IN THE SUPREME COURT OF FLORIDA

BILLY RAY NIBERT,

Appellant,

v.

CASE NO. 71,980

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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RELIMINARY STATEMENT

Appellant Billy Ray Nibert, was the defendant before the trial court and the Appellee, the State of Florida, was the prosecution. The parties will be referred to by their proper names or as they appeared before the trial court. The record on appeal consists of five (5) volumes and will be referred to by the letter "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

Issue I: Since the statutory aggravating circumstance (heinous, atrocious, or cruel) was not overridden by the non-statutory mitigating factor (abusive childhood), death was the appropriate penalty. Dixon, supra, LeDuc v. State, 365 So.2d 149 (Fla. 1978).

Issue 11: In light of Holland v. Illinois, this Court should revisit its decision in Kibler v. State, *supra,* and deny the defendant's request for a new trial.

Issue 111: In the instant case, the trial court could permissibly conclude, based on the answers given and the demeanor of the prospective juror, that his attitude would prevent or impair his performance of duties as a juror and was subject to being stricken.

Issue IV: The trial court did not abuse its discretion in allowing witness Andruskiewiez to repeat Nibert's threat identifying the victim as his target two days before the victim's murder. The defendant's own statement of criminal intent was relevant to support the application of the heinous, atrocious, or cruel aggravating factor, it was necessary to expose the jury to the complete circumstances surrounding offense, and it specifically negated Nibert's claim that the statutory mitigating circumstances of impaired capacity [§921.141(6)(f)] and emotional or mental disturbance [§921.141(6)(b)] and non-statutory mitigating circumstances warranted leniency. Nibert's statements evidenced not only the planning of a serious crime, but the premeditated design to confront this vulnerable victim.

Issue V: It is up to the trial court to decide if any particular mitigating circumstance has been established and the weight to be given it. So long as the trial court considers all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion.

Issue VI: Multiple stabbing of a conscious, resisting, victim who survives the attack at least long enough to see it to its conclusion, is sufficient to support heinous, atrocious, or cruel.

Issue VII: Appellant's disagreement with this Court's decision in Smalley does not support reversal.

Issue VIII: The failure to object to the standard jury instruction results in a waiver of this claim. Furthermore, even if the merits of the argument could be reached, it has been rejected.

ARGUMENT

ISSUE I

THE SENTENCE OF DEATH IS PROPORTIONATE TO OTHER CASES SUPPORTED BY A SINGLE AGGRAVATING CIRCUMSTANCE AND IS APPROPRIATE UNDER THE FACTS OF THIS CASE.

This Court's function in reviewing a death sentence is to consider the circumstances of this case in light of other death penalty decisions and determine whether the death penalty is appropriate. Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), citing Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). The Trial Court ~~at bar~~ found one valid aggravating factor (heinous, atrocious, or cruel) and one non-statutory mitigating factor, (Nibert's "abusive, deprived and unfortunate childhood"). (R. 462). In rejecting Nibert's claim that the death penalty was not warranted under the facts of this case, the trial court stated:

> [THE COURT]: Mr. Nibert, as I said before, I considered the memorandum of your attorney and as well as the recommendation of the advisory jury in this case. I found that there was one statutory aggravating circumstance and that was that the murder of the victim, Eugene Howard Snavely, by the Defendant, Billy Ray Nibert, especially heinous, atrocious, and cruel, and the evidence supported that in that the victim was stabbed seventeen times, the stab wounds being to the victim's back, four of the stab wounds going to the victim's hand and characterized as defensive wounds. One witness testified that Mr. Nibert said he had made the victim, Eugene Howard Snavely, get down on his knees during the course of the stabbing. The medical testimony was that the stab wounds are painful and that the victim could have remained conscious throughout the stabbing.

A photograph of the kitchen that was admitted into the sentencing phase showed large amounts of blood on the floor and on the cabinets and around the area of the kitchen.

In addition to that, there was testimony that the victim left his house and his kitchen and ran across the street to his brother's house after suffering the seventeen stab wounds and while severely bleeding and died or at least collapsed there.

I did not find that there were any statutory mitigating circumstances. I didn't think that the evidence supported the claim that the capacity of the Defendant to conform his conduct to the requirements of law was impaired or that he was under the influence of extreme emotional or mental disturbance, although Dr. Sidney Merin so testified that was his opinion.

I thought there was other evidence that refuted these claims. Among that evidence was that you are married, you're still married, your wife described you as a good husband and like to take even what your employer said, you were a trustworthy employee unless intoxicated and when you didn't show up.

Your claim that he was intoxicated at the time of the murder wasn't supported by the evidence, despite the fact that I realize that there was evidence that you had an alcohol problem and had had an alcohol problem since early childhood.

I did find that there were some non-statutory mitigating circumstances and, specifically, I found that, based on the evidence, that you did have an abusive, deprived, and an unfortunate childhood. However, I took into consideration that you were twenty-seven years old at the time of the murder.

In conclusion, the Court feels that the mitigating circumstances do not outweigh the aggravating circumstances. I'm also giving great weight to the jury recommendation in this case. The jury recommended by vote of seven to five that this Court impose the death penalty.

(R. 460-462).

In the instant case, the defendant asks this court to find additional statutory and non-statutory mitigating evidence in spite of the trial court's refusal to find additional factors in mitigation. As noted in Hudson, what the defendant really asks is that this Court reweigh the evidence and come to a different conclusion than did the trial court; the principle is well-settled that it is not within the appellate court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances. Hudson, 538 So.2d at 831, citing Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981).

In support of his argument that the death penalty is disproportionate, the Defendant relies on Smalley v. State, 546 So.2d 720 (Fla. 1989). In Smalley, this court found that death was an inappropriate sentence in light of one aggravating circumstance (heinous, atrocious, or cruel) and seven statutory and non-statutory mitigating factors found by the trial court, including the conclusion that it was unlikely that Smalley intended to kill the child victim, and that at the time of the murder, Smalley was severely depressed, under a great deal of stress, and his ability to appreciate the criminality of his conduct was substantially impaired. None of those factors exist sub judice. Furthermore, Holsworth v. State, 522 So.2d 348 (Fla. 1988), Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) and Freeman v. State, 547 So.2d 125 (Fla. 1989) each involved improper jury overrides and Ross v. State, 474 So.2d 1170 (Fla. 1985) involved a bitter domestic dispute; therefore, the defendant's reliance on the foregoing authority is likewise

misplaced. None of the Defendant's cited caselaw requires reversal of the death sentence imposed under the facts of this case. See, e.g. Swan v. State, 322 So.2d 485 (Fla. 1974) [jury override]; Lloyd v. State, 524 So.2d 396 (Fla. 1988) [Death penalty not appropriate where one aggravating circumstance, murder committed during the course of an attempted robbery, outweighed by one mitigating factor, no significant history of prior criminal activity]; Rembert v. State, 445 So.2d 337 (Fla. 1984) [Death penalty not warranted in light of one aggravating circumstance, murder committed duirng commission of a felony; the defense introduced a considerable amount of non-statutory mitigating evidence, and the State conceded that in similar circumstances, many people receive a less severe sentence.]; Caruthers v. State, 465 So.2d 496 (Fla. 1985) [Death sentence not appropriate in light of one aggravating factor (murder committed while the defendant was engaged in the commission of an armed robbery) and multiple mitigating factors (no significant history of prior cirminal activity, defendant's voluntary confession, defendant's conditional guilty plea subject to life sentence, mutual love and affection of family and friends, defendant's remorse, and encouragement of his younger brother to do well and avoid violating the law.]

In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), this court held that when one or more aggravating circumstance is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances. Under Dixon, a finding of only one aggravating circumstance is sufficient to support a death sentence.

When Nibert arrived at Mr. Andruskiewiez' door at approximately 5:00 p.m., Nibert was soaked with blood. Nibert did not appear to have suffered any injury which would account for the blood; Nibert first told Andruskiewiez that he'd been in a bar fight and then he claimed that he'd been in a fight on the street. (R. 238-239). Andruskiewiez had observed Nibert when Nibert was intoxicated, and Nibert did not appear to be intoxicated on the date of the murder. (R. 240). When the 11:00 p.m. television newscast deported the story of the victim's murder, Nibert said he "did the old man." (R. 241). When Andruskiewiez asked Nibert what he'd done, Nibert admitted making the victim get on his knees and repeatedly stabbing the victim. (R. 241-242). The "old man" never bothered anybody in the neighborhood; the victim just drove by on his bicycle when Nibert pointed him out and said that he was going to rob the "old man." (R. 243-244). Less than 45 minutes after the victim and Nibert went into the victim's house, the victim emerged from his home with 17 stab wounds, he staggered across the street, knocked on the door to his brother's residence, and collapsed in the yard, while covered with his own blood and clutching the knife used by Nibert to end his life. (R. 196-198). Sub judice, since the single statutory aggravating circumstance was not overridden by the non-statutory mitigating factor, death was the appropriate penalty. Dixon, supra, LeDuc v. State, 365 So.2d 149 (Fla. 1978).

ISSUE II

WHETHER THE TRIAL JUDGE ERRED BY PERMITTING THE STATE TO EXCUSE BLACK PROSPECTIVE JURORS BY PEREMPTORY STRIKE WITHOUT REQUIRING THE STATE TO GIVE NON-RACIAL REASONS FOR THE EXCUSAL?

In the instant case, the record confirms that after the State used peremptory challenges to excuse two prospective black jurors, the defense counsel objected and stated the prosecutor was using his challenges to excuse blacks from the jury without a race-neutral reason. It is clear, as in Kibler v. State, **546** So.2d **710** (Fla. **1989),** that the prosecutor and the trial court were uncertain as to whether or not the opinion of this court in State v. Neil, **457** So.2d **481** (Fla. **1984),** was applicable under the facts and circumstances of this case.

The defendant, ***sub*** *judice,* is white.' He was challenging the excusal of blacks from the petit jury. All parties were aware of this Court's decision of State v. Neil, ***supra,*** however, the prosecutor and the trial judge viewed this case as being distinguishable. The defendant in Neil was black, thus both the defendant and the jurors being challenged were members of a distinct racial group. Additionally, the prosecutor indicated because he had not challenged one prospective black juror and that person was on the panel, no further inquiry was necessary.

The victim in this case was also white; however, that factor, which the trial judge appears to have considered in her decision not to have the prosecutor explain his reasons for the challenges, is not important in determining this jury selection issue.

As the defendant acknowledges, the trial court did not have the benefit of this Court's later pronouncements of Kibler v. State, *supra*, and Slappy v. State, 522 So.2d **18** (Fla. **1988).** The Slappy opinion makes it clear that a defendant can make a legitimate challenge to the excusal of prospective black jurors through the use of peremptory challenges even if other black jurors have not been challenged. As this Court said, "Indeed, the issue is not whether several jurors have been excused because of their race, but whether *any* juror has been so excused, independent of any other." Ibid. at p.**21.** Accord, Thompson v. State, **548** So.2d **198** (Fla. **1989).** In June of last year **(1989)** it was made clear in Kibler that a white defendant has standing to challenge the prosecutor's exercise of his peremptory challenges to exclude blacks from the jury.

The Neil, Slappy, and Kibler decisions from this Court were all based on the **Florida Constitution,** Article I, Section 16, which provides:

> SECTION **16. Rights** of **the accused. -** In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed....

This is the Florida Constitutional equivalent to the Sixth Amendment of the United States Constitution. The United States Supreme Court recently addressed the issue of whether a white defendant could challenge the prosecutor's use of peremptory

challenges to excluded prospective black jurors. *See,* Holland v. Illinois, **1990** WL **2871 (1990).** The court in Holland held that while a white defendant had standing to raise the issue of the prosecutor's excusal of blacks, he had no sixth amendment right to be tried by a fair cross section of the community. The State respectfully requests that this Court revisit the Kibler decision in light of this case emanating from the United States Supreme Court.

The court in Holland v. Illinois, *supra,* made a distinction between an analysis under the sixth amendment and the equal protection clause; the court's decision in Batson v. Kentucky, **476** U.S. **79, 106** S.Ct. **1712, 90** L.Ed.2d **69 (1986),** was based on purposeful discrimination under the equal protection clause. The court went on to the discuss the sixth amendment's guarantee of an impartial jury drawn from a venire which represents a fair cross section of the community, the same guarantee is embodied in Article **1,** Section **16** of the **Florida Constitution.** Once a venire has been assembled, the use of peremptory challenges then furthers the goals of the sixth amendment by allowing both the defense and the state to eliminate prospective jurors who would be unduly biased in favor of either side. The court further opined that a fair cross section requirement in the composition of the petit jury would undermine rather than serve the goal of impartiality guaranteed under the federal constitution.

Such an analysis is equally true under the Florida Constitution. A criminal defendant is guaranteed an impartial jury. By requiring that jury venires represent a fair cross

section of the community the guarantee under Article 1, Section 16 has been met. No usefully purpose is served by requiring a fair cross section in the petit jury. Holland v. Illinois, *supra.*

In light of Holland v. Illinois, this Court should revisit its decision in Kibler v. State, *supra,* and deny the defendant's request for a new sentencing hearing.

ISSUE III

THE TRIAL COURT PROPERLY EXCLUDED PROSPECTIVE JUROR WEATHERFORD FOR CAUSE.

In Cook v. State, 542 So.2d 964 (Fla. 1989), this Court emphasized that there is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges for cause and the trial judge is in a far superior position to properly evaluate the juror's responses. In Cook, this Court noted with approval the statement that

> There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercises of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury.
>
> Id. at 969, citing United States v. Ploof, 464 F.2d 116, 118-19 n. 4 (2d Cir.), cert. denied sub nom. Godin v. United States, 409 U.S. 952, 93 S.Ct. 298, 34 L.Ed.2d 224 (1972). Accord United States V. Rouco, 765 F.2d 983 (11th Cir. 1985), cert. denied 475 U.S. 1124, 106 S.Ct. 1646, 90 L.Ed.2d 190 (1986); United States v. Carlin 698 F.2d 1133 (11th Cir.) cert. denied, 461 U.S. 958, 103 S.Ct. 2431 '77 L.Ed.2d 1317 (1983).

The defendant claims that the excusal of prospective juror for cause violated Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Witherspoon and its progeny emphasize that the trial judge, rather than the appellate court, is in the best position to gauge the responses given during voir dire by prospective jurors.

In Witt, supra, the court concluded:

> This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the he manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 424-26, 105 S.Ct. at _____, 83 L.Ed.2d at 852-853 (emphasis added, footnote deleted).

> As we stated in Marshall v. Lonberger. [459 U.S. 422. 103 S.Ct. 843, 74 L.Ed.2d 646 (1983)] at [459 U.S.] 434, 74 L.Ed.2d 646, 103 S.Ct. 843:
>
> "As was aptly stated by the New York Court of Appeals, although in a case of rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges his power of observation often proves the most accurate method of ascertaining the truth. . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." Boyd v. Boyd, 252 NY 422, 429, 169 NE 632, 634.

469 U.S. at 434, 105 S.Ct. at _____, 83 L.Ed.2d at 858.

In the instant case, the trial court could permissibly conclude, based on the answers given and the demeanor of the

prospective juror that his attitude would prevent or impair his performance of duties as a juror and was subject to being stricken. Witt, 469 U.S. at 423, 105 S.Ct. at _____, 83 L.Ed.2d at 851. The trial court excluded juror #14, Mr. Weatherford, for cause, noting that Mr. Weatherford stated that he was opposed to the death penalty, he compaigned politically against the death penalty and he did not wish to miss teaching his class the following day. (R. 134). The following excerpts from the voir dire clearly support the trial court's excusal for cause of juror #14, Mr. Weatherford.

> [THE COURT]; ". . . Are any of you opposed to the death penalty?
>
> And the first row out here, are any of you opposed?
>
> PROSPECTIVE JUROR #17: I feel the same way as this lady here.
>
> THE COURT: And you are Mr. Maglin?
>
> PROSPECTIVE JUROR #17: I'm not against it either, but I would have to be convinced very strong.
>
> THE COURT: Yes, sir. Mr. Weatherford, do you feel the same way?
>
> PROSPECTIVE JUROR #14: No. I'm against it. (e.s.)
>
> THE COURT: Then, Mr. Weatherford, let me ask you the follow up question that I asked her.
>
> After you listen to the evidence and you listen to the instructions that I will give you, would you automatically vote against the death penalty, no matter what the evidence, and no matter what the instructions?

PROSPECTIVE JUROR #14: It would have to be an extraordinary circumstance to get me to vote for the death penalty. I have been opposed to it as a political issue for years. (e.s.)

(R. 50).

* * *

[THE COURT]: Do any of you have a prior commitment, an appointment, something that you cannot rearrange which would keep you from being able to serve on this jury because it is going to last through Wednesday of this week, and if you do, would you raise your hand?

* * *

PROSPECTIVE JUROR #14: I'm a professor at the University of South Florida, and I have two classes tomorrow.

THE COURT: Mr. Weatherford, let me ask you the same question that I asked Mr. Hall.

First of all, would it be possible for you to get anybody to cover your classes for you?

PROSPECTIVE JUROR #14: One of them it would be, but the other one I'm the only qualified professor. I'm not concerned about may consternation, but my students have had a hard time in scheduling a room for assignment, and it's pretty unsettled at the present time.

THE COURT: What do you teach?

PROSPECTIVE JUROR #14: Philosophy. The seminar is on John Rowls (phonetic), the Theory of Justice.

(R. 35-37).

[PROSECUTOR]: On the third row, under the appropriate circumstances, could each one of you make a recommendation of death? If you can't, raise your hand.

PROSPECTIVE JUROR **#14:** (Indicating).

[PROSECUTOR] MR. BENITO: You have expressed you opposition to the death penalty?

PROSPECTIVE JUROR **#14:** Yes.

MR. BENITO: As you sit here today you have automatically vote against the death penalty?

PROSPECTIVE JUROR **#14:** Most probably.

(e.s. (R. 62).

MR. BENITO: And you would also say that your ability to follow the law with regards to the death penalty might be substantially impaired because of your views?

PROSPECTIVE JUROR #14: I don't think that I would say that, because I believe that the law permits me to vote against the death penalty.

MR. BENITO: That's correct, but it also permits you to vote for the death penalty, but you're coming in, let's say, leaning towards voting against it? Wouldn't that be a fair statement?

PROSPECTIVE JUROR **#14:** That's true.

MR. BENITO: Can you think of a situation where you would vote for the death penalty?

PROSPECTIVE JUROR **#14:** Perhaps in extraordinary heinous crimes, but I would be very surprised at myself.

MR. BENITO: If the State were seeking the death penalty as the State is doing in this particular case, as you come in here today with your personal views, it may be very difficult for you to give the State a fair trial -- is that a fair statement?

PROSPECTIVE JUROR **#14:** No., I would be fair about it. I just think that you are wrong.

MR. BENITO: You think that I'm wrong in seeking the death penalty, but you still think that you can give me a fair trial?

PROSPECTIVE JUROR #14: I would listen to the case, but I would be most likely to decide no.

MR. BENITO: You don't think that I'm wrong when you first came in here?

PROSPECTIVE JUROR #14: Not automatically. Just about ninety-five percent.

(e.s.) (R. 63-64).

During subsequent questioning by the defense counsel, Juror Weatherford stated:

PROSPECTIVE JUROR #14: If the law said specifically that if the aggravating circumstances outweigh the mitigating circumstances to any degree, then the death penalty should be imposed -- I would certainly have a difficult time obeying that law.

[DEFENSE COUNSEL] MR. MEYERS: But you would decide whether they outweigh or --

PROSPECTIVE JUROR #14: But I may feel that they do outweigh and still not feel that the death penalty is warranted.

MR. MEYERS: It depends on what weight you would give to it. I guess you might put more weight on something than --

PROSPECTIVE JUROR #14: In the abstract, I probably would, but I mean -- I would weigh them against each other. But if the balance is not sufficient in my mind to settle the question --

MR. MEYERS: Well, I guess, would you be able to follow your oath as a juror and abide by the Court's instructions?

PROSPECTIVE JUROR #14: To the best of may interpretation, yes.

(e.s.) (R. 114).

Sub judice, the trial court properly decided that the prospective juror's expressed views would substantially impair his ability to follow the law, despite seemingly ambiguous responses during portions of the voir dire. See also Davis v. Maynard, 869 F.2d 1401, 1408-1409 (10th Cir. 1989); and Creamer v. Bivert, 214 Mo. 473 113 S.W. 2d 1118, 1120, where the appellate court in another context noted:

> He sees and hears much we cannot see and hear. We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or the sneering tone, the heart, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the soleminty of an oath, the carriage and mien.
>
> The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as the honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify *so* that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.

Decisions about a given juror's ability to give both parties a fair trial are highly fact intensive. Thus, the United States Supreme Court treats the decision of whether a juror will let his personal views on capital punishment prevent or substantially impair his ability to apply the law as a question of fact. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). This court should not disturb this particularly fact intensive determination by the trial judge who was there listening to the tenor of the questions and answers as they were given. The prospective juror admitted that he had been politically opposed to the death penalty for years, thought the Prosecutor was 95% wrong at the outset, admitted that he would have a difficult time obeying the law; and when asked if he would automatically vote against the death penalty, responded "Most probably." The State has a legitimate interest in not seating jurors who are "unable to view the case impartially." Hill v. State, 549 So.2d 179, 185 (Fla. 1989), quoting Witt, 469 U.S. at 422, 105 S.Ct. at 851. Here, as in Mitchell v. State, 527 So.2d 180 (Fla. 1988), the record supports the conclusion that the juror's view toward the death penalty would have substantially impaired, if not totally prevented, the proper performance of his duty as a juror. In Mitchell, this Court stated:

> ". . . We previously held in Lara v. State, 464 So.2d 1173, 1178-79 (Fla. 19851, quoting Herring v. State, 446 So.2d 1049, 1055-56 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984), that:

> It would make a mockery of the jury selection process to . . . allow persons with fixed opinions to sit on juries. To permit a person to sit as a juror after he has honestly advised the court that he does not believe he can set aside his opinion is unfair to the other jurors who are willing to maintain open minds and make their decision based solely upon the testimony, the evidence, and the law presented to them.
>
> **527** So.2d at **180.**

As evidenced by the foregoing arguments and authorities, the trial court did not abuse its discretion in excusing Juror #14, Mr. Weatherford, for cause.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO INTRODUCE EVIDENCE THAT NIBERT TARGETED THE VICTIM TWO DAYS PRIOR TO THE MURDER.

Two days before the murder, Nibert said he knew where he could get his hands on some money, and Nibert pointed out the victim and identified the "old man" as his target. (R. 243-244). Thus, Nibert's presence at the victim's home was no mere coincidence and, contrary to the Defendant's claim, the testimony introduced by the State was not based on mere speculation; it was direct evidence derived from a threat by the defendant targeting this man as his victim.

Review of evidentiary rulings is pursuant to an abuse of discretion standard, Muehleman v. State, 503 So.2d 310, 315 (Fla.), cert. denied, _____ U.S. _____, 108 S.Ct. 39, 98 L.Ed.2d 170 (1987) [Penalty phase]. Trial courts enjoy wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed. Section 90.402, Florida Statutes (1987) authorizes the admission of all relevant evidence. In the instant case, the trial court did not abuse its discretion in allowing witness Andruskiewiez to repeat Nibert's threat identifying the victim as his target two days before the victim's murder. The defendant's own statement of criminal intent was relevant to support the application of the heinous, atrocious, or cruel aggravating factor, it was necessary to expose the jury to the complete circumstances surrounding offense, and it specifically negated

Nibert's claim that the statutory mitigating circumstances of impaired capacity [§921.141(6)(f)] and emotional or mental disturbance [§921.141(6)(b)] and non-statutory mitigating circumstances warranted leniency. Nibert's statements evidenced not only the planning of a serious crime, but the premeditated design to confront this vulnerable victim.

As long ago recognized in Snyder v. Massachussetts, 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330, (1934) justice, though due to the accused, is due to the accuser also. 291 U.S. 122-124. The kind of evidence which is considered relevant for purposes of imposition of a death sentence is evidence which is relevant to the defendant's character, background and record or the circumstances of the offense. Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 973, 988, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 303-304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) ("justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Internal quotation citations omitted). It is the kind of evidence which "has some bearing on the defendant's 'personal responsibility and moral guilt.'" Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (19870 quoting Enmund v. Florida, 458 U.S. 782, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

As this Court agreed in Garcia v. State, 492 So.2d 360, 366 (Fla. 1986), facts presented during the penalty phase cannot be antiseptically packaged when presented to the jury. In the instant case, as in Muehleman v. State, 503 So.2d 310 (Fla. 1987) the evidence was properly admitted to expose the jury to a more complete picture of those aspects of the defendant's history which had been put in issue. In Muehleman, this Court found no abuse of discretion in admitting testimony concerning other crimes by the defendant in rebuttal to the defendant's expert testimony, presented in mitigation, that the defendant lacked the substantial capacity to plan in advance and execute crimes. 503 So.2d at 316. See also, Teffeteller v. State, 495 So.2d 744 (Fla. 1986). [The trial court had discretion to allow the resentencer to hear or see probative evidence, including the testimony regarding the murder and photograph of the victim, in order that the jury could render an appropriate advisory sentence]; Johnson v. State, 465 So.2d 499 (Fla.), certiorari denied, 106 S.Ct. 186, 474 U.S. 865, 88 L.Ed.2d 155 (1985) [Fact that defendant gave several inconsistent statements to law enforcement authorities before trial did not preclude use of those and other statements as evidence of aggravating circumstances in sentencing phase.] Walton v. State, 547 So.2d 622 (Fla. 1989) [Once a defendant claims reliance on mitigating circumstance of no significant history of prior criminal activity, the State could properly rebut this claim with direct evidence of criminal activity, even though convictions were not obtained.] Since Lockett and its progeny require that the

circumstances surrounding the offense and character of the defendant be considered as relevant factors to be considered prior to the imposition of sentence, there is not rational basis for excluding this aspect of Nibert's criminal scheme.

ISSUE V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN WEIGHING THE MITIGATING EVIDENCE AND IN CONSIDERING THE JURY'S DEATH RECOMMENDATION.

It is up to the trial court to decide if any particular mitigating circumstance has been established and the weight to be given it. Hudson, supra; Toole v. State, **474** So.2d **731** (Fla. **1985);** Daugherty v. State, **419** So.2d **1067** (Fla. **1982).** Sub judice, the record shows that the trial court carefully considered and detailed her basis for rejecting the defendant's claimed mitigating factors. Thus, Nibert's self-serving claim that the trial judge arbitrarily rejected his mitigating evidence is totally untenable.

The fact that Nibert's wife has no plans to divorce this convicted murderer relates to her character, not Nibert's. Furthermore, the defense evidence of prior alcohol abuse does not entitle Nibert to mitigation of his sentence. Nibert targeted the vulnerable "old man" as his victim ahead of time, Nibert was invited into the victim's home; he confronted the victim when no one else was around; Nibert readily manufactured a story to explain the extensive blood stains; Nibert evidenced no signs of intoxication on the date of the murder; and Nibert specifically recalled the particular details of the murder, including forcing the "old man'' to kneel and stabbing him repeatedly. Thus, the defendant's claim of alcohol abuse was properly rejected as a mitigating factor. See e.g., Kokal v. State, **492** So.2d **1317** (Fla. **1986)** [Defendant claimed impairment by drugs and alcohol mitigating factor properly rejected where the defendant recounted

specific details of murder contradicting notion that he did not know what he was doing.] Koon v. State, 513 So.2d 1253 (Fla. 1987) [Claim of diminished mental capacity due to intoxication properly rejected where there was testimony that even though Koon was high, he was not drunk at the time of the victim's murder.]. So long as the trial court considers all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. Hill v. State, 549 So.2d 179, 183 (Fla. 1989).

Lastly, the defendant's reliance on Ross v. State, 474 So.2d 1170 (Fla. 1985) is misplaced. In Ross, the was evidence that the defendant had been drinking when he attacked the victim and the killing was the result of an angry domestic dispute. Here, the unsuspecting victim was lured into his own house where he was brutally attacked.

The law is clear that the sentencing judge must consider in mitigation any aspect of defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for life sentence. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1981). A trial judge is not obligated to find mitigating circumstnaces, Suarez v. State, 481 So.2d 1201 (Fla. 1985); but in this case, the trial court did conclude that a mitigating factor existed, Nibert's abusive, deprived and unfortunate childhood. Cf. Lara v. State, 464 So.2d 1173 (Fla. 1985) [The defendant's acts in committing the murder were not significantly influenced by his childhood experience so as to justify its use as a mitigating

circumstance.] The fact that the judge did not find that the defendant's sporadic employment record was sufficient to substantiate a finding of mitigation does not indicate that she gave the evidence no weight at all. The law only requires that the defendant be permitted to present evidence in mitigation, and requires the sentencer to consider it. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). It is within the trial court's discretion to determine the weight to be given such evidence.

The defendant recognizes that the jury's recommendation of death is entitled to great weight, Grossman v. State, 525 So.2d 833 at 846 (Fla. 1988). However, he 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 v. State, 322 So.2d 908 (Fla. 1975) 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 argument and not extend Tedder to any further extension than it presently occupies.

ISSUE VI

THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AND THE DEATH PENALTY WAS PROPERLY IMPOSED IN THIS CASE.

In Nibert's original appeal, this Court approved the finding that this murder was especially heinous, atrocious or cruel. Nibert v. State, **508** So.2d 1 at **4** (Fla. **1987).** On resentencing, the Trial Court stated the following reasons for finding this aggravating factor:

STATUTORY AGGRAVATING IRCUMSTANCES [F.S. **921.141(5)]**

> **1.** The murder of the victim Eugene Howard Snavely was especially heinous, atrocious and cruel. The evidence was that the victim was stabbed seventeen **(17)** times, eight **(8)** of those stab wounds were to the victim's upper back, four **(4)** of the stab wounds to the victim's hand and characterized as defensive wounds indicating the victim was attempting to ward off the defendant during the attack. On witness testified that the Defendant, Billy Ray Nibert, said he had made the victim, Eugene Howard Snavely, get down on his knees during the stabbing. The medical testimony was that stab wounds are extremely painful and that the victim could have remained conscious throughout the stabbing. In fact, the victim left his house and ran across the street to his brother's house after suffering the seventeen (17) stab wounds and while severely bleeding.
>
> A photograph of the victim's kitchen admitted in the Sentencing Trial showed large amounts of blood on the floor and cabinets, demonstrating the brutality of the murder.
>
> The evidence clearly indicated that Eugene Howard Snavely's death was brutal, not instantaneous, and unnecessarily tortuous thus setting it apart from other first degree murders and making it especially heinous, atrocious, and cruel.
>
> **(R. 534-535).**

The defendant claims that the trial court erred in imposing the death penalty because the homicide at bar was "typical of most knife murders". The Defendant's cavalier treatment of the brutal slaughter of the victim does not camouflage the evidence in this case and Nibert errs in his reliance on Teffeteller v. State, 439 So.2d 840 (Fla. 1983), and Demps v. State, 395 So.2d 501 (Fla. 1981). In Teffeteller, this Court found that the criminal act that ultimately caused the victim's death was a single shot from a shotgun. The relatively impersonal act of firing a single shot from a shotgun at some distance from the victim, despite the fact that it inflicted a painful and slow killing wound, is easily distinguishable from a frenzied knife attack at close range where multiple deep wounds were inflicted.

In Demps, the victim was a fellow inmate. He was found bleeding from multiple stab wounds and died after some period of survival. However, this Court's rejection of the heinous, atrocious, or cruel factor was summary. . . "[w]e do not believe this murder to have been so 'conscienceless or pitiless' and thus set 'apart from the norm of capital felonies' as to render it 'especially heinous, atrocious, or cruel."' 395 So.2d at 506 (footnotes and citations deleted). This constitutes the entire discussion in Demps of the heinous, atrocious, or cruel factor.

This Court apparently has receded from Demps, as at least two subsequent prison stabbing deaths were held to be heinous, atrocious, or cruel. Lusk v. State, 446 So.2d 1038 (Fla. 1984) (victim stabbed in back three times in prison lunchroom); Morgan v. State, 415 So.2d 6, 12 (Fla.), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982):

> Under established precedent interpreting the capital felony sentencing law, the third aggravating circumstance [heinous, atrocious, and cruel] is also supported. The evidence showed that death was caused by one or more of ten stab wounds inflicted upon the victim by appellant [in the victim's cell during sleeping hours]. See Rutledge v. State, 374 So.2d 975 (Fla. 1979), cert. denied, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979) ; Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979).

Recent cases suggest that multiple stabbing of a conscious, resisting, victim who survives the attack at least long enough to see it to its conclusion, is sufficient to support heinous, atrocious, or cruel. Turner v. State, 530 So.2d 45 (Fla. 1987), cert. denied, _____ U.S. _____, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989) (killer pursued and cornered his victim, then stabbed and cut her to death despite her pleas); Perry v. State, 522 So.2d 817 (Fla. 1988) (victim beaten and stabbed repeatedly in her home); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) (thirty stab wounds, some defensive, showing victim survived to suffer the effects of the repeated goring); Floyd v. State, 497 So.2d 1211 (Fla. 1986) (twelve wounds to the torso and one defensive wound to the hand, indicating victim was conscious during the stabbing, although she died with minutes thereafter); Johnston v. State, 497 So.2d 863, 871 (Fla. 1986) (citations deleted):

> The medical examiner testified that the victim, an 84-year-old woman who had retired to bed for the evening, was strangled and stabbed three times completely through the neck and twice in the upper chest. The medical examiner's testimony also revealed that it took the helpless victim three to

> five minutes to die after the knife wound severed the jugular vein. The court also mentioned, correctly, that the victim was in terror and experienced considerable pain during the murderous attack. The heinous, atrocious or cruel aggravating circumstances was properly applied in this circumstance. Cf. Wright v. State, 473 So.2d 1277 (Fla. 1985) (multiple stab wounds on the body of a 75-year-old woman), cert. denied, ____ U.S. ____, 106 S.Ct. 870, 88 L.Ed.2d 909 (1986). . . .

This court previously approved the finding of the aggravating circumstance of heinous, atrocious, or cruel aggravating factor to the facts of this case, Nibert v. State, 508 So.2d 1 (Fla. 1987); the defendant has not demonstrated any basis for setting aside the Trial Court's independent finding of this factor on resentencing. Nibert ruthlessly butchered the elderly victim and, accordingly, the death penalty was properly imposed in this case.

A resentencing proceeding is an entirely new proceeding and neither the doctrine of collateral estoppel nor law of the case apply to compel the resentencer to find the same mitigating factors as those found in the original sentencing hearing. King v. State, 15 F.L.W. 511 (Fla. Case #73,360, Opinion filed January 4, 1990).

ISSUE VII

THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS, AND CRUEL IS NOT UNCONSTITUTIONALLY VAGUE.

Last year, this defense argument was rejected in Smalley v. State, 546 So.2d 720 (Fla. 1989). Appellant's disagreement with this Court's decision in Smalley does not support reversal.

ISSUE VIII

THE TRIAL JUDGE'S INSTRUCTION TO THE JURY ON §921.141(5)(h) AGGRAVATING CIRCUMSTANCE WAS CONSTITUTIONALLY ADEQUATE.

In denying the defendant's special requested jury instruction #1, the trial court stated:

> THE COURT: Mr. Meyers, we had a matter that was left over from yesterday, and that was a -- Defendant's Requested Special Jury Instruction #1, and that's the instruction that you requested as follows:
>
> The fact that Mr. Snavely continued to life for a while after the stabbing and was in undoubted pain and knew that he was facing imminent death, does not in and of itself support a finding that this murder was especially heinous, atrocious, or cruel.
>
> Your have me in support the case of the State of Jackson v. State, 502, So.2d 409 which was a 1986 case.
>
> I'm not going to give that instruction.
>
> Mr. Meyers, I did read your case, and the portion of the case that you have highlighted for me does say that in this particular instance -- and it was not a knife wound but I believe a shotgun wound -- the fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as the prospect may be, may have been, or may have been does not set this senseless murder apart from the norm of capital felonies.
>
> I believe, as Mr. Benito pointed out yesterday, that is one of the facts -- one piece of evidence that wag elicited from the witnesses, but there were other pieces of evidence which included the number of stab wounds, which included the testimony by one witness that Mr. Nibert had said that the victim was on his knees.

> Even the case that you gave to me, the Jackson v. State case says that standard jury instructions at the conclusion of the penalty phase accurately inform the jury of the law, so I am going to give the standard jury instructions.
>
> If you would like to argue the fact that Mr. Snavely continued to live for a while after the stabbing and was in undoubted pain and knew that he was facing imminent death does not in and of itself support a finding that this murder was especially heinous, atrocious, and cruel.
>
> MR. MEYERS: Thank you, Judge.
>
> THE COURT: Mr. Meyers, Mr. Benito has typed up the jury instructions as we went over them yesterday, including the aggravating circumstance that we agreed should be given as well as the four mitigating circumstances.
>
> He has also included an additional suggestion which is entitled submitting the case to the jury in which he suggests that the jury be informed that they need to elect a foreman and explain to them the process that a foreman presides over the deliberations, much as a chairman presides over a meeting.
>
> Other than that, I believe that the instructions are as we discussed them yesterday.
>
> [DEFENSE COUNSEL] MR. MEYERS: We have no objections to the instructions other than the Court denying our motion for the two requested jury instructions.
>
> **(R. 346-348).**

Thus, as evidenced by the foregoing, the defendant did not object to giving the standard jury instruction which explained that in order for this circumstance to be applicable, it was necessary for the crime to have been especially heinous, atrocious or cruel. (R. **404**). Here, as in Smalley, supra, the

failure to object to the standard jury instruction results in a waiver of this claim. 546 So.2d at 722,. Furthermore, even if the merits of the argument could be reached, it has been rejected. Smalley, supra; Bertolotti v. Duqger, 883 F.2d 1503 (11th Cir. 1989). See also, Lemon v. State, 456 So.2d 885 (Fla. 1984) [No error to refuse to instruct the jury on the definition of heinous, atrocious, or cruel from 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). The standard jury instructions were sufficient. Id., at 887].

CONCLUSION

Based on the foregoing facts, arguments and authorities, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to The Public Defender's Office, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830, this 30th day of January, 1990.

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