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THE THE SUPREME COURT OF FLORIDA

EDWARD CASTRO,

Appellant,

vs. CASE NO. 71,982

STATE OF FLORIDA,

Appellee.

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ANSWER BRIEF

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PRELIMINARY STATEMENT

The Appellant was the defendant in the trial court. The parties will be referred to as they appear before this Court. The record will be referred to by the use of the symbol "TR" followed by the appropriate page number in parenthesis, the Initial Brief of Appellant will be referred to by the symbol "IB" followed by the appropriate page number in parenthesis.

STATEMENT OF THE CASE

Appellee accepts appellant's recital of the statement of the case with the following addition.

In the written finding of facts prepared by the trial court regarding the penalty proceedings, the court, after a careful review of the mitigating and the aggravating circumstances presented, concurred with the jury's recommendation that the defendant be sentenced to death. The trial court found three aggravating circumstances supported by the record, to wit:

> A. That the capital felony was a homicide committed in a cold, calculated and premeditated manner without the pretense of moral or legal justification.
>
> B. The capital felony was especially heinous, atrocious and cruel.
>
> C. The capital felony was committed while the defendant was engaged in the commission of the robbery.

With regard to each of the statutory aggravating circumstances found, the trial court in minute detail presented his reasons in support of his findings. (TR 2759-2761).

In mitigation, the trial court found two nonstatutory aggravating factors:

> A. That the defendant was sexually abused as a child, creating an "anti-social personality", and
>
> B. That the defendant conditioned the giving of his confession on the receipt of psychiatric help. The defendant recognized his danger to others, sought help, and requested that he be "kept out of the population" so that he would not kill again. (TR 2762).

The trial court also noted that he considered, but rejected two additional mitigating circumstances raised by Castro, to wit:

> 1. The disparity between the defendant and Robert McKnight; and
>
> 2. Castro's prior consumption of alcohol just prior to the murder. (TR 2762).

STATEMENT OF THE FACTS

Appellee also accepts the statement of the facts prepared by Appellant contained in his Initial Brief pages 3-10 with the following additions.

In recounting the events following the murder of Austin Scott, Robert McKnight testified that when he and appellant arrived in Lake City, it appeared to him that "Tony was pretty well intoxicated by then by drinking Vodka and whiskey and the beer that he started hustling some kids, high school age, I would say, and then . . .". (TR 1569). However, Deputy Sheriff Bobby Boatwright had no problems talking to appellant at the gas station after he exited the restroom. (TR 1667). At that time, Deputy Boatwright noticed dry blood on appellant's jeans and fresh scratch marks on his body. (TR 1667-1668). Appellant became hostile as a result of initial questioning and refused to identify himself. (TR 1669). At that point, appellant was arrested for disorderly intoxication based on Officer Boatwright's observation that he smelled alcohol on appellant and he saw open containers in the car. (TR 1670). Deputy Hodson testified that appellant's conduct was belligerent, however, once he got him into a holding cell at the Columbia County Jail, appellant was given something to eat and talked with Deputy Hodson. (TR 1680-1681). Officer Reich at the Columbia County Jail testified that on January 14, 1987, at approximately 5:00 p.m., appellant was brought to his facility for booking.

Appellant was hostile, cursing, and wanting cigarettes. (TR 1789-1791). Officer Reich, during the course of the booking, observed appellant remove papers from his pocket and proceeded to tear them up and try to eat them. (TR 1794). The papers were recovered and found to contain the name of Austin Scott, the victim. A 1937 Gold World's Fair ring was also found with the papers as a result of the cell search. (TR 1794-1795). Officer Reich was present when Detective Gallegos arrived and she immediately read appellant his Miranda warnings. (TR 1802). Appellant signed his rights card at approximately 7:15 p.m. on January 14, 1987 in the presence of Detective Gallegos and witnessed by Officer Reich. (TR 1802-1803). Officer Reich testified that when appellant arrived at Columbia County Jail, he smelled of alcohol and had obviously been drinking, but did not appear to be under the influence of alcohol. (TR 1819). Appellant had no difficulty in walking or getting around and his speech patterns were clear when discussing the crime with Officer Reich. (TR 1820). Detective Gallegos made similar observations when she talked with him after 7:15 p.m., January 14, 1987. (TR 1833).

Lt. Neil Nydam of the Columbia County Sheriff's Office was later called by Detective Gallegos to come to the jail concerning a homicide investigation. Lt. Nydam testified that when he arrived at the jail he asked appellant if he wanted to talk with him and after appellant said yes, Lt. Nydam read appellant his constitutional rights. (TR 1829). He was then brought to Lt. Nydam's office and at that point, again was apprised of his

Miranda warnings. The executed Affidavit of Rights form was signed by Castro at approximately 8:30 p.m. (TR 1905). Lt. Nydam observed that Castro's speech was clear, he did not seem intoxicated, he had a good memory and good recall and had no problems walking. (TR 1906). As a result of discussions with Castro, a taped confession was obtained. (TR 1907). Said confession was subsequently played to the jury.

SUMMARY OF THE ARGUMENT

ISSUE I

Robert McKnight's testimony that appellant attempted to stab him three days prior to the murder of Austin Scott was relevant and admissible pursuant to Williams v. State, 110 So.2d 654 (Fla. 1959). The admission of blood spatter evidence and testimony regarding a steak knife found near the murder scene was relevant and was admitted to either prove or disprove a material fact.

ISSUE II

Additional peremptory challenges requested by appellant pretrial and requested at trial during voir dire were not shown to be be required. The denial of appellant's request was not prejudicial.

ISSUE III

Statements not suppressed by the trial court were the result of voluntary and knowing waivers executed by appellant. Prior to each statement appellant was informed of his Miranda warnings and on at least two occasions he signed a rights form.

ISSUE IV

Pursuant to Meeks v. State, 487 So.2d 1058 (Fla. 1986), appellant's right to be present at all stages of his trial was not violated.

ISSUE V

Under Florida caselaw, appellant is not entitled to have the jury furnished special verdict forms delineating between felony murder and premeditated murder.

ISSUE VI

Appellant was not entitled to special interrogatory verdicts regarding the aggravating factors. This is especially true in the instant case where the statutory aggravating factors were limited to three factors under Section 921.141(5), Florida Statutes.

ISSUE VII

Appellant was not prejudicially harmed when the trial court failed to specifically define what a nonstatutory mitigation was. Moreover, the state was not required to limit cross-examination of Dr. Mara, especially when the cross-examination fell well within the scope of direct examination. The inquiry

concerning appellant's remorse for his earlier sexual encounters was not prejudicial and does not mandate a new sentencing proceeding.

ISSUE VIII

The two statutory aggravating factors that the crime was heinous, atrocious and cruel and that the murder was committed in a cold, calculated and premeditated manner were proven beyond a reasonable doubt. Therefore, the death penalty is appropriate sub judice.

ISSUE IX

The various attacks to the constitutionality of the Florida death penalty on its face and as applied are not well taken and contrary to the caselaw of this state.

ISSUE I

THE TRIAL COURT DID NOT ERR BY ALLOWING INTO EVIDENCE MATTERS THAT HAD NO RELEVANCE BUT WERE PREJUDICIAL.

Appellant cites three circumstances within which he urges reversal based on the admission of evidence at trial. Specifically he points to the testimony of Robert McKnight, wherein over defense objection, he testified that three days prior to the murder of Austin Scott appellant had tied him up and threatened to stab him to death. (TR 1588-1592). The admission into evidence over objection of defense counsel of the expert testimony of Officer Greg Stewart concerning blood spatter evidence (TR 1842-1854, 1855-1886), and finally, the admission of testimony concerning a steak knife which was found outside the apartment where the body of Austin Scott was found. (TR 1851-1656). Appellant argues the cumulative effect of the admission of the aforenoted violated his constitutional rights to due process and a fair trial and resulted in irreparable harm. Appellee disagrees and submits the following.

A. ADMISSION OF OTHER BAD ACTS.

Citing to Williams v. State, 110 So.2d 654 (Fla. 1959), appellant argues "the evidence of the prior bad act on the part of appellant against McKnight is clearly inadmissible as it has no relevance to any material fact in issue.'' (AB 16). Negating the possibility that said evidence was germane to show McKnight's state of mind, fear of appellant, he argues that McKnight's state of mind was totally irrelevant. The record reflects to the contrary.

Robert McKnight testified that on the Saturday before the murder, the day he met appellant, he had been with him between 30 and 45 minutes when appellant ripped up a sheet, tied his hands, gagged him and then with a knife at his throat, asked him where he wanted to be stabbed. McKnight testified that the only reason he was not harmed was because a man named Gallager came into the room and at that point, appellant released him. (TR 1593-1594). Appellant told McKnight that he was testing him. (TR 1594).

McKnight's fear may have been dispelled by appellant's telling him that he was only testing him. At the time of the murder of Austin Scott, however, McKnight's state of mind, specifically his fear of appellant, was genuine in light of the similarities of the violent act attempted three days earlier to him. Not only was McKnight's state of mind important to show why he went along with Castro, but it also went to prove motive, opportunity, intent, absence of mistake, and show a common plan

or scheme on the part of appellant. The trial court ruled that the admission of McKnight's accounting was relevant to show why McKnight stabbed Austin Scott after appellant told him to do so and more importantly, after McKnight saw the victim and believed him to be already deceased. (TR 1590).

Contrary to appellant's assertion, the evidence concerning the prior attack by appellant on McKnight was admissible and pertinent to the facts of Austin Scott's murder. See Craig v. State, 510 So.2d 857, 863-864 (Fla. 1987); Heiney v. State, 447 So.2d 210 (Fla. 1984); Roman v. State, 475 So.2d 1228, 1234 (Fla. 1985); Waterhouse v. State, 429 So.2d 301, 306, (Fla. 1983); Harmon v. State, ____ U.S. ____ (Fla. May 19, 1988) 13 F.L.W. 333 and Correll v. State, 523 So.2d 562 (Fla. 1988).

Moreover, assuming that appellant has demonstrated some error in the admission of McKnight's testimony, the instant case is a prime candidate for a harmless error analysis and finding. In light of the overwhelming evidence against appellant, it is inconceivable that the admission of the prior attack against McKnight by appellant was so prejudicial as to require reversal.

B. ADMISSION OF BLOOD SPATTER EVIDENCE.

Appellant next argues that it was reversible error to admit the testimony of Officer Greg Stewart regarding his analysis of the blood spatter evidence. Officer Stewart testified that he went to the crime scene and collected samples from the area surrounding the crime scene of what he believed to be blood stains. (TR 1864). He explained in great detail how he measured the stains from the apparent source and based on his calculations was able to determine that the blood stains were created from a front to rear motion from the "front of the room to the back of the room and this side of the bed (indicating)". On cross-examination, Officer Stewart testified that he did not know whether the blood stains had anything to do with Austin Scott's death.

However, the state did present testimony of Harry Hopkins who examined both the defendant and deceased blood types and the blood that was found or collected from the walls and ceiling of the murder scene. In examining the blood samplings, Mr. Hopkins was able to determine that the material was human blood and that the blood was consistent with the blood type of the victim. (TR 1755-1757, 1764-1765). Robert McKnight's testimony reflects that when he entered the room, he observed appellant covered with blood and helped appellant clean up and wipe down the blood throughout the apartment. (TR 1562, 1564 – 1565).

While Officer Stewart could not personally connect the blood spatter evidence with the crime that occurred, his testimony was

only one piece of the puzzle concerning the crime scene and the circumstances that occurred January 14, 1987. His testimony was relevant and assisted in the proof of a material fact pursuant to Section 90.401, Florida Statutes (1987). See Blanco v. State, 452 So.2d 520 (Fla. 1984), and Straight v. State, 397 So.2d 903, 905-907 (Fla. 1981).

C. ADMISSION OF TESTIMONY REGARDING A STEAK KNIFE.

A third issue upon which appellant asserts reversal is mandated concerns the admission of testimony regarding a steak knife. The record reflects that William Kohler, a part owner in the building at 26 Sanchez Street testified that a couple days following the murder of Austin Scott, he found a steak knife outside apartment 11. (TR 1655). Defense counsel sought to exclude all testimony regarding the discovery of the steak knife, and indeed, the steak knife was not introduced into evidence. Mr. Kohler did inform the jury that he found the knife. The state, through the testimony of crime lab technician Harry Hopkins presented evidence that there was no blood found on the knife and it was not the murder weapon. (TR 1753, 1760-1761). The state made no further reference to the knife but argued vehemently that the reason for informing the jury of its discovery and the fact that it did not have any traces of blood on it, was to dispel any attempt by the defense to argue that the state had a potential murder weapon but was unable to prove it

was the murder weapon. Indeed, the record reflects that the defense in closing brought up the circumstances of the knife and its lack of relevance to a crime herein.

The trial court ruled that the knife would not be admitted into evidence and it was not. The state made no further reference to the knife with the exception of ascertaining information from lab technician Hopkins that the knife did not contain any blood and therefore was not connected to the homicide. There was a valid purpose for its admission and even if error, was harmless error beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE II

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES.

Appellant contends the trial court abused its discretion in failing to permit additional peremptory challenges to the defense because he was forced to accept a juror who was first cousin to one of the state's witnesses, (TR 386-390), and a juror who indicated that he believed that if a person is arrested, he is probably guilty of the crime for which he is arrested. (TR 930-937).

Pretrial, appellant filed a motion for additional peremptory challenges asserting that the limiting of ten peremptory challenges to a capital case makes it more difficult for:

> A defendant charged with a capital crime to obtain an acceptable jury then for defendants charges with other then capital crimes. There is no compelling interest, nor is there any rational basis, for a limitation on the number of peremptory challenges in capital cases that makes it more difficult to obtain a fair and impartial jury in capital cases then in other criminal cases. (TR 2586-2587).

During the course of voir dire, appellant renewed his motion as follows:

> Ms. Jenkins: Since we have exercised all of our peremptory challenges, we would at this time be moving for additional peremptory challenges.

The Court: Motion denied.
(TR 1239)

From the outset, appellant sowed the seeds for the need for "additional peremptory challenges". In order to perfect the claim, he now points to two jurors, specifically, juror White and juror Waddy and provides generalized reasons why he was "forced" to accept them because he used all of his peremptory challenges.

It should be first noted that while he did renew his request for peremptory challenges during voir dire, the request was general and without specificity as to need. (TR 1239). Moreover, with regards to juror White, who, was a first cousin to one of the state witnesses, and a minister, (TR 391), he testified that he did not believe that he would be uncomfortable sitting in this case, nor would he have any problems being a fair and impartial juror to both sides. (TR 390). Juror Waddy, although at first acknowledging that he thought if you were arrested and brought to the courtroom you must have done something wrong, stated that he would have to acquit an individual if the state did not have sufficient evidence to prove beyond a reasonable doubt that a defendant was guilty. (TR 942).

Neither juror evidenced bias that precluded the defendant obtaining a fair trial. Pursuant to Parker v. State, 456 So.2d 436 (Fla. 1984); Jacobs v. State, 396 So.2d 713 (Fla. 1981) and Johnson v. State, 222 So.2d 191 (Fla. 1969), appellant has failed to demonstrate the trial court abused its discretion in not granting additional peremptory challenges to the defense.

ISSUE III

THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION WERE NOT VIOLATED WHEN THE TRIAL COURT DENIED APPELLANT'S MOTION TO SUPPRESS.

Appellant's next point on appeal requires little discussion. The record reflects that prior to any statements being made to Investigator Gallegos, Lt. Nydam and Investigator Leery, appellant was provided his Miranda warnings and executed at least two rights forms prior to making detailed statements to the authorities. In a pretrial motion to suppress hearing, (TR 2227-2434), the court heard the witnesses testimony regarding appellant's condition at the time he made the statements and the condition in which they found appellant. Based on the totality of the circumstances, the trial court ruled that all un-Mirandized sessions were to be excluded, however, those confessions made after Miranda warnings were not to be suppressed. As observed by appellant, the United States Supreme Court in Oregon v. Elstad, 470 U.S. 298, (1985), concluded that subsequent Mirandized confessions were not inadmissible although a suspect had once responded to unwarned yet uncoerced questioning. Recently in Patterson v. Illinois, _____U.S.____, decided June 24, 1988, 2 F.L.W. Fed. s 608, the United States Supreme Court observed:

> As a general matter, then, an accused who is admonished with

> warnings prescribed by this court in Miranda, 384 U.S., at 479, has been sufficiently apprised for the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one. We feel that our conclusion in a recent Fifth Amendment case is equally apposite here: "Once it is determined that a suspects decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intentions to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." See Morine v. Burbine, 475 U.S., at 422-423, 2 F.L.W. Fed. at S 610.

To suggest that the trial court in reviewing the totality of the circumstances, did not consider the voluntariness of certain statements, misstates the proceedings below. Clearly the statements were not erroneously admitted into evidence but rather were found to be voluntary based on timely Miranda warnings and a knowing waiver executed by appellant. See also Colorado v. Connelly, 93 L.Ed.2d 473 (1986), and Patterson v. State, 513 So.2d 1257 (Fla. 1987).

ISSUE IV

THE TRIAL COURT DID NOT ERR BY CONSIDERING A REQUEST FOR ADDITIONAL TESTIMONY BY THE JURY WITHOUT CONSULTING APPELLANT OR DEFENSE COUNSEL.

Appellant next argues that pursuant to this court's decision in Ivory v. State, 351 So.2d 26, (Fla. 1977), a new trial should result because in the absence of the prosecutor, defense counsel and defendant, the foreman of the jury asked the trial judge to rehear the testimony of Robert McKnight. The scenario which lead to this circumstance can be found at (TR 2079-2083). In a nutshell, the foreman asked the trial judge if they may rehear the testimony of Robert McKnight. This occurred outside the presence of defense counsel and the state following a stipulation by the parties that the trial court could tell the jury about the arrangements at lunch outside their presence and the presence of the defendant. The trial court herein made no ruling when inquiry by the foreman was made, rather, he asked the court reporter whether those notes were available and adjourned. When the parties returned, the court immediately informed them of the request and following discussions concerning said request, all parties agreed that the jury would have to use their own recollections of Mr. McKnight's testimony. (TR 2084-2086). During this entire circumstance and discussions, no objection was raised by defense counsel or the defendant that he was absence during critical point in the proceedings.

As acknowledged by appellant, several decisions emanating from this court since Ivory v. State, supra., have modified the per **se** rule announced therein. In particular, in Meeks v. State, 487 So.2d 1058 (Fla. 1986), this court held that neither Ivory v. State, supra. nor Rule 3.410 requires that a defendant be present with the judge responds to a jury request for additional instructions. Rule 3.410 only requires that the judge notify the prosecutor and defense counsel that the jury has requested additional instructions. See also Morgan v. State, 492 So.2d 1072 (Fla. 1986); Williams v. State, 488 So.2d 63 (Fla. 1986) and Roberts v. State, 510 So.2d 885, 891 (Fla. 1987).

Based on the foregoing, it is clear that the trial court committed no error in his entertaining the question asked by the jury foreman and then at the first opportunity to do so, informed both defense counsel and the prosecution of the circumstances. This court should affirm Issue IV on appeal.

ISSUE V

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUEST FOR SPECIAL JURY VERDICTS CONCERNING FELONY MURDER AND PREMEDITATED MURDER.

Appellant next argues that the trial court erred in failing to grant his request that the jury be given specific jury forms delineating between felony murder and premeditated murder. (TR 1961). In Brown v. State, 473 So.2d 1260 (Fla. 1985), this court held that "neither constitutional principles of law or procedure requires special verdicts in capital cases." 473 So.2d at 1265. In Buford v. State, 491 So.2d 355 (Fla. 1986), the court held:

> The crux of appellant's argument is that in light of the various theories of first degree murder presented to the jury, a special verdict form was required to insure that the jury did not convict him under a theory and factual setting which would prohibit the imposition of the death sentence. We disagree. In Brown v. State, 473 So.2d 1260 (Fla., cert denied, ____ U.S. ____, 106 U.S. S.Ct. 607, 80 L.Ed.2d 585, 1985,) we found no error in the trial court's refusal to use special verdict forms which would have indicated whether the first degree murder conviction was based upon premeditated murder or felony murder. Id. at 1265. Similarly, we now hold that a special verdict form is not required to determine whether a defendant's first degree murder conviction is based upon premeditated murder, felony murder or accomplice liability. 492 So.2d at 358.

Similarly, appellant has demonstrated no basis upon which to modify the holdings in Buford or Brown. Appellant's reliance on the recent Supreme Court's decision in Mills v. Maryland, ____U.S.____ 43 C.L.Rpt. 3056, June 6, 1988, does not change the outcome. In Mills, the United States Supreme Court was concerned with the ability of a Maryland jury to consider mitigating circumstances. Therein the question addressed whether Maryland could sustain a requirement of unanimity with regard to a finding of a mitigating circumstance. The dicta relied upon by appellant herein does not change or impact on the need for a special verdict form. See Rogers v. State, 511 So.2d 526 (Fla. 1987). Based on the foregoing, appellee would urge the court to affirm the trial court's denial for special jury verdicts herein.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUEST FOR SPECIAL INTERROGATORY VERDICTS REGARDING THE AGGRAVATING CIRCUMSTANCES.

Appellant next urges that the trial court erred in denying his motion for a interrogatory verdict regarding aggravating factors, seeking to have the jury give the specific vote on each aggravating which it found. Without citing authority for the proposition that the trial court erred, appellant argues that the reason such a vote is desirable is to protect against arbitrariness in the imposition of capital punishment. The practice and procedures formulated for the imposition of capital punishment neither mandate or require such a result. See Section 921.141 Florida Statutes. Moreover, it should be noted that in the instant case, the aggravating factors sought to be proved were limited. Appellant and the state entered into a stipulation as to the statutory mitigating factors. See Brown v. State, 473 So.2d 1260, 1271 (Fla. 1985) and Proffitt v. Florida, 428 U.S. 242 (1976).

Based on the foregoing, appellee would submit appellant has failed to demonstrate any error.

ISSUE VII

APPELLANT WAS NOT DENIED DUE PROCESS BECAUSE OF THE ADMISSION OF IRRELEVANT EVIDENCE DURING THE PENALTY PHASE AND THE REFUSAL OF THE TRIAL COURT TO GIVE PROPER REQUESTED INSTRUCTIONS.

Appellant next presents a three prong attack as to the propriety of circumstances occurring at the penalty phase. Specifically, he argues that questions asked of Dr. Mara concerning the mental health of former United States Senator Paula Hawkins was irrelevant and highly prejudicial; that he was denied specially requested jury instructions and that the trial court failed to instruct the jury that they may consider nonstatutory mitigating evidence in determining their recommendation.

A. QUESTIONING OF DR. MARA.

Appellant first complains that the prosecution improperly inquired of Dr. Mara on cross-examination whether she had knowledge regarding former United State Senator Paula Hawkins who had publicly admitted to being a victim of sexual abuse as a child. (TR 2161-2163). The cross-examination was well within the limits for cross-examination based on the direct testimony presented by Dr. Mara that after reviewing and diagnosing Mr. Castro, she was able to determine that:

ANSWER: Yes sir. I have gone over some of them briefly already in the total presentation, but just to list a few, you would look at the early history of neglect and abuse, and early history of neglect and deterioration.

No. 2. The early history of incest.

No. 3. The early history of lack of belonging, the alienation.

No. 4. The lack of development with what we call conscience, which usually begins about 3 or 4, appears as though the incest helped fixate that, helped stop it and delay it, and then a history of alcoholism and drug abuse.

QUESTION: Would you say, in your opinion, that the person that presented to you on the day in January, the person you evaluated, that he was what he is, what you have found him to be, because of what happened to him when he was a child, his experience as child?

ANSWER: In part, yes, sir.

QUESTION: Is anything about his development, the social history he presents to you, finding you have, is that normal with regard to someone who has been in his type of environment, his type of life?

ANSWER: Well, sir, what we have to look at is the research and literature in the field, in looking at what we know about side effects of abuse, these are often times, as I have cited as characteristic, some of the things that I mentioned as developing the side effects of abuse and incest, the different types of personality traits that delay development with the conscience, those kind of things are often times associated with an early history of abuse. (TR 2143-2144).

Clearly, based on the inquiry of Dr. Mara on direct examination, cross-examination attempted to investigating her knowledge of other individuals who were known to be sexually abused as children. It should be noted that on redirect by appellant's counsel further inquiry was made with regard to Dr. Mara's knowledge of former Senator Hawkins at which point Dr. Mara indicated that she had not examined her and had never evaluated her and therefore was unable to make any statements with regard to Paula Hawkins' mental status. (TR 2163, 2165). Moreover, in closing the state made no further mention of Paula Hawkins yet, defense counsel again informed the jury that Dr. Mara was not responsible nor had she evaluated Paula Hawkins regarding any sexual abuse she may have suffered as a child. (TR 2202).

The cross-examination sub judice was appropriate based on Parkins v. State, 238 So.2d 817 (Fla. 1970), and Booker v. State, 397 So.2d 910 (Fla. 1981).

Appellant argues also that the inquiry of the prosecutor found on p. 2154 of the record that "Okay. During your interview with the defendant, did he articulate, speak to you in terms of any remorse concerning . . .". was highly prejudicial and improper and therefore requires a new trial. The record reflects that at this point of the inquiry it was unclear as to what the question was going to be and apparently, the trial court, after listening to oral argument as to whether a mistrial or curative instructions should be granted denied both. Appellee would

submit that although lack of remorse is not a proper aggravating factor with regard to the imposition of the death penalty, the inquiry in the instant case was so obscure and unrelated to whether appellant actually had remorse for the murders that at best, the harmless error analysis in light of the overwhelming evidence of quilt vitiates any harm sub judice. See State v. DiGuilio, supra.

B. APPELLANT'S SPECIALLY REQUESTED JURY INSTRUCTIONS.

Numerous special jury instructions were requested by defense counsel at trial, three of which were denied and are the subject matter of the complaint herein. **(TR** 2766-2773). Appellant argues that because each of the instructions in particular, Instruction No.4, Instruction No. 6, and Instruction No. 7 purportedly state the law as established, the trial court erred in rejecting said instructions. Appellee would disagree. **A** plethora of cases hold that were standard jury instructions are presented at the penalty phase and they adequately address or touch upon those specially requested instructions by defendant, error has not occurred. See Parker v. State, 456 So.2d 436 (Fla.. 1984); Lemon v. State, 456 So.2d 885 (Fla. 1984); Vaught v. State, 410 So.2d 147 (Fla. 1982), and Delap v. State, 440 So.2d 1242 (Fla. 1983).

Further mention regarding Instruction No. 7 is necessary in light of the fact that the trial court in relying on Herring v. **State**, 446 So.2d 1049 (Fla. 1984) concluded that the aggravating

factor of cold, calculated, and premeditated was appropriate. Although this court has receded from Herring in Rogers v. State, 511 So.2d 526 (Fla. 1987), the standard jury instruction provided herein adequately covered that aggravating factor. See Rogers, supra.

C. THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY THAT THEY MAY CONSIDER NONSTATUTORY MITIGATING EVIDENCE IN DETERMINING THE PROPER PENALTY RECOMMENDATION.

Appellant's last complaint regarding the jury instructions at the penalty phase provides reversible error occurred when the trial court neither instructed the jury with regard to the statutory mitigating evidence nor provided a "catch-all" instruction to the jury that "any other aspect of the defendant's character or record, and any other circumstances of the offense," could be considered in mitigation. Appellant argues that "although the instructions make mention of the mitigating circumstances, nowhere is the jury told what kind of mitigating factors they are permitted to consider. As is clear from Dr. Mara's testimony and the trial court's finding of fact, the defense presented evidence of nonstatutory mitigating circumstances.'' (AB 42-43).

At the very worst the failure of the trial court to give an instruction that any other aspects of the defendant's character or record or any other circumstance of the offense may be considered in mitigation is harmless error beyond a reasonable doubt. The record reflects that at the close of the instructions at the penalty phase, defense counsel asked to approach the bench

and informed that court that the defense neglected to ask the court 'to actually define what a nonstatutory mitigating factor was. (TR 2213). The state countered that they had indeed encouraged the jury to consider all the "evidence of mitigating circumstances and *so* it's not as if the state is saying that no mitigating evidence exist," (TR 2213). The trial court ultimately determined that he didn't believe the instruction was critical and further stated " I think it would create undue influence since it was not asked of me until after I completely read everything, including the verdict form," (TR 2219).

The failure to instruct the jury with regard to what the nature of non statutory mitigation might be viewed in the context of the record clearly is harmless error beyond a reasonable doubt. No restrictions were placed on the jury as to what in mitigation they might consider. The instructions as presented specifically restricted the jury to three statutory aggravating factors and provided:

> Should you find sufficient aggravating circumstances to exist it is then your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.
>
> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching

> your conclusion as to the sentence that should be imposed.
> A mitigating circumstance need not be proved beyond a reasonable doubt. If you are reasonably convinced that a mitigating circumstance exist, you may consider it as established.
>
> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence in the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence should be based on these considerations. (TR 2210). (Emphasis added).

Neither the prosecution nor the trial court nor defense counsel in any way restricted what could be considered by the jury in mitigation. The prosecution in its closing argument stated:

> The judge is going to tell you that you first must consider these circumstances. Then you must weigh any mitigation that you find from the evidence that you heard during the trial and from the evidence presented by the defense side yesterday.
>
> I'm not going to elaborate on her testimony because you just heard it yesterday afternoon, but I submit to you she spent three hours with the man and did some drawing test and psychological test. She comes in here and tells you that he's an anti-social personality; he had a deprived childhood, and other factors that she gave you in her own opinion - - in her own opinion, she thinks that mitigates this murder. She doesn't know the facts of the murder.

> Mr. Black asked her, "Did anybody bother telling you what the facts of this murder were?" "No." Therefore, I don't think she is in a position to come in here and tell you what is mitigating. You decide that. You decide if Mr. Castro's anti-social personality or his deprived childhood. and the other things you heard mitigates this kind of crime. (TR 2194-2195).

There is no doubt that Edward Castro murdered Austin Scott. Castro confessed and the state presented testimony of Robert McKnight who all but saw the dastardly deed done. The state put on no additional evidence at the penalty phase of the trial. Castro (appellant's Statement of Facts (AB 9-10)), presented the testimony of Dr. Barbara Mara an expert in clinical psychology who had examined Castro and detailed his background to the jury. She testified that appellant was apparently sexually abused at an early age, suffered from guilt and remorse about his early sexual encounters and, as a result thereof had become addicted to alcohol and drugs. She related that much of his problems were related to his alcohol use and drug abuse and that he suffered from bouts of depression and further suffers from a mixed personality disorder. In sum, Dr. Mara testified that the following mitigating factors exist with regard to Castro:

1. That he had a early history of neglect and abuse;
2. That he had an early history of incest;
3. That he had an early history of lack of belonging and alienation;
4. That he lacked development of conscience;

5. That he suffered from alcoholism and drug abuse.

Based on the totality of these circumstances, the jury returned a recommendation of death by a 10 to 2 vote. The trial court in reviewing the jury's recommendation and the facts and circumstances of the case concurred with the jury's recommendation and imposed death. His written findings found three statutory aggravating factors applicable and two non statutory mitigating factors applicable.

Appellee is not unmindful of the teachings of Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), and Lockett v. Ohio, 98 S.Ct. 2954 (1978), however, the failure on the part of the trial court to provide instructions with regard to a definition of non statutory mitigating factors is harmless error. At its very worst, the omission herein resulted in a better situation then found under a "Hitchcock" violation, and this court has, on more then one occasion, concluded that where a Hitchcock violation occurs, harmless error will be applied if the totality of the circumstances demonstrate conclusively that neither the judge nor the jury would have been impacted by the "missing" instruction. See White v. Dugger, 523 So.2d 140 (Fla. 1988); Booker v. Dugger, 520 So.2d 246 (Fla. 1988); Demps v. Dugger, 514 So.2d 1092 (Fla. 1987); Ford v. State, 522 So.2d 345 (Fla. 1988) and Delap v. Dugger, 513 So.2d 659 (Fla. 1987). Moreover, harmless

error should be found because no evidence was presented regarding statutory mitigating evidence and the parties agreed that that particular instruction should not be read. (TR 2217-2218). As observed in White v. Dugger:

> . . . on the totality of the circumstances of this case we can, and do, unhesitatingly find that the instant evidence of non statutory mitigating circumstances, if in fact not considered by the jury and/or the judge, would conclusively have no effect upon the recommendation of the death sentence imposed in this case. The charge which may have limited the jury a consideration of statutory mitigating circumstances was clearly harmless. 523 So.2d at 141.

Based on the foregoing, appellee would urge that the issues raised in Issue VII do not mandate reversal.

ISSUE VIII

THE IMPOSITION OF THE DEATH PENALITY IN THE INSTANT CASE DOES NOT VIOLATE THE EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION BECAUSE IT IS BASED ON AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

Appellant next contends that of the three statutory aggravating factors found by the trial court, two were inappropriately found. Specifically, he contends that this capital murder was not especially wicked, evil, atrocious or cruel and the murder was not committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Appellee disagrees and submits that the record more then sufficiently supports beyond a reasonable doubt both findings.

A. HEINOUS, ATROCIOUS AND CRUEL.

The trial court found in a detailed finding of fact that the capital felony was especially heinous, atrocious and cruel. (TR 2776). Specifically, the court found:

> . . . According to the defendant's confession, the victim's ability to walk and speak was somewhat impaired, making the victim an easy target. However, the victim's senses were not completely impaired, because the defendant was able to

> read the fear on Scott's face; the defendant described Scott as "leery", "nervous", and "suspicious".
>
> When Scott attempted to leave, the defendant "snapped". Scott was thrown to the bed and choked. The victim's face "turned purple" and eventually "blood started coming out of his mouth." Scott struggled so violently that the defendant feared Scott was about to get loose or scream.
>
> After substantial difficulty, the defendant reached for and was able to grasp the knife he had placed in his sock. The defendant showed the victim the knife and told him to "settle down", that he only wanted to car. The victim struggled more, receiving several defensive wounds in his futile efforts to disarm his assailant.
>
> In a brutal finale, the defendant continued choking Scott, showed Scott the knife, and told Scott "Hey man, you're lost. Dig it.?" And started stabbing Scott. The defendant admitted stabbing the victim between 5 and 15 times and boldly asserted that he stabbed the victim "as many times as he wanted to".
>
> The defendant not only brutally choked the victim, but he inflected flesh wounds to Scott's hands as Scott attempted to fend off Castro. When Scott was unable to cry out, Scott was shown the instrument of his fate, verbally toyed with and then repeatedly stabbed. The court finds beyond a reasonable doubt that the murder was heinous, atrocious and cruel. (TR 2776).

Absent a single stab wound to the chest found in Proffitt V. Wainwright, 685 F.2d 1227 (11th Cir. 1982) rehearing denied, 706

F.2d 311, rehearing en banc denied, 708 F.2d 734, cert. denied, 104 S.Ct. 508, after remand, 756 F.2d. 1500 rehearing denied, 774 F.2d 1179, and absent a domestic type stabbing murder, Garron v. State, ____So.2d____ (Fla. decided May 19, 988) 13 F.L.W. 325, multiple stab wound murders and strangulation murders have traditionally been considered heinous, atrocious and cruel killings. The trial court so found in the instant case based on a plethora of evidence that not only did Mr. Austin suffer from the strangulation and multiple stab wounds, but also that he was fully aware of his impending death and taunted and teased by Castro regarding his impending death. Moreover, the medical examiner testified that based on the 11 wounds on Scott's body, some of those wounds were defensive wounds. (TR 1697-1698). Dr. Chen's also testified that although brutally strangulated, Scott was still alive and that the strangulation in addition to the stab wounds caused his death. (TR 1729). She further testified Scott probably lived about 10 minutes, (TR 1729), but the ultimate cause of death was the stab wounds and excessive bleeding due to the stab wounds. (TR 1720).

Based on the authority of the following cases, appellee would submit affirmance of the trial court's finding that the murder was heinous, atrocious and cruel must obtain. See Jackson v. State, _____So.2d____ (Fla. decided May 5, 1988) 13 F.L.W. 305 (stabbing); Quince v. State, 414 So.2d 185 (Fla. 1982) (strangulation); Lusk v. State, 446 So.2d 1038 (Fla. 1984) (stabbing); Lemon v. State, 456 So.2d 885 (Fla. 1984) (strangulation); Mitchel v. State ___ So.2d____ (Fla. decided May

19, 1988) 13 F.L.W. 330 (stabbing); Johnston v. State, 497 So.2d 863 (Fla. 1986) (stabbing); Floyd v. State, 497 So.2d 1211 (Fla. 1986) (stabbing); Tompkins v. State, 502 So.2d 415 (Fla. 1986) (strangulation); Johnson v. State, 465 So.2d 499 (Fla. 1985) (strangulation); Medina v. State, 466 So.2d 1046 (Fla. 1985) (strangulation and stabbing); Brown v. State, 473 So.2d 1260 (Fla. 1985) (strangulation); Nibert v. State, 508 So.2d 1 (Fla. 1987) (stabbing); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) (stabbing); and Smith v. State, 424 So.2d 726 (Fla. 1982) (stabbing).

B. THE CAPITAL MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT *ANY* PRETENSE OF MORAL OR LEGAL JUSTIFICATION

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this court receded from its previous holding in Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984), regarding its interpretation of cold calculated and premeditated manner without any pretense of moral or legal justification. Therein the court held:

> Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "to plan the nature of before hand: seek out . . . to design, prepare or adopt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described

> in the statute, which must bear the indicia of "calculation" since we conclude that "calculation" consist of a careful plan or prearranged design, we recede from our holding in Herring v. State, (cite omitted), to the extent it dealt with this question. 511 So.2d at 533.

The trial court in discerning that the instant homicide was in fact cold, calculated and done in a premeditated manner without pretense of moral or legal justification, detailed (TR 2774-2775) how Castro planned and carried out the death of Austin Scott. In sum, the court noted that Castro brought the victim to his room and immediately turned up his personality in order to keep the victim there and continued to give him alcohol. Castro's plan was to make sure Scott was sloppy drunk, staggering and slurring. The court noted:

> Back at the efficiency, Castro and Scott began drinking again. As they drank, the defendant contemplated methods of taking Scott's vehicle. Initially, the defendant considered merely tying Scott up, throwing him into the trunk and leaving with the car. Castro decided that this plan was not feasible, because a handyman was working in front of the apartments. The defendant feared Scott might attract the handyman's or the neighbors attentions.
>
> Armed with a second plan, the defendant instead asked Scott to give him a ride to the bus station then told Scott he needed a few minutes to collect a $10.00 debt. The defendant excused himself from the apartment, not to collect the $10.00 debt as he had told Scott but to get a knife from the upstairs apartment where McKnight was staying.

The defendant was unable to find the knife he had previously "stashed" so he instead "snagged" a steak knife from his neighbor's kitchen sink. In one confession the defendant states that "it (presumably the murder) was on my mind already." In a second confession, the defendant recanted that when he went to get the knife he knew he was "going to take this guy out." Unwilling to risk the possibility of Scott alerting the neighbors and motivated by his desire for another man's property, the defendant left and returned with a clear intention of killing Scott.

However, on his way back with the knife, the defendant was surprised to discover that Scott's car was no longer parked in front of the apartment. For a moment the defendant thought his plan had been foiled -- "this guy had gotten a sixth sense, a sense of survival. . . . he knew he was in trouble and decided it was time for him to leave," feared Castro.

The Castro saw Scott's car pulling around. The defendant waived Scott down and used his "golden tongue" to lure Scott back into the apartment for another beer. Castro began sizing up his prey -- Scott was drunk, nervous and he had valuable possessions (the car, two rings, a "nice" watch and maybe money) when Scott became visibly apprehensive and expressed a desire to leave, the defendant "snapped" into a frenzy. Unwilling to left a third opportunity at the car pass, the defendant killed Scott.

This was not simply a robbery that went awry. The murder was a result of a coldly rational and calculated plan to obtain Scott's car. By the defendant's own admission that intend existed at the time he went to get the knife. The defendant had

> already considered alternative ways to get Scott's automobile and ultimately determine that the safest ways was to silence Scott.
>
> When Scott nearly escaped, the defendant exerted great effort to lure him back. More then simple premeditation existed -- the defendant was a predator who planned, baited, lured and eventually crushed and bludgeoned the life from his victim. The court finds that a heightened premeditation existed and that the murder was committed in a cold, calculated manner without pretense of moral or legal justification. (TR 2775)

Appellee would submit that in light of Rogers v. State, supra. heightened premeditation necessary to apply this aggravating circumstances existed herein and the trial court so found. Unlike Mitchel v. State, ____So.2d _____ (Fla. decided May 19, 1988) 13 F.L.W. 330, this was not a case where rage arose resulting in the death of the victim. Rather, there was a preplanned premeditated design on the part of Castro to steal the possessions of Austin Scott. There was reflection on the part of the defendant to affect this murder. Beyond per adventure this aggravating factor applies.

Clearly the trial court was correct in discerning that three statutory aggravating factors were applicable in the instant case, as such affirmance of the aggravating circumstances found is mandated.

ISSUE IX

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

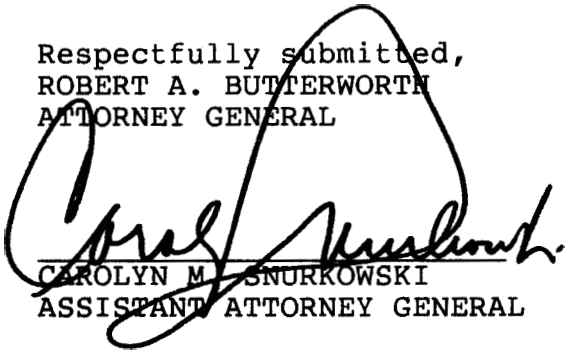
Appellant next presents a menagerie of constitutional claims asserting that the Florida sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied. Acknowledging that each of the claims have specifically or impliedly rejected, appellant in summary form urges reconsideration of each of these issues.

Without addressing each, appellee would merely urge that acknowledgment by appellant that the claims he has presented have all been addressed or decided adversely to the capital defendants and a similar result is mandated herein. See Rogers v. State, 511 So.2d at 536; Brown v. State, 473 So.2d 1260 (Fla. 1985); Spaziano v. Florida, 104 S.Ct. 3154 (1984); Proffitt v. Florida, 428 U.S. 242 (1976); Garcia v. State, 492 So.2d 360, 367 (Fla. 1986); and State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 94 S.Ct. 1950 (1974).

CONCLUSION

BASED ON THE FOREGOING appellant's conviction and sentence should be affirmed.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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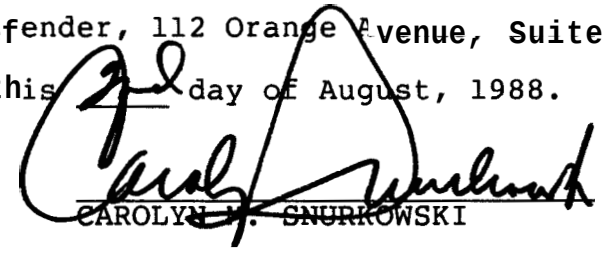
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF** has been furnished by U.S. Mail to Michael S. Becker, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014 this 2nd day of August, 1988.



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