, 489-90, 492, 804, 812, 820).** Only one expert, Dr. Krop, reached a contrary conclusion (R **428, 802).** Following a lengthy hearing on the matter, the trial court stated the following:

> I've read all the reports of the psychiatrists, psychologists, listened to the testimony carefully here today, listened to arguments of counsel, been through the criteria and [Florida] Rule [of Criminal Procedure] **3.211,** and conclude at this time that the defendant is

competent to stand trial.

(R 510).

Appellant argues that his "ability and willingness to cooperate with his defense attorney is the crux of this issue." See, Initial Brief of Appellant, page 29. Assuming arguendo that the above statement accurately represents the touchstone of the instant claim of error, appellant is entitled to no relief from this Court. All four experts described appellant as uncooperative during their respective evaluations (R 428, 488-89, 800, 804, 806, 810). The pivotal question then concerns the cause of such obstructive behavior, i.e., whether or not appellant was unable, as opposed to unwilling, to cooperate with the experts and, hence, unable to facilitate their evaluation of appellant's ability to cooperate with counsel.

Florida Rule of Criminal Procedure 3.210, governing the appointment of experts for competency evaluations of criminal defendants, does not require that the experts succeed in examining their subject. Muhammad v. State, 494 So.2d 969, 972 (Fla. 1972). In the instant case, Drs. Barnard, Mhatre and Davis believed appellant to be capable of assisting them in their evaluations, as well as capable of assisting counsel in preparation for trial, if appellant so chose (R 411, 478, 482, 491, 805, 813). Only Dr. Krop was unsure of his findings as indicated by the decision to conduct a second evaluation after conferring with the other examiners (R 426-27, 473). Dr. Krop's uncertainty is not surprising given the fact that, with Dr. Krop, appellant was even more obstructive than usual in pursuance of

his objective to escape accurate diagnosis.[1]

Unlike the trial court, this Court will not enjoy the benefit of personally observing the appellant's appearance and demeanor in the courtroom prior to addressing the issue of appellant's competency to stand trial. Nevertheless, even the cold record transcript reveals an individual who appears to be operating on a cognitive level which is far from marginal, at least in those instances when he does not perceive same to be inconsistent with his self-interest.[2]

A trial judge enjoys great discretion in weighing expert testimony and need not be bound by it even if same is uncontradicted. Bates v. State, 506 So.2d 1033, 1034 (Fla. 1987). However, an unequivocal finding of competency by a single expert is sufficient to support a consistent determination by the ultimate finder of fact. See, Muhammad v. State, 494 So.2d at 972, citing Ross v. State, 386 So.2d 1191 (Fla. 1980). Even if

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[1]Based upon his reading of the reports submitted by Drs. Mhatre and Davis, Dr. Krop opined that appellant had been the most uncooperative in the evaluation conducted by himself, although appellant was reportedly also extremely uncooperative in Dr. Barnard's initial interview (R 428). As a result of appellant's lack of response, Dr. Krop was unable to completely rule out the hypothesis that appellant is simply a hostile, uncooperative criminal (R 446). Any deficiency in the experts' diagnoses in this regard appears fairly attributable to what Dr. Mhatre described as appellant's ''conscious efforts to misconstrue the facts,'' characterized by Dr. Davis as "a deliberate attempt to ... make a mockery of the legal system" (R 813, 815).

[2]Although appellant declined to testify during *any* portion of the lower court proceedings, thereby arguably rendering the trial judge's competency determination more difficult, on one of those rare occasions when appellant spoke on the record in his own behalf during a motion to withdraw counsel, in regard to an affidavit of insolvency appellant made the following salient inquiry: ''What does it pertain to?" (R 388). Even Dr. Krop was forced to acknowledge appellant's capacity to exhibit appropriate courtroom behavior as indicated by appellant's conduct during the competency hearing itself (R 451).

the evaluation of Dr. Davis were completely rejected by this Court as appellant advocates, the evaluations of Drs. Barnard and Mhatre would still preclude relief with respect to this issue. Moreover, in response to appellant's suggestion that the trial judge abused his discretion by failing to order further evaluation of the appellant to resolve Dr. Krop's doubts with respect to the issue of malingering, this Court has held that in an instance "[w]here a defendant attempts to thwart the process by refusing to cooperate, the court has no duty to order a futile attempt at further evaluation." Gilliam v. State, 514 So.2d 1098, 1100 (Fla. 1987), citing Muhammad v. State, supra. No abuse of discretion having been demonstrated, appellant's convictions and sentences must be affirmed.

POINT TWO

THE TRIAL COURT DID NOT ERR IN FAILING TO FIND AS A CIRCUMSTANCE IN MITIGATION APPELLANT'S PURPORTED MENTAL DEFECT AT THE TIME OF THE MURDERS; MOREOVER, THERE IS NO RECORD EVIDENCE TO SUPPORT APPELLANT'S CONTENTION THAT THE TRIAL COURT FAILED TO CONSIDER ALL AVAILABLE EVIDENCE IN MITIGATION.

Appellant maintains that "[i]t is clear from the trial court's findings of fact that he completely overlooked the substantial and competent evidence in the record indicating that Antonio Carter had serious mental problems at the time of the offense...." See, Initial Brief of Appellant, page 33.

Prior to addressing the crux of the instant claim of error, appellee would strongly take issue with appellant's contentions concerning the substance and quality of the evidence allegedly overlooked by the trial court. Appellant first refers to the testimony and written evaluations of four mental health experts who evaluated appellant's competency to stand trial, (see, Point 1, supra), which evidence he maintains establishes the existence of some (unspecified) mental deficiency suffered by appellant at the time of the commission of the subject crimes. Significantly, the mental deficiency upon the existence of which appellant currently relies is **not** identified in appellant's argument with respect to this claim. Indeed, in substantiation of the blanket assertion that "[a]ll four witnesses agreed in their testimony and in their reports that Antonio Carter suffered from some form of mental deficiency. The experts differed only as to the degree of Carter's deficiency," appellant cites the entire record

transcript of the competency hearing as well as all written reports submitted by all examining experts. See, Initial Brief of Appellant, page 32.

According to appellee's reading of the record, the most consistent finding among the experts was the diagnosis of appellant as a sociopath[3] (R 471, 493, 805). Although a majority of the experts found some evidence of appellant's reduced mental capacity, the probative value of such evidence is significantly diminished by one expert's unequivocal evaluation of appellant as being of average or above-average intelligence (R 815). See, Point Eleven, infra. As a consequence, appellee is unable to identify with particularity the unspecified unanimous determination of the mental health experts with respect to appellant's purported mental deficiency.

Appellant next refers this Court to the penalty phase testimony of Deborah Cox to the effect that she felt appellant was not "in his right mind'' at the time he pulled the trigger leaving two victims dead[4] (R 256). As pointed out in another point of appellant's brief, the prosecution did not attempt to dispute this testimony (R 256). See, Initial Brief of Appellant, page 35, 37. However, the absence of objection or refutation

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[3]Evidence establishing a defendant's sociopathy does not constitute a mitigating circumstance. *See,* **Card** v. **State,** 453 So.2d 17 (Fla. 1984); **Shriner** v. State, 386 So.2d 525 (Fla. 1980), cert. denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 829 (1981).

[4]Parenthetically, it should be observed that, even subsequent to appellant's convictions herein, this witness appeared to harbor doubts concerning the appellant's guilt (R 256).

does not alter the quality of the evidence presented.

In Garron v. State, 528 So.2d 353, 357 (Fla. 1988), this Court observed that, in order for lay opinion testimony on the issue of a defendant's sanity to be considered competent, the witness must personally observe the defendant during or in close temporal proximity to the event giving rise to the prosecution. In the instant case, Deborah Cox testified that she and appellant were raised together except on those occasions when appellant was in foster care or detention homes (R 254). The witness also alluded to personal contact with the appellant of an unspecified duration following his release on parole some four months prior to commission of the instant offenses (R 256). However, the subject testimony does not establish that the witness personally observed the appellant either immediately before or after his commission of the murders and the testimony of other witnesses conclusively establishes that the witness was not present during the actual shootings. As a consequence, appellee would argue that the probative value of the subject testimony is negligible in view of the fact that even uncontradicted expert testimony concerning a defendant's mental status is not binding on the trial court. See, Bates v. State, 506 So.2d 1033, 1034 (Fla. 1987) (trial judge enjoys great discretion in weighing expert testimony and need not be bound by it even if same is uncontradicted).

Finally, appellant refers to the conviction phase testimony of state witness Peter Hadburg on direct examination establishing that, immediately prior to the murders, appellant gave Hadburg

and one of appellant's ultimate victims a nasty glare (R **112 .** This circumstance is obviously more easily explained with the benefit of hindsight, as it is logical to assume that individuals who are determined not to be suffering from any legally-cognizable mental infirmity often appear unjustifiably bitter, from a bystander's point of view, moments before their commission of premeditated murder.

In sum, based upon the references in appellant's brief, appellee would assert that there was precious little, if any, evidence of the existence of a mental defect, being suffered by the appellant at the time of his commission of the murders, for the trial judge to allegedly overlook. Nevertheless, there is no record evidence which suggests that the trial judge failed to consider any of the above-described evidence, irrespective of the inconsequential weight to which it is entitled.

According to appellant, the trial judge's statement as contained in his findings of fact (R **359),** indicating his knowledge of and reliance upon the methodology for analyzing evidence in mitigation presented in Rogers v. State, 511 So.2d **526** (Fla. **1987),** is entitled to no deference by this Court:

> Despite the trial court's indication that his consideration of the mitigating evidence was done in compliance with this Court's decision in **Rogers v.** State, **511** So.2d **526, 534** (Fla. **1987),** the trial court simply ignored the evidence as to these valid mitigating circumstances. In reality, the trial court did not follow the dictates set forth in **Rogers,** supra. We simply cannot tell what consideration the trial court gave to the evidence of

Cart r's mental problems.

See, Initial Brief of Appellant, page 33. However, the failure of a trial judge to determine the applicability of mitigating evidence to a defendant's crime does not establish that such evidence was overlooked by the trial court. Lusk v. State, 446 So.2d 1038 (Fla. 1984). Even the failure of a trial judge's findings of fact to specifically address evidence presented in mitigation on behalf of a defendant does not demonstrate that such evidence was not considered. Brown v. State, 473 So.2d 1260 (Fla.), cert. denied, ____ U.S. ___, 106 S.Ct. 607 (1985); Mason v. State, 438 So.2d 374 (Fla. 1983). Moreover, "the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion," Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983); see also, Muhammad v. State, 494 So.2d 969, 976 (trial court not obligated to infer mitigating circumstance concerning defendant's mental status in absence of request for finding of mitigation on such a ground or presentation of evidence to support such a finding).

Turning now to the method of analysis represented by the trial judge to have been utilized in reaching its sentencing determination, it is evident that no error has been demonstrated with respect to this issue or, alternatively, that any purported error is harmless. As pointed out in Rogers v. State, 511 So.2d at 534:

> [A] "finding" that no mitigating factors exist has been construed in several different ways: (1) that the evidence urged in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the

> facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved.
>
> [W]e find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

It is evident that the trial judge followed the dictates of Rogers, supra, in determining that the single non-statutory mitigating circumstance found to be established by the record "in no way counterbalances or mitigates the aggravating factors'' (R 359). Is it reasonable to assume, as does appellant, that the trial judge would utilize this analytical format to find the existence of a non-obligatory, non-statutory mitigating circumstance and then abandon such analysis in wholesale rejection of all other available evidence in mitigation?

Reviewing the evidence represented by appellant to establish the existence of a mental defect at the time of his commission of the murders, it is abundantly clear that no reversible error has been demonstrated. The suggestion that appellant's level of

intelligence is so deficient as to render him less blameworthy for his crimes is simply unsupported by the record. The trial judge appropriately afforded little weight to evidence relating to appellant's alleged mental impairment as a result of appellant's ability to recount the details of the robbery and murders (R 501, 506, 817-18). See, Kokal v. State, 492 So.2d 1317 (Fla. 1986): Point Eleven, infra. Moreover, appellant's sociopathy, while arguably established by the record, is entitled to receive no mitigating value by the sentencer. Furthermore, the applicability of sections 921.141(6)(b) and 921.141(6)(f), Florida Statutes (1985), commonly referred to as the mental status statutory mitigating circumstances, cannot be established through the incompetent lay witness testimony of a family relative who remains unconvinced that appellant committed the crimes for which he was convicted or the conviction phase testimony of a state witness to the effect that an individual presumed to be the appellant appeared angry moments prior to his commission of the robbery/murders.

Finally, should this Court be persuaded, as alleged by appellant, that the trial judge neglected to analyze any of the evidence presently urged in mitigation, appellant is still not entitled to the relief sought unless "this Court can say that the errors in weighing aggravating and mitigating factors, if corrected, reasonably could have resulted in a lesser sentence." Rogers v. State, 511 So.2d at 535. Otherwise, any purported error must be deemed harmless under State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986). Put succinctly, four months

after being placed on parole following incarceration for an armed robbery, appellant elected to trade the lives of two innocent bystanders for the contents of a Mom and Pop grocery store cash register drawer. It should be observed that the application of sections 921.141(5)(a), 921.141(5)(b) and 921.141(5)(d), Florida Statutes (1985), to appellant's crime is not presently contested by the appellant. Moreover, none of the evidence in mitigation presently identified by appellant serves to ameliorate the enormity of the appellant's crimes. See, Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984). Consequently, his sentence of death must be affirmed by this Court.

POINT THREE

THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT APPELLANT'S JURY UPON TWO STATUTORY MITIGATING CIRCUMSTANCES PERTAINING TO APPELLANT'S MENTAL STATUS AT THE TIME OF THE MURDERS; MOREOVER, THIS CLAIM OF ERROR WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

As conceded by appellant, the instant claim of error was not properly preserved for appellate review by request for the inclusion of standard penalty phase jury instructions pertaining to appellant's mental status at the time of the murders or objection to their omission. Fla. R. Crim. P. 3.390(d); Jackson v. State, 522 So.2d 802, 809 (Fla. 1988); Middleton v. State, 465 So.2d 1218, 1226 (Fla. 1985); see, Initial Brief of Appellant, pages 35-36. Nevertheless, appellant is not entitled to any relief even if this Court elects to entertain this issue on the merits.

As acknowledged by appellant, the trial judge correctly informed the jury that it could consider "any aspect of the defendant's character or record or any other circumstance of the offense" in mitigation if established by the evidence (R 268). See, Initial Brief of Appellant, page 35. This instruction has expressly been held by this Court to provide minimum adequate "guidance to the jury for considerating circumstances which might mitigate against death" (citation omitted). Floyd v. State, 497 So.2d 1211, 1216 (Fla. 1986). Clearly, the defect present in Floyd, supra, which has been aptly characterized by appellant in another point in his brief as the trial court's error in "instructing the jury that no mitigating circumstances were

established by the evidence," is not present in the case **sub judice.** See, Initial Brief of Appellant, page 53. Afforded the benefit of this "catch-all" instruction, appellant's jury could properly consider, and indeed was advised to consider, any evidence presented which reflected positively upon the appellant.

Furthermore, as previously suggested in Point Two, supra, appellee contends that evidence pertaining to appellant's mental status at the time of the murders was insufficient to entitle appellant to the subject (unrequested) instructions. A trial judge is only obligated to charge a jury with the law applicable to a given case. Fla. R. Crim. P. 3.390(a). Moreover, standard penalty phase instructions to the court mandate the reading of standard instructions to the jury upon "only those mitigating circumstances for which evidence has been presented." Fla. Std. Jury Inst. (Crim.) (Penalty Proceedings--Capital Cases at 81); Lara v. State, 464 So.2d 1173 (Fla. 1985). This Court's opinion in Floyd, supra, implicitly approves such a practice in finding only the trial court's failure to give the standard penalty phase instruction on **non-statutory** mitigating circumstances, as opposed to those enumerated by statute, to constitute error:

> **Although none of the statutory mitigating factors were applicable, the jurors,** having been told that they were to weigh mitigating factors, **were not instructed** that they were permitted **to consider nonstatutory mitigating factors.**

Floyd v. State, 497 So.2d at 1215 (emphasis supplied).

Contrary to the assertions of appellant, neither the testimony of Deborah Cox nor that of Peter Hadburg was sufficient

to invoke the trial judge's **sua sponte** determination that mitigating evidence bearing upon appellant's mental status at the time of the murders had been presented. First, the testimony of a **state** witness on direct examination presented during the **conviction** phase of appellant's trial to the effect that someone presumed to be the appellant appeared to be unjustifiably hostile moments before the murders can by no stretch of the imagination be characterized as the presentation of **mitigating** evidence by the **appellant.** See, Point **Two,** supra. In analyzing an allegation that the trial court had failed to consider in mitigation the effects of childhood trauma upon the defendant, this Court in Rogers v. State, 511 So.2d **526, 535** (Fla. **1987)** (emphasis supplied), observed the following:

> **No testimony** on this question **was presented during the penalty phase,** and Rogers raised the issue for the first time on appeal.

Likewise, with respect to appellant's arguments concerning the "unrefuted" lay opinion testimony of Deborah Cox, appellee would refer this Court to the detailed analysis of the probative value of such evidence contained in Point Two, supra.

In view of appellant's own recognition of the probative value of the aforedescribed evidence as "slight", it would appear that appellant is attempting to bootstrap his purported entitlement to jury instructions based upon evidence known only to the trial judge which was adduced at appellant's competency hearing and was never presented to the jury in either the conviction or penalty phase of trial. See, Initial Brief of Appellant, page **37.** With regard to the quantum of evidence

requiring a (requested) jury instruction on a statutory mitigating circumstance, appellee would refer this Court to Cooper v. State, **492** So.2d **1059, 1062** (Fla. **1986):**

> Appellant contends that the trial court erred by rejecting as an instruction and not considering as a mitigating circumstance evidence that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. He relies upon evidence that he ingested intoxicants prior to the commission of the murders. The state points out that there was evidence that appellant was not intoxicated. Evidence of alcohol and marijuana use on the night of the murder does not compel a finding of this mitigating circumstance (citation omitted). A trial court does not err in rejecting this mitigating circumstance when it is inconsistent with testimony presented ... (citation omitted). We hold that **the presentation of evidence of some alcohol and marijuana consumption, without more, does not require a jury instruction on this mitigating circumstance.**

(emphasis supplied). On the authority of Cooper, supra, it is appellee's contention that, in order for a defendant to be entitled to a requested standard jury instruction on a statutory mitigating circumstance, something more than the mere presentation of "some" evidence supporting the application of the mitigating circumstance for which the instruction is sought is required, at least in those cases where the evidence is conflicting. In the instant case, evidence concerning appellant's mental status at the time of the murders, which was presented to the trial court by way of pre-trial motion to

determine appellant's mental capacity to stand trial, overwhelmingly militates in favor of the trial court's determination, as well as that of appellant's own counsel, that appellant was not entitled to standard jury instructions on the mitigating circumstances enumerated in sections 921.141(6)(b) and 921.141(6)(f), Florida Statutes (1985). See, Point One, supra, and Point Eleven, infra. No reversible error with respect to this issue having been demonstrated, appellant is entitled to no relief herein and his sentence of death must therefore be affirmed.

POINT FOUR

APPELLANT'S SENTENCE OF DEATH IS NOT DISPROPORTIONATE TO THE SEVERITY OF HIS CRIME OR TO OTHER SIMILAR CASES IN WHICH THE ULTIMATE SANCTION HAS BEEN UPHELD BY THIS COURT.

Appellant embarks upon his discussion of the instant claim of error with the observation that his crime "can perhaps best be described as a simple robbery 'gone bad'." See, Initial Brief of Appellant, page 40. According to appellant, because the murders were committed while he was engaged in the commission of a robbery, "an obvious lack of premeditation exists." Id. In this regard, appellee feels compelled to point out that appellant's jury obviously disagreed with appellant's characterization of his crimes when it found appellant guilty of the premeditated murder, as well as the felony-murder, of victim Patel as charged in the indictment (R 238-39, 351).

Contrary to appellant's assertions, this appellant's crime is clearly distinguishable from one in which a robber panics and pulls the trigger in his twisted objective of self-defense. Faced with the option of merely wounding his victims, appellant instead made the conscious choice, according to his jury, to kill Rohit Patel (R 238-39, 351). Patel suffered a total of four bullet wounds to the right side of his body (R 80). In addition, expert medical testimony established that victim Haberle was lying on the ground when appellant fired his first shot to the abdomen (R 77). As Haberle lay consciously suffering from this debilitating, though not necessarily fatal, wound appellant issued the "coup de grace" to the victim's head (R 61-62, 72, 88-

89, 98, 100).

The utter senselessness of these deaths becomes glaringly apparent when one considers the fact that, despite his alleged mental deficiency, appellant somehow found the wherewithal to spare the life of a potential third victim prior to effecting his escape from the scene of the crime. This near-eyewitness to the murders heard a final gunshot as he was hurriedly leaving the premises (R 122-26).

The facts of the instant case are analogous to those presented in White v. State, 446 So.2d 1031 (Fla. 1984). In that case, despite the defendant's reliance upon a defense which entailed one of appellant's victims shooting the other and then inflicting his own wounds during the **defendant's** asserted exercise of self-defense, this Court rejected a claim that the facts did not support a jury finding of premeditation. Moreover, despite this Court's striking of two of the four aggravating circumstances found by the trial court to be applicable to the defendant's crime, this Court nevertheless affirmed the defendant's sentence of death with the following observation:

> When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factor(s) which might override the aggravating factors, death is presumed to be the appropriate penalty. **White v. State,** 403 So.2d 331 (Fla. 1981), **cert. denied, ___ U.S. ___,** 103 S. Ct. 3571, 77 **L.Ed.2d** 1412 (1983); **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).

White v. State, 446 So.2d at 1037. Significantly, the two

aggravating circumstances found to support the defendant's death sentence in White, supra, were found by the trial judge to be applicable herein. Appellant does not presently contest the applicability of the three statutory aggravating circumstances found by the trial judge in the instant case (R 358-60). In Hill v. State, 515 So.2d 176, 179 (Fla. 1987), this Court affirmed a sentence of death for a murder arising out of the defendant's "hopelessly bungled robbery" of a savings and loan association in an instance where the trial court's finding of four aggravating circumstances, in contrast to one mitigating circumstance, was uncontested by the defendant. See, also, Remeta v. State, 522 So.2d 825 (Fla. 1988) (defendant's sentence of death for robbery/murder affirmed in view of existence of four aggravating circumstances which outweighed four mitigating circumstances).

Furthermore, appellant's attempt to minimize the comparative severity of the crime for which his sentence of death was imposed must fail for an even more compelling reason under the facts presented. Significantly, two of the three aggravating circumstances rendering appellant's sentence of death appropriate in the instant case are wholly independent of the facts surrounding the particular crime resulting in such a sentence (R 358-60).[5] As a consequence, appellant's comparison of his murder of Rohit Patel with other murders wherein the aforementioned

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[5] §921.141(5)(a), Florida Statutes (1985): The capital felony was committed by a person under sentence of imprisonment.

§921.141(5)(b), Florida Statutes (1985): The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

antecedent aggravating circumstances were not found to be present is less than persuasive. The "imposition of life sentences in similar cases is not absolutely controlling." McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977).

Moreover, such cases as Holsworth v. State, 522 So.2d 348 (Fla. 1988), and Amazon v. State, 487 So.2d 8 (Fla. 1986), relied upon by appellant, are not truly analogous since both involve the trial court's override of a jury recommendation of life imprisonment, wherein the facts suggesting a sentence of death must be so clear and convincing that virtually no reasonable person could differ. See, Cannady v. State, 427 So.2d 723 (Fla. 1983); Tedder v. State, 322 So.2d 908 (Fla. 1975). In contrast, appellant's jury recommended a sentence of death by a majority of eleven to one (R 356). Moreover, in Burr v. State, 466 So.2d 1051 (Fla. 1985), this Court upheld a jury override arising out of a convenience store robbery/murder similar to the facts presented herein. For all of the above-stated reasons, appellant's sentence of death, reflecting the conscience of the community as well as the informed and reasoned judgment of the trial judge, should remain undisturbed by this Court. See, Grossman v. State, 525 So.2d 833, 846 (Fla. 1988).

POINT FIVE

FLORIDA'S DEATH PENALTY HAS NOT BEEN UNCONSTITUTIONALLY APPLIED TO THIS APPELLANT AS A RESULT OF THE STATE'S REJECTION OF APPELLANT'S PLEA OFFER: MOREOVER, APPELLANT HAS FAILED TO PROPERLY PRESERVE THE INSTANT CLAIM OF ERROR FOR APPELLATE REVIEW.

Appellant commences his argument concerning the instant claim of error with the following representation:

> Appellant submits on appeal that his death sentence constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. This conclusion necessarily results when one considers that the prosecutor's decision to seek the ultimate sanction in prosecuting Antonio Carter was based, in large part, on the inappropriate consideration of the feelings of and sympathy for the surviving members of the victims' families.

See, Initial Brief of Appellant, page 46. In the first instance, it should be noted that appellant concedes the absence of proper preservation of the instant claim of error in the trial court. At the time the circumstances of the rejected plea offer initiated by the appellant were made a matter of record, no contention that appellant's federal constitutional rights had been violated was forthcoming (R 262-64). For the first time on appeal, appellant argues that Florida's ultimate criminal sanction is unconstitutional as applied to him. As a consequence, this Court should decline to entertain a claim of error which was neither advanced in, nor considered by, the trial court. Grossman V. State, 525 So.2d 833, 842 (Fla. 1988): Eutzy

v. State, 458 So.2d 755, 757 (Fla. 1984): Trushin v. State, 425 So.2d 1126, 1129-30 (Fla. 1982).

Furthermore, even if appellant can succeed in clearing the aforementioned procedural impediment to appellate review, an equally formidable obstacle to relief is appellant's mischaracterization of and idle speculation regarding the circumstances surrounding the instant claim of error. Appellant's first misapprehension involves his assertion that the prosecutor's decision to seek the death penalty "was based, in large part, upon the inappropriate consideration of the feelings of and sympathy for the surviving members of the victim's families." See, Initial Brief of Appellant, page 46. In actuality, the prosecutor's decision to seek the death penalty was undoubtedly predicted upon the knowledge, common to both counsel by the conclusion of the discovery process, that at least three statutory aggravating circumstances were likely to be found applicable to the appellant's crimes. It should be noted that two of the three aggravating circumstances subsequently relied upon by the trial judge to support the imposition of the death penalty[6] are not easily subject to refutation by a defendant (R 358-60). A defendant's prior record (parole status and conviction of prior violent or prior capital crimes) usually speaks for itself, leaving little room for interpretation by the finder of fact. Hence, appellee would assert that all parties

[6] §§921.141(5)(a) and §921.141(5)(b), Florida Statutes (1985).

recognized appellant's strong eligibility for the electic chair[7].

Moreover, appellant's idle speculation that "[i]f neither Patel nor Haberle had any family members, the prosecutor probably would have accepted Carter's offer to plead to a minimum fifty year term'' is entitled to no deference by this Court. See, Initial Brief of Appellant, page 47. This record affirmatively establishes that the prosecutor never had any intention of seeking any penalty for appellant's crimes short of death (R 263). The mere fact that appellant chose to initiate an offer which was subsequently deemed unacceptable to the state should in no way be permitted to denigrate the prosecutor's original lawful intention:

> Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute. Art 11, §3, Fla. Const.; **Cleveland** v. **State,** 417 So.2d 653 (Fla. 1982); **State v. Cain,** 381 So.2d 1361 (Fla. 1980); **Johnson v. State,** 314 So.2d 573 (Fla. 1975).

State v. Bloom, 497 So.2d 2, 3 (Fla. 1986).

In addition, this Court has expressly held that, although victim impact has a place in the criminal justice system, such a consideration must simply not be utilized as an aggravating factor in the sentencing process. Grossman v. State, 525 So.2d

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[7] This conclusion is supported by the terms of the plea offer itself (two guilty pleas in exchange for two consecutive life sentences with the application of a mandatory life term), since the only benefit to be realized from such a bargain would be avoidance of the death penalty (R 262-263).

at 842. As previously noted, there is no record evidence to support appellant's contention that the sentiments of the surviving relatives of appellant's victims played any role whatsoever in appellant's antecedent eligibility for or ultimate receipt of the death penalty (R 358-360). This Court is not permitted to predicate reversible error upon appellant's untimely conjecture concerning what effect circumstances **not** applicable to the instant case **might** have had upon the prosecutor's ultimate decision not to waver from his original prosecutional intent. See, Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, reh. denied, 429 U.S. 873, 97 S.Ct. 190 (1976).

Finally, even if this Court were to glean the possibility of error from this unpreserved claim, Grossman, supra, permits the application of harmless error analysis, on a case-by-case basis, to allegations of error predicated upon Booth v. Maryland, ___ U.S. ____, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). Grossman v. State, 525 So.2d at 845. As in Grossman, only appellant's judge, as opposed to appellant's jury, was apprised of the offending information. Moreover, even without exposure to the subject facts, appellant's jury was persuaded by a majority of eleven to one that death was the appropriate penalty (R 356). Based upon the foregoing arguments, even if appellant were not procedurally barred from raising the instant claim of error for the first time on appeal, any alleged error should be deemed harmless by this Court and appellant's sentence of death affirmed.

POINT SIX

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO THE STANDARD PENALTY PHASE JURY INSTRUCTION ON CERTAIN STATUTORY AGGRAVATING CIRCUMSTANCES; MOREOVER, APPELLANT FAILED TO PROPERLY PRESERVE A PORTION OF THIS ISSUE FOR APPELLATE REVIEW.

As conceded by appellant, his current objection to the standard jury instruction concerning section 921.141(5)(b), Florida Statutes (1985), was not properly preserved in the trial court by appropriate objection prior to jury deliberation (R 260). See, Initial Brief of Appellant, page 52. As a consequence, this portion of the instant claim of error should not be entertained by this Court. Fla. R. Crim. P. 3.390(d); Jackson v. State, 522 So.2d 802, 809 (Fla. 1988): Middleton v. State, 465 So.2d 1218, 1226 (Fla. 1985).

Although appellant's position concerning the unconstitutionality of section 921.141(5)(a), Florida Statutes (1985), was timely presented to the trial court (R 259, 272-73), appellee maintains that this Court's decision in Johnson v. State, 442 So.2d 193 (Fla.), cert. denied, 466 U.S. 963, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1983), addressing the propriety of standard jury instructions pertaining to section 921.141(5)(b), is dispositive with respect to both of appellant's challenges.

In Johnson, this Court expressly recognized the propriety of standard jury instructions which accurately state the law applicable to a specific statutory aggravating circumstance:

> The defendant had previously been convicted of felonies involving the use or threat of violence.

> Appellant argues that the trial court erred in instructing the jury that the felonies of which Johnson had been convicted, attempted robbery and attempted murder, were as a matter of law felonies involving the use or threat of violence. Appellant further contends that the trial court's reliance on this factor was erroneous in the absence of evidence of actual violence used or threatened by appellant. Both robbery and murder involve violence per se; any attempt to commit these crimes must inherently involve the threat of violence. We find no merit here.

Johnson v. State, 442 So.2d at 197 (emphasis supplied). Such reasoning is equally applicable to the standard penalty phase instruction accurately informing the jury that, as a matter of law, if they should find a given defendant was on parole from prison at the time the subject offense was committed, the defendant was "under sentence of imprisonment" for purposes of the application of section 921.141(5)(a), Florida Statutes (1985). See, Straight v. State, 397 So.2d 903, cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981).

Without this essential guidance, a jury recommendation of death could be subject to the justifiable speculation that statutory aggravating circumstances erroneously found to be applicable contributed to an unreliable advisory sentence. Just as one example, a jury apprised that a defendant was on probation for the offense of armed robbery at the time of the commission of his capital crime could, without proper instructions concerning the applicable law to be applied to the facts, improperly find the existence of two statutory aggravating circumstances, as opposed to one. See, Ferguson v. State, 417 So.2d 639, 646

(1982) (probation does not constitute ''sentence of imprisonment" for purpose of application of section 921.141(5)(a), Florida Statutes): Antone v. State, 382 So.2d 1205, cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980) (the offense of armed robbery constitutes "a felony involving the use or threat of violence to the person" for purpose of application of section 921.141(5)(b), Florida Statutes).

As this Court has recently reiterated, the standard penalty phase jury instructions accurately inform a capital defendant's jury of the applicable law. Jackson v. State, 502 So.2d 409, 411 (Fla. 1986). As pointed out in Combs v. State, 525 So.2d 853, 857-58 (Fla. 1988), in the context of an unrelated challenge to the constitutionality of standard penalty phase instructions, this appellant's entitlement to any relief with respect to the instant claim of error would necessitate the resentencing of virtually every capital defendant sentenced to death in this state since 1981 when the subject instructions were approved by this Court in In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla.), modified, 431 So.2d 599 (Fla. 1981). Finally, this Court should decline appellant's invitation to reverse itself on such a previously-rejected and, in this case, partially-unpreserved claim of error, particularly in view of the fact that the application of sections 921.141(5)(a) and 921.141(5)(b), Florida Statutes (1985), to appellant's crimes by the ultimate sentencer (See, Point Eight, infra) is not presently contested herein. No reversible error having been demonstrated, appellant's sentence of death must be affirmed.

POINT SEVEN

APPELLANT'S VOLUNTARY ABSENCE FROM A NON-CRUCIAL STAGE OF APPELLANT'S TRIAL FOLLOWING A WAIVER OF PRESENCE BY COUNSEL, WHICH WAIVER WAS IN APPELLANT'S PRESENCE, DOES NOT CONSTITUTE FUNDAMENTAL ERROR.

As indicated by appellant, during jury selection individual voir dire was conducted. Appellant was present with counsel during these proceedings. Peremptory challenges were then exercised in chambers. At the conclusion of the proceedings on November 9, 1987, the state subjected venireman Locke to a peremptory challenge, following which the trial judge indicated its intention to excuse Locke and send the remaining venire home to return the following morning for the completion of jury selection (R **664).**

Upon suggestion of the trial judge that reinstruction would be appropriate, defense counsel formally requested such reinstruction (R **664).** However, upon questioning, neither counsel for appellant nor counsel for the state wished to be present, although defense counsel requested that the reinstruction be made a matter of record (R **664-665).** Then the following transpired:

> THE COURT: Well, if I do it on the record, does the Defense have to be present?
>
> [DEFENSE COUNSEL]: No, sir.
>
> THE COURT: Do you waive your presence and the defendant's presence?
>
> [DEFENSE COUNSEL]: Yes.

[DEFENSE COUNSEL]: Could I talk to my client privately?

THE COURT: Sure. You can stay.

(R **665).** Thereafter, the trial judge returned to the courtroom, excused venireman Locke and repeated admonitions regarding media coverage of the case, further instructing the balance of the venire to return the following morning (R **665-66).**

For the first time on appeal, appellant predicates fundamental error upon his voluntary absence from a non-crucial stage of trial following a waiver of his presence by counsel which waiver occurred in appellant's presence. Such a scenario is not unlike that presented in Ferry v. State, **507** So.2d **1373** (Fla. **1987).** In Ferry, this Court concluded that the defendant's voluntary absence during the actual challenging of prospective jurors did not mandate reversal in view of a valid waiver of the defendant's presence and acquiescence by the defendant inferred from the defendant's silence while present during counsel's waiver:

> The trial court's inquiring of defense counsel concerning Ferry leaving the courtroom took place in Ferry's presence and Ferry had the opportunity prior to leaving the courtroom to give counsel his input on the exercise of challenges. Under the totality of these circumstances, we find that Ferry voluntarily absented himself and his counsel validly waived his presence. A contrary holding on these facts would promote deliberate sandbagging. We will not allow a defendant who voluntarily absents himself, who knows that juror challenges will take place in his absence and whose attorneys waive his presence, and cooperates without

> objection during the exercise of challenges to claim reversible error on appeal. **See United States v.** Willis, 759 F.2d 1486 (11th Cir.), cert. denied, ____ **U.S.** ____, 106 S.Ct. 144, 88 L.Ed.2d 119 (1985).

Ferry v. State, 507 So.2d at 1375. The facts of the instant case compel the same conclusion.

In the first instance, appellee would argue that appellant's presence was not even required under Florida Rule of Criminal Procedure 3.180 during a perfunctory admonition to prospective jurors administered by the trial judge at the appellant's behest following the completion of examination and challenges for the day. See, Fla. R. Crim. P. 3.180(a)(4). Indeed, the subject event is more appropriately characterized as "an ancillary proceeding that touched on voir dire, but was not voir dire." See, Lambrix v. State, 13 F.L.W. 472 (Fla. August 18, 1988). Moreover, it cannot be said that the subject proceeding falls within the ambit of Florida Rule of Criminal Procedure 3.180(a)(5) given the fact that appellant's jury had not yet been selected nor sworn. See, Initial Brief of Appellant, page 56. Furthermore, it would appear illogical to suggest that "fundamental fairness might be thwarted" as a result of appellant's absence from a purely precautionary (and repetitious) procedure administered solely for the appellant's benefit. See, Herzog v. State, 439 So.2d 1372, 1375 (Fla. 1983), quoting Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982).

In any event, as conceded by appellant, a capital defendant may waive his presence during even a crucial stage of his

trial. Peede v. State, 474 So.2d 808 (Fla. 1985). Moreover, in two recent cases, this Court has subjected the involuntary absence of a defendant from various aspects of the voir dire process to harmless error analysis and found no prejudice to be present. See, Turner v. State, 13 F.L.W. 426, 427 (Fla. July 7, 1988) (defendant's involuntary absence from in-chambers voir dire conference harmless): Harvey v. State, 13 F.L.W. 398, 399 (Fla. June 16, 1988) (defendant's absence from voir dire when prospective juror excused for cause harmless).

Nowhere in his brief does appellant assert that he was actually prejudiced by the trial judge's instructions made to prospective jurors in his absence. One can only speculate in precisely what manner appellant would have participated, even on a "limited basis", in the momentary monologue upon which fundamental error is presently predicated. See, Initial Brief of Appellant, page 56. "A party may not invite error and then be heard to complain of that error on appeal." Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983). For the above-mentioned reasons, appellant's convictions must be affirmed.

POINT EIGHT

STANDARD PENALTY PHASE JURY INSTRUCTIONS DO NOT DIMINISH THE JURY'S ROLE IN THE SENTENCING PROCESS: MOREOVER, APPELLANT FAILED TO PROPERLY PRESERVE THIS ISSUE FOR APPELLATE REVIEW.

Appellant maintains that the penalty phase instructions initially approved by this Court in In re Standard Jury Instructions in Criminal Cases, 327 So.2d 6 (Fla. 1976), and utilized "in virtually every death penalty case in this state since 1976" diminish the jury's role in the sentencing process in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). See, Combs v. State, 525 So.2d 853 (Fla. 1988). At the outset, it should be observed that appellant failed to properly preserve this issue for appellate review through objection to the proposed instruction prior to jury deliberation (R 266, 271). Fla. R. Crim. P. 3.390(d); Jackson v. State, 522 So.2d 802, 809 (Fla. 1988); Middleton v. State, 465 So.2d 1218, 1226 (Fla. 1985). Moreover, even if consideration on the merits were appropriate, this Court has previously addressed and rejected the argument presented by appellant. In Grossman v. State, 525 So.2d 833, 840 (Fla. 1988), this Court observed the following:

> In the penalty phase of a capital proceeding, the jury is instructed, in pertinent part, that although the final responsibility for sentencing is with the judge, that it should not act hastily or without due regard to the gravity of the proceedings, that it should carefully weigh, sift, and consider evidence of mitigation and statutory aggravation, realizing that human

> life is at stake, and bring to bear its best judgment in reaching the advisory sentence. We are satisfied that these instructions fully advise the jury of the importance of its role and correctly state the law.

Accord, Banda v. State, 13 F.L.W. 451, 452 (Fla. July 14, 1988) (present standard instructions not erroneous statements of the law): Jackson v. State, 522 So.2d at 809 (standard jury instructions fully advise the jury of the importance of its role and correctly state the law): Smith v. State, 515 So.2d 182, 185 (Fla. 1987) (jury instructions indicating that jury recommendation is advisory and that the judge is the ultimate sentencer properly stress the importance of the jury role in making its advisory recommendation).

The United States Supreme Court has expressly characterized the jury's role in the Florida death penalty process to be "advisory" in nature. Spaziano v. Florida, 468 U.S. 447, 451, 104 S.Ct. 3154, 3157, 82 L.Ed.2d 340 (1984): Combs v. State, 525 So.2d. at 857-58. Furthermore, with respect to appellant's assertions concerning the special significance afforded a life recommendation under Tedder v. State, 322 So.2d 908 (Fla. 1975), this Court has held that the weight accorded a jury's advisory recommendation of life is not "so heavy as to make it the de facto sentence." Grossman v. State, 525 So.2d at 840. In view of the fact that this Court has recently considered and rejected the appellant's arguments and that the instant claim of error was not properly preserved for appellate review, appellant is entitled to no relief and his sentence of death should be affirmed.

POINT NINE

THE TRIAL COURT DID NOT ERR BY AFFORDING UNDUE WEIGHT TO THE JURY RECOMMENDATION OF DEATH.

In upport of his contention that the trial judge afford d too much deference to the jury's advisory verdict of death for the murder of Rohit Patel, appellant refers this Court to the sentencing order which states in pertinent part:

> IV. Conclusion
>
> There are three aggravating circumstances. They are strong circumstances that must be given great weight. The Defendant had previously been convicted of armed robbery and murder. He was on parole at the time of the instant offense. This offense also occurred during an armed robbery. The mitigating circumstance of Defendant's deprived childhood, although sad and regrettable, in no way counterbalances or mitigates the aggravating factors. The aggravating factors are dominate (sic) and fully support the jury's recommendation of a death sentence.
>
> The jury recommended a life sentence be imposed upon the Defendant for Count 11. This Court disagrees with that recommendation. This Court finds the same factors in Count I would also support a death sentence in Count 11. However, given the totality of the circumstances this Court is not inclined to overrule the jury's recommendation as to Count II. It will impose a life sentence with no parole for 25 years.

(R 359-60). From his observation that the trial judge appropriately accorded great weight to the jury recommendation of life for the murder of Frederick Haberle, see, Tedder v. State, 322 So.2d 908 (Fla. 1975), appellant then extrapolates the conclusion that the trial judge must have merely followed the advisory verdict of death in dereliction of the obligation to exercise independent judgment in imposing sentence. See, Initial Brief of Appellant, page 62.

In the first instance, appellee takes issue with appellant's position that, unlike a jury recommendation of life, a jury recommendation of death is not entitled to great weight. In Grossman v. State, 525 So.2d 833, 846 (Fla. 1988), this Court observed that "[a] jury recommendation of death, reflecting the conscience of the community, is entitled to great weight (citations omitted)." Accord, Smith v. State, 515 So.2d 182, 185 (Fla. 1987): Garcia v. State, 492 So.2d 360, 367 (Fla.), cert. denied, ___ U.S. ___, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986).

Moreover, appellant's reference to what he would undoubtedly characterize as proper disposition of appellant's sentence with respect to Count II in no way establishes a presumption of impropriety with respect to the imposition of sentence in Count I. Indeed, in Randolph v. State, 463 So.2d 186 (Fla. 1984), this Court refused to recognize a presumption of undue influence in an instance where sentence was imposed upon the defendant immediately following the jury's recommendation. In contrast, appellant's sentence of death was imposed the day after the jury rendered its advisory verdicts in the instant case (R 281-82,

356-360).

In this regard, it would appear that appellant misconstrues the trial judge's observation that the balancing of aggravating and mitigating factors "fully support[s] the jury's recommendation of a death sentence" (R 359). The mere fact that a trial judge agrees with the jury's recommendation does not constitute grounds for relief so long as the record demonstrates that "the court has weighed relevant facts and reached its own independent judgment" concerning the reasonableness of the jury's recommendation. Rogers v. State, 511 So.2d 526, 536 (Fla. 1987). The sentencing order imposing death upon this appellant indicates the trial judge carefully considered the evidence, as well as the argument of counsel, in reaching its reasoned and independent judgment that a single non-statutory mitigating factor in no way counterbalanced the three "strong" statutory aggravating circumstances found to be present (R 358-59). Such a scenario contracts sharply with the facts presented in Ross v. State, 386 So.2d 1191 (Fla. 1980), relied upon by appellant, wherein the trial judge expressly stated that, finding no compelling reason to override the jury, he would impose "their" sentence of death. No reversible error having been demonstrated with respect to this issue, appellant's sentence of death should be affirmed.

POINT TEN

FLORIDA'S CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED: MOREOVER, APPELLANT FAILED TO PROPERLY PRESERVE THE VARIOUS ISSUES HE NOW RAISES FOR APPELLATE REVIEW.

For the first time on appeal, appellant raises, in summary fashion, a number of challenges to the constitutionality of Florida's death penalty statute. While candidly acknowledging that each of these claims has previously been rejected by this Court, appellant fails to point out that none were presented to the trial court and, hence, at least with respect to appellant's various attacks on the constitutionality of the statute as applied, same were not properly preserved for appellate review. Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984); Trushin v. State, 425 So.2d 1126, 1129-1130 (Fla. 1982).

The first challenge involves the assertion that appellant's constitutional rights were violated as a result of the trial court's failure to conduct a record inquiry to determine whether appellant knowingly, voluntarily and intelligently relinquished his right to testify at trial. In Torres-Arboledo v. State, 524 So.2d 403, 410-11 (Fla. 1988), this Court recently rejected an identical claim with the following observation:

> Although we agree that there is a constitutional right to testify under the due process clause of the United States Constitution (footnote omitted), we agree . . . that this right does not fall within the category of fundamental rights which must be waived on the record by the defendant himself.

See also, Remeta v. State, 522 So.2d 825, 827 (Fla. 1988).

With respect to appellant's assertions that Florida's death penalty statute fails to provide a standard of proof for determining that aggravating circumstances outweigh factors in mitigation, fails to define what constitutes sufficient aggravating circumstances and fails to provide individualized sentencing determinations through the application of presumptions, mitigating evidence and (unspecified) factors, this Court has consistently held that the aggravating and mitigating circumstances enumerated in section 921.141(5) and (6), Florida Statutes, are not vague and provide meaningful restraints and guidelines for the exercise of discretion by the judge and jury. Lightbourne v. State, 438 So.2d 380 (Fla. 1980): State v. Dixon, 283 So.2d 1 (Fla. 1973). Furthermore, the **per** se constitutionality of section 921.141, as well as the mechanics of its operation, have been consistently upheld despite numerous and multifarious challenges. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979): Ferguson v. State, 417 So.2d 639 (Fla. 1982): Foster v. State, 369 So.2d 928 (Fla.) cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979): Alvord v. State, 322 So.2d 533 (Fla. 1975): State v. Dixon, supra. Moreover, appe11ant lacks standing to contest the constitutionality of aggravating circumstances which are not applicable to the instant case. See, Clark v. State, 443 So.2d 973, 978 n.2 (Fla. 1983).

The failure to provide a capital defendant with notice of

the specific aggravating circumstances upon which the state will seek to impose the death penalty likewise has repeatedly been held to be constitutional. State v. Bloom, 497 So.2d 2 (Fla. 1986): Gore v. State, 475 So.2d 1205 (Fla. 1985): Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982): Sireci v. State, 399 So.2d 964 (Fla. 1981). Similarly, the oft-repeated assertion that the death penalty constitutes cruel and unusual punishment has been rejected by this Court in a multitude of decisions. Diaz v. State, 513 So.2d 1045 (Fla. 1987): Marek v. State, 492 So.2d 1055 (Fla. 1986): Medina v. State, 466 So.2d 1046 (Fla. 1985): Booker v. State, 397 So.2d 910 (Fla.), cert. denied, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981). Other decisions of this Court passing upon the "cruel and unusual punishment" question include: Halliwell v. State, 323 So.2d 557 (Fla. 1975): Washington v. State, 362 So.2d 68 (Fla. 1978), cert. denied, 441 U.S. 937, 98 S.Ct. 2063 (1979): Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239 (1979): Thompson v. State, 389 So.2d 197 (Fla. 1980): Menendez v. State, 419 So.2d 312 (Fla. 1982): Lightbourne v. State, supra, and citations therein: Clark v. State, supra: and Thomas v. State, 456 So.2d 454 (Fla. 1984).

This Court has also held that jury unanimity is not required under Florida's capital sentencing scheme. James v. State, 453 So.2d 786 (Fla. 1984). A capital defendant possesses no constitutional right to be sentenced by a jury. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984):

Proffitt v. Florida, supra; Brown v. State, 473 So.2d 1260 (Fla.), cert. denied, ____ U.S. ____, 106 S.Ct. 607 (1985). Moreover, the contention that section 921.141(5)(d), Florida Statutes, is unconstitutional because it imposes a tomatic aggravation upon a felony murder has been rejected in Clark v. State, supra: Mills v. State, 476 So.2d 172 (Fla. 1985); Menendez v. State, supra; and White v. State, 403 So.2d 331 (Fla. 1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983).

With respect to appellant's contention that he was tried by an impartial jury as a result of the exclusion of jurors who were opposed to capital punishment, the United States Supreme Court recently resolved this dispute to appellant's detriment in Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). In accordance with present controlling precedent, this Court has consistently held that prosecution-prone juries are not unconstitutional. DuBoise v.State, 520 So.2d 260 (Fla. 1988): Diaz v. State, supra; Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Tompkins v. State, 502 So.2d 415 (Fla. 1986); Puiatti v. State, 495 So.2d 128 (Fla. 1986).

With respect to appellant's criticism of the implicit holding in Elledge v. State, 346 So.2d 998 (Fla. 1977), this Court has subsequently determined that where the existence of at least one valid aggravating circumstance is not outweighed by the evidence presented in mitigation, death is presumed to be the appropriate penalty. White v. State, 446 So.2d 1031 (Fla. 1984); White v. State, 403 So.2d 331 (Fla. 1981), cert, denied, 463 U.S.

1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983).

Finally, appellant's observations concerning this Court's reversals of its own prior decisions fails to take into consideration the effect of intervening caselaw. It is the law in effect at the time an appeal is decided which controls. Dougan v. State, 470 So.2d 697 (Fla. 1985): Wheeler v. State, 344 So.2d 244 (Fla. 1977), cert. denied, 440 U.S. 924, 99 S.Ct. 1254 (1978). As this Court observed in Magill v. State, 420 So.2d 649, 651 (Fla. 1983):

> There can be no mechanical, litmus test established for determining whether . . . any aggravating factor is applicable. Instead the facts must be considered in light of prior cases addressing the issue and must be compared therewith and weighed in light thereof.

See also, Sullivan v. State, 441 So.2d 609, 613-14 (Fla. 1983).

In summary, this Court should decline to entertain what it has previously characterized as a "grab bag" of summarily-presented, previously-rejected and, in this case, unpreserved challenges to the constitutionality of Florida's capital sentencing scheme. See, Stano v. State, 460 So.2d 889, 894-95 (Fla. 1984). Accordingly, appellant's convictions and sentence of death should be affirmed.

POINT ELEVEN

FLORIDA'S CAPITAL SENTENCING STATUTE IS NOT UNCONSTITUTIONAL AS APPLIED TO THIS APPELLANT UPON THE PURPORTED BASIS THAT APPELLANT IS MENTALLY RETARDED.

Like many of the issues contained in appellant's initial brief, the instant claim of error was not properly preserved for appellate review by objection or motion in the trial court. See, Doyle v. State, 13 F.L.W. 409 (Fla. June 23, 1988). Appellant concedes as much with the observation that what he characterizes as "practically unrefuted" evidence of appellant's mental deficiency "was not presented at the guilt or the penalty phase of the trial."[8] See, Supplemental Initial Brief of Appellant, page 2. The constitutionality of a statute as applied to a particular set of facts is not properly raised for the first time on appeal. Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984); Trushin v. State, 425 So.2d 1126, 1129-30 (Fla. 1982). Consequently, this Court should decline to entertain the instant claim of error on the merits.

However, even if this Court were to consider this issue on the merits, appellant is entitled to no relief under Penry v. Lynaugh, cert. granted, 108 S.Ct. 2896 (1988), irrespective of

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[8] Parenthetically, it should be observed that appellant moved this Court to accept review of this issue presented in a supplemental initial brief as a result of counsel's concern that failure to raise same on direct appeal might be deemed ineffective assistance of counsel. See, Motion to Accept Supplemental Initial Brief of the Appellant. However, the failure of appellate counsel to raise on appeal a claim of error which was not properly preserved in the trial court does not constitute ineffectiveness. See, Routly v. Wainwright, 502 So.2d 901 (Fla. 1987).

its ultimate disposition by the United States Supreme Court. Such is the case because, contrary to the assertions of appellant, the evidence of appellant's purported mental retardation is far from clear and convincing. See, Supplemental Initial Brief of Appellant, pages 1,3.

This record reveals the appellant to be an individual who is astute enough to recognize that projecting an appearance of greater mental deficiency than that which is actually present may promote his self-interest but who is not quite clever enough to convince anyone unequivocally of the actual existence of the feigned infirmity. Significantly, the same observation, appellant's sporadic performance during evaluation, led three of the four experts to the conclusion that, while clearly not a mental giant, appellant had more going for himself cognitively-speaking than appellant desired to voluntarily disclose.

Although Dr. Barnard judged appellant to be of dull normal intelligence, such a limitation was not viewed to preclude appellant from attempting to rationalize his culpability in this double-murder (R 503, 820). Similarly, Dr. Mhatre rejected appellant's "selective amnesia" as a basis for determining appellant to be incompetent, indicating that appellant was able to furnish a great deal of information concerning matters unrelated to his current legal plight while at the same time malingering through obstructive passive-aggressive behavior (R 416-17). Dr. Mhatre did not perceive appellant's lesser comparative intellect to hinder appellant's ability to survive in the normal day-to-day function which, in appellant's case,

included the operation of a handgun (R **420).** Dr. Davis, on the other hand, found appellant to be quite efficient:

> This man is of average or above-average in intelligence. He is very quick with his mind and very astute. He could understand everything that was being asked of him, and his answers were quick and to the point. There was no confusion or hesitancy.

(R 815).

In sharp contrast to the other diagnoses, Dr. Krop did not perceive appellant to be malingering as a result of the appellant's ability to "respond fairly well'' in certain structured situations **(R 429).** In Dr. Krop's experience, malingerers are always consistent in their attempts to "look bad" (R **431).** Having convinced Dr. Krop that he was not malingering by virtue of having exceeded Dr. Krop's expectations in testing (R 430), it would appear fair to state that, at least as far as Dr. Krop is concerned, appellant is smarter than the average malingerer.

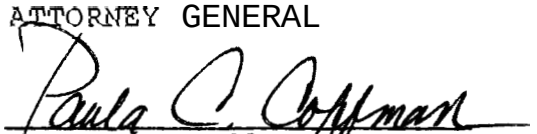
In view of what can best be characterized as equivocal evidence of appellant's borderline mental deficiency, relief by this Court with respect to this issue would appear inappropriate. To whatever extent this Court finds appellant's arguments on this unpreserved claim of error persuasive, appellant is at most entitled to a remand for further factual determinations consistent with this Court's opinion. However, for the reasons expressed herein, appellant's sentence of death should be affirmed.

CONCLUSION

Based upon the arguments and authorities presented herein, appellee respectfully requests this honorable court to affirm in all respects the appellant's convictions for first-degree murder and the imposition of a sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true and correct copy of the foregoing answer brief of appellee has been furnished by mail to: Christopher S. Quarles, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, on this 30th day of September, 1988.

Paula C. Coffman
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