SUPREME COURT OF FLORIDA

ANTHONY JOHN PONTICELLI,

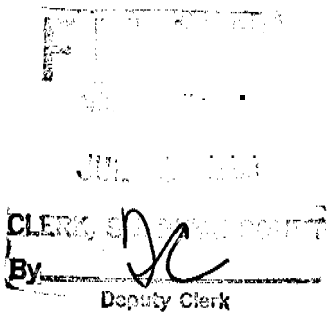
Appellant,

vs. CASE NO. 73,064

STATE OF FLORIDA,

Appellee.

_____/



ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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AUTHORITIES CITED

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SUMMARY OF ARGUMENT

POINT ONE: There was sufficient evidence upon which the court could rely in making its finding of competency. Two psychologists came to the opinion that Ponticelli[1] was competent after a battery of tests and extended personal interviews.

POINT TWO: Ponticelli was not in custody when he made his first three statements, as a result there was no Edwards violation. The defendant's sixth amendment rights were not violated either because the adversary proceedings had not begun. The trial court acted correctly in suppressing the statements at trial. The judge offered to give a curative instruction, but defense counsel was unable to form one.

POINT THREE: The testimony of Dr. Mark Branch was properly excluded because it neither would assist the trier of fact nor be applicable to evidence at trial.

POINT FOUR: Voir dire was properly limited to exclude questions regarding another, completely unrelated case that had resulted in an insanity acquittal. Examination of that type would serve to confuse the jurors. Also, the defense has not established prejudice to Ponticelli.

POINT FIVE: The trial court properly permitted the state to inquire of one of its witnesses, an inmate, regarding the

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[1] The appellant is referred to as the defendant, the defense, or by name. The appellee is referred to as the state. References to the record on appeal are indicated "(R and page)"; those to the initial brief denoted "(B and page)".

potential danger that he faced as a result of testifying. The testimony was admissible as anticipatory rehabilitation.

POINT SIX: The photographs complained of were not cumulative as each was used for different purposes. The record is not sufficiently detailed to support the claim of an extended publication of photographs to the jury.

POINT SEVEN: It was proper for the court to allow the state to ask of a psychiatrist during the penalty phase whether Ponticelli knew the difference between right and wrong, as well as whether he knew the consequences of his acts. Although the questions relate to the insanity defense, they are also relevant in determining whether mitigating factors exist under §921.141(6)(b) and/or (f), Fla. Stat. (1987).

POINT EIGHT: The murder of Nicholas Grandinetti was especially heinous, atrocious, and cruel. Ponticelli shot him in the back of the head, beat him with the butt of his weapon, and later left him moaning face down on the floor board of the car.

POINT NINE: The murders were committed in a cold, calculated, and premeditated fashion. Ponticelli told others to whom he showed the gun that he planned to kill the Grandinettis. He laid out and followed through on an intricate plan to deceive and then kill the victims. He brought the murder weapon with him and had an extended period of time to reflect upon his plan before carrying it out.

POINT TEN: The defense argument regarding application of the death penalty statute is procedurally barred because no objection was voiced below. The statute is facially constitutional because

it provides a process which narrows the class of murders who will face the penalty, and provides for mitigation and discretion during sentencing.

POINT ELEVEN: The trial court gave adequate consideration to mitigating circumstances, The court did consider the expert testimony, but rejected it.

POINT TWELVE: The capital sentencing statute is constitutional. The same general principles discussed in Point Ten apply here. Each additional specific ground raised has previously been rejected, and no sufficient grounds for reconsideration are present here.

POINT ONE

THE TRIAL COURT DID NOT ERR IN FINDING THE DEFENDANT COMPETENT TO STAND TRIAL.

The defense initially alleges error of constitutional dimensions and advances some well settled principles (B 31). However, the subsequent argument fails to establish constitutional error in the proceeding below. To the contrary, the weight of the evidence presented at the competency hearing is discussed to the virtual exclusion of all other considerations. As discussed in detail below, such an argument does not establish reversible error.

The standard of review on this issue is whether the trial court abused its discretion. King v. State, 387 So.2d 463, 464 (Fla. 1st DCA 1980), citing, Brown v. State, 69 So.2d 344 (Fla. 1954). King involved conflicting expert opinions regarding competency. Two defense witnesses, one psychiatrist and one psychologist, were of the opinion that King was incompetent. On the other hand, a court appointed psychiatrist believed him to be competent. In affirming, the court pointed out:

> Given the conflicting expert testimony on competency, it was the court's responsibility to resolve the disputed factual issue... Id., citing, Fowler v. State, 255 So.2d 513, 514 (Fla. 1971), which held "... it was and is the function of the trial court to resolve such factual disputes." (citation omitted).

Although the defense acknowledges as much (B 31-32), contrary facts are pointed to in attacking the finding of competency. However, there was sufficient evidence to support the competency finding. Cf., Ferguson v. State, **417** So.2d 631, **634** (Fla. 1982). The first expert witness to testify, Dr. A. John Mills, is a psychiatrist who believed the defendant to have been incompetent (R 1181). He spent only 15 minutes with Ponticelli, who rejected the evaluation (R **1180**). "A defendant may not thwart the process by refusing to be examined." Muhammad v. State, **494** So.2d 969, **973** (Fla. 1986), cert. denied, **479** U.S. 1101, **107** S.Ct. 1332, **94** L.Ed.2d 183 **(1987)**. **See** ~~also~~, Gilliam v. State, 514 So.2d 1098 (Fla. 1987). In addition to this brief meeting the doctor's opinion was based upon reports and depositions (R 1181). The doctor acknowledged that he had not ascertained whether the defendant could appreciate the nature of the charges against him (R 1183). Nor had he discussed with the defendant the range and nature of possible penalties, the advesarial process, or the defendant's capacity to disclose pertinent information to his attorney. These omissions are significant:

> ...[T]he standard to determine whether a defendant is competent to stand trial is "'whether he has sufficient present ability to consult with his lawyer with a reasonable understanding--and whether he has a rational as well as factual understanding of the proceedings against him.'" Pridgen v. State, 531 So.2d **951** (Fla. 1988), citing, Brief **of** the Solicitor General, which quoted, Dusky v. United States, 362 U.S. 402, **80 S.Ct. 788, 4** L.Ed.2d 824 **(1960)**.

Two psychologists were of the opinion that the defendant was competent (R **1196, 1207; 1217).** **Dr. Rodney A.** Poetter met with Ponticelli for two to two and one-half hours, during which he administered a battery of tests (R **1191-1192).** The defendant would not discuss particulars of the case (R **1194).** Nonetheless, the defendant defined different roles in the criminal justice system accurately (R **1195),** he understood the nature of the charges **and** penalties, and he was capable of assisting counsel (R **1201-1202).** Although Dr. Poetter sensed a suggestion of some personality problems, he found neither a major emotional disorder nor psychosis (R **1193, 1207).** The other psychologist, Dr. Harry Krop, met with Ponticelli for approximately two hours (R 1210). He found no evidence of mental illness (R **1212).** The defendant was able to discern between reality and fantasy (R **1213).** Ponticelli's refusal **to** discuss the case was a cognitive decision rather than a delusional process (R **1215).**

Further, the trial court had the benefit of observing Ponticelli during the competency hearing. Cf., Gilliam, supra, **1100.** Defense counsel below asked Dr. Krop what the defendant had told him he would do if a witness were to tell a lie about him. The defendant had indicated that he would sit passively and not say anything (R **1216).** However, Ponticelli's conduct was to the contrary during the testimony of Dr. Mills when the doctor testified that the defendant had rejected the evaluation. Ponticelli interjected, "That's false right there." Defense counsel cautioned, "Just be quiet" (R **1180).**

This court has "held that an unequivocal finding of competency by one expert *is* sufficient ...." Muhammad, supra, 972, citing, Ross v. State, 386 So.2d 1191 (Fla. 1980). Review by this court is limited to determining the sufficiency of the evidence. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981). Therefore, as there was sufficient evidence, the finding of competency should be upheld.

POINT TWO

THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS.

Four statements by Ponticelli were transcribed (SR 2; 12; 28; 46). He was not in custody when he made the first three.

> ...[A] suspect in a custodial interrogation by law enforcement officials is entitled to the procedural safeguard of the Miranda[2] warning, the key being that the suspect must be in custody. Correll v. State, 523 So.2d 562, 564 (Fla. 1988).

The first statement was taken at the home of John Turner (R 784, SR 2-11). Although the defendant was seated in a police car, he was not under arrest and was free to leave (R 787). Cf., Perry v. State, 522 So.2d 817 (Fla. 1988), where it was held that the mere fact that the statement was taken in the police station did not render the person in custody. Once Ponticelli indicated he wanted to speak to an attorney the first interview was terminated (R 795; SR 11). More than four hours later the defendant gave a second statement at the home of his parents, who were present (R 811-815; SR 12-27). The defendant was not under arrest at this time (R 815). The third statement was obtained during a telephone call which Ponticelli had made to the police (R 830; SR 28-45). The defendant's fifth amendment rights were not violated

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

in the taking of the first three statements because they were not obtained during custodial interrogation:

> The ultimate inquiry in determining whether a suspect is in custody is "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Correll, supra, **564-565**, citing, California v. Beheler, **468** U.S. **1121, 1125,** 108 S.Ct. **'3517, 3520, 77 L.Ed.2d** 1275 (1983), which quoted, Oregon v. Mathiason, **429** U.S. 492, **495,** 97 S.Ct. **711, 714, 50** L.Ed.2d **714 (1977)). See also,** Roman v. State, **475** So.2d **1228** (Fla. 1985), cert. denied, **475** U.S. **1090, 106** S.Ct. **1480, 89** L.Ed.2d **734 (1986).**

Ponticelli's fourth statement was taken while he was in custody **(R 837; SR 46-52).** However, **it** was preceded by the Miranda warning (R **837).**

The defense also argues ,that Ponticelli's fifth amendment rights were violated because the police reinitiated contact after he had requested counsel at the conclusion of the first interview **(B 40;** Edwards v. Arizona, 451 U.S. **477, 101 S.Ct.** 1880, **68** L.Ed.2d **378 (1981)).** Factually this is inaccurate. Ponticelli, who waited at Turner's house for his return from the state attorney's office, approached the officer. He asked if he could speak to his parents first before the officer interviewed them (R 811). Assuming, arguendo, that the police had reinitiated contact, the defense argument represents too broad of **a** reading of the Edwards' holding:

> ...[A]n accused, such as Edwards [i.e., one in custody], having expressed his desire to deal with

> the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. Id., S.Ct. at 1885.

The United States Supreme Court discussed the application of Edwards in Arizona v. Roberson, ___ U.S. ____, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988):

> The Edwards rule thus serves the purpose of providing "clear and unequivocal" guidelines to the law enforcement profession. Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Id., 2098, citation to, 451 U.S. at 484-485, 101 S.Ct. at 1884-1885 (emphasis added).

Ponticelli, unlike Edwards, was not in police custody when he gave his first three statements. The defense contends that a "clear Edwards violation occurred'' (B 40). However, each case it cites involves custodial interrogation.

The defense also argues that the trial court erred in not suppressing the statements because the detective had assured the defendant prior to the first statement that the statement could

not be used against him (B **36-37, 40-41).** The record does not indicate how far the tape had progressed before it was stopped at trial (R **790-791).** The judge observed, "... it's clear that the statement was given in response to the threat of the subpoena and that Investigator Munster told him that the statement wouldn't be used against him'' (R 792). Although the judge denied a motion for a mistrial, he did suppress the first statement and offered to give a curative instruction. However, defense counsel was unable to frame an instruction (R **805-807).** The judge could appropriately do no more.

The defense asserts in the heading for Point 11, although it is not argued further, that a sixth amendment violation resulted as well (B *36).* This contention is without merit:

> [Ponticelli's] sixth amendment claim fails because at the time the statement[s] [were] made formal charges had not been filed against him and, therefore, adversary proceedings had not yet commenced. Keen v. State, 504 So.2d **396,** 400 (Fla. 1987), citing, Moran v. Burbine, **475** U.S. 412, **106 S.Ct. 1135,** *89* **L.Ed.2d 410 (1986).** See also, Patterson v. Illinois, ___ U.S. ___, 108 S.Ct. **2389, 101 L.Ed.2d 2d 261 (1988).**

Accepting error below, arquendo, it was nonetheless harmless because admission of the statements did not impact upon the jury verdict. LeCroy v. State, **533** So.2d 750, **753** (Fla. 1988), citing, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). There were inconsistencies throughout all four of Ponticelli's statements. As a result had the first statement been suppressed

pretrial it would have had little effect. Further, the other inculpatory evidence was overwhelming. It included, but was not limited to, the following: Ponticelli had showed a gun to others and told them that he planned to kill two people (R 474, 537). After he committed the murders he returned and boasted that the had killed them (R 477, 517, 542). His clothes had blood on them (R 478), which one of the witnesses later washed out (R 479). The defendant also discussed the lingering death of one of the victims i e., shot in the head and yet moaning (R 479, 563, 541). Also, see the corroborative testimony of the physicians who performed the autopsies, (R 360-409), and that of the crime laboratory analysts (R 908; 926; 933).

POINT THREE

THE TRIAL COURT PROPERLY EXCLUDED THE TESTIMONY OF DR. MARK BRANCH.

Section 90.702, Fla. Stat. (1987), provides for the admission of expert witness testimony when it facilitates an understanding of the evidence or helps to determine a fact in issue. It further provides that "the opinion is admissible only if it can be applied to the evidence at trial." The fallowing colloquy took place after Dr. Branch's testimony had been proferred:

> THE COURT: And yet this witness can offer no testimony whatsoever on the elements of the insanity defense.
>
> MR. REICH: That's true.
>
> THE COURT: And there's no way he can relate his testimony to your client.
>
> MR. REICH: ...other than me giving him facts in a hypothetical question ... (R 992-993).

The judge then sustained the state's objection to the doctor's testimony without expressly stating the bases for exclusion (R 993). However, the questions above indicate that the proferred evidence was excluded as neither potentially helpful in resolving the insanity issue nor applicable to the evidence at trial.

Defense counsel below hoped to elicit testimony regarding the insanity defense from Dr. Branch despite the concession that he could not offer any testimony whatsoever on the elements of the defense (R 992). This court has instructed:

> The trial court has broad discretion over the admissibility of expert testimony and its determination will not be disturbed on appeal unless there is a clear showing of error. Way v. State, 496 So.2d 126, 127 (Fla. 1986), citing, Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct.1 1329, 79 L.Ed.2d 724 (1984).

In *Way* this court found no abuse of discretion in excluding the testimony of a clinical psychologist regarding the "toned down personality" and low keyed nature of Way to explain an outward lack of emotion. Id., 127. Although the issue in that case turned on the jury's ability to evaluate the defense claims without expert testimony, there was nonetheless no abuse of discretion below. Dr. Branch, who has a Ph.D. in psychology (R 973), is not licensed in Florida (R 988). His research area is behavioral pharmacology, and his subjects are monkeys, rats, and pigeons (R 974). He has never made a diagnosis upon a human (R 988). His "hope", however, is that this research can eventually be applied to humans (R 977). He told defense counsel, "... you're probably about as qualified as I am to make a diagnosis of psychosis" (R 986). The doctor conceded his testimony would be general in nature (R 989). He could not express opinions on whether a cocaine psychotic episode had occurred in this case (R 987), or whether the defendant knew the difference between right and wrong on the day of the murders (R 989). "This Court, as most other courts, will accept new scientific methods of establishing evidentiary facts only after a proper predicate has

first established the reliability of the new scientific method" Ramirez v. State, 14 F.L.W. 119, 120 (Fla. 1989). The defense has not established, indeed because it cannot, that testimony based upon animal behavioral studies is scientifically reliable for the purpose of supporting an insanity defense.

POINT FOUR

THE VOIR DIRE WAS PROPERLY LIMITED TO EXCLUDE QUESTIONS REGARDING A SPECIFIC CASE WHICH HAD RESULTED IN A VERDICT OF NOT GUILTY BY REASON OF INSANITY.

The extent of voir dire is subject to judicial discretion. Essix v. State, 347 So.2d 664, 665 (Fla. 3d DCA 1977), citations omitted, cert. denied, 357 So.2d 185 (Fla. 1978). Reversal upon limitation of voir dire must be based upon an abuse of that discretion. Zamara v. State, 361 So.2d 776, 780 (Fla. 3d DCA 1978), citations omitted, cert. denied, 372 So.2d 472 (Fla. 1979). "In the absence of demonstrable prejudice, not grounded upon mere speculation, reversal is not proper." Id.

Like the judge in Essix, the judge below permitted a wide scope of questions in an extensive voir dire. Id., at 665. The state agrees that potential jurors' attitudes toward the insanity defense are properly inquired about. Below both the court and defense counsel repeatedly addressed this issue during voir dire (R 18, 20, 23, 25,27, 28, 66-76, 79-81, 83-88, 90, 92-95, 118-123, 161-171, 173-175, 183, 198, 200-201, 208, 219-221, 224-225, 229-231, 235-236, 249-254 and 262). The case of Washington v. State, 371 So.2d 1108 (Fla. 4th DCA 1979), cited by the defense, is not on point because it involved a total preclusion by the trial court of questions regarding the insanity defense. The defense argument here illustrates the soundness of the judge's decision below regarding not getting "bogged down in what they know about the Greinert case and their feelings about that." (R

28). The defense now refers to John Hinckley. The questioning of the venire regarding other specific cases could very well confuse the jury concerning the appropriate issues.

Furthermore, the defense argument is based upon speculation. It conjecturally claims, "Much of the public sentiment was negative as can be discerned from the newspaper articles included in the record." (R 48). However, only one of the articles addresses public reaction to the Greinert verdict, and its subjects were limited to friends of one of the victims (R 1799-1800). Although the judge did acknowledge the notoriety of the Greinert case, (not unusual for a triple homicide), he did not acknowledge adverse public sentiment to the insanity defense as a result of that verdict (R 8). The defense simply has not established prejudice as a result of the limitation in voir dire.

As the testimony of the defense's sole expert was excluded (R 993), no insanity defense was raised. Further, no instructions on the insanity defense were given (R 1130-1146; 1365-1370). The limitation of voir dire was therefore harmless, if error at all, because it did not impact upon the verdict. LeCroy, supra.

POINT FIVE

THE TRIAL COURT PROPERLY DENIED THE DEFENSE MOTION FOR A MISTRIAL AFTER A STATE WITNESS, A CONVICT, HAD TESTIFIED REGARDING THE POTENTIAL DANGER HE FACED BECAUSE OF HIS TESTIMONY.

The state witness, Dennis James Freeman, was incarcerated at the Marion County Jail **(R 713)**. Prior to his placement there he was in the Lake County Jail, and prior to that in the Citrus County Jail. Id. Beyond any doubt the credibility of this witness was open to attack. In Bell v. State, **491** So.2d 537, **538** (Fla. 1986), this court **held** in relevant part:

> The credibility of witnesses is always in issue. C. Ehrhardt, Florida Evidence **§401.1** (2d ed. 1984). We see no violation to **the** evidence code in allowing a party to mitigate the impact of inconsistent statements likely to be introduced, nor anything intrinsic to the jury's truth-finding function in an arbitrary requirement that opposing counsel's trial strategy may not be undercut. "Generally the rule against impeaching your own witness has not been interpreted to forbid counsel from **asking** his own witness on direct examination about prior inconsistent statements or prior convictions when done in an attempt to 'soften the blow' or reduce the harmful consequences.'' Ehrhardt, 8608.2 (citations omitted).

Although the above expressly **refers** to prior inconsistent statements and prior convictions, it can lagically and appropriately be extended to witnesses whose credibility is subject to attack because of present incarceration. The quote in

any event implies as much because present incarceration is obviously the result of a prior conviction.

In Koon v. State, 513 So.2d 1253 (Fla. 1987), this court held:

> The fact that a witness has been threatened may bear on his credibility regardless of who made the threat. Therefore, there was a legitimate basis for the admission of this testimony. Id., at 1256, cert. denied, ___ U.S. ___, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1988).

Contrary to the defense contention that the testimony below was irrelevant (B 52), it was relevant "to take the wind out of the sails of a defense attack on the witness's credibility." Bell, supra, 538. Stated otherwise, the state was anticipatorily rehabilitating its witness by establishing that he was testifying despite the possibility of physical harm he faced in jail because he felt that it was "morally right." (R 716).

The defense also claims that the curative steps taken by the court regarding the testimony concerning possible danger led to "the suggestion that Appellant was 'arranging' for other inmates to possibly harm Freeman." (B 51). Defense counsel below apparently did not infer such a suggestion because he did not voice an objection at this point. Further, the portion of the colloquy reproduced in the defendant's brief omits an integral sentence. There is no indication of the omission by ellipsis points or otherwise. The exchange should have read:

> Q. Mr. Freeman, you were telling the jury that you felt that you could possibly be in danger as a result of testifying here in court.

> Danger from other inmates that you are currently housed with at the jail? [Omitted sentence].
>
> **A. Yes, Ma'am.**
>
> Q. Now, you're not currently housed with the defendant?
>
> A. No, Ma'am.
> (R 715) (emphasis added).

The exchange simply does not imply an "arrangement". If the jury attached any significance at all to the testimony, it would have been an inference that other prisoners view inmates who testify for the state with considerable hostility.

In any event, if error occurred it was harmless. As already discussed, there was overwhelming evidence of guilt. Further, the testimony complained of was unrelated to the guilt of Ponticelli. As a result it did not impact upon the verdict.

POINT SIX

THE PHOTOGRAPHS COMPLAINED OF WERE NOT CUMULATIVE; THE RECORD DOES NOT SUPPORT THE CLAIM OF EXTENDED PUBLICATION.

Admission of photographs is within the discretion of the trial court, and should not be disturbed in the absence of a clear showing of an abuse in that discretion. Patterson v. State, 513 So.2d 1257, 1260 (Fla. 1987) (citations omitted).

The photographs complained of, state's exhibits 9 and 12, were not cumulative as each was introduced for a different purpose. Exhibit 9 was used during the examination of an investigator for the medical examiner (R 352-353). The photograph revealed rigor mortis had set in upon the body of Ralph Grandinetti (R 357). The photograph was relevant because a time frame for the murder could be established by the rigor mortis (R 356). State exhibit 12 was used in examining the physician who had autopsied Ralph Grandinetti (R 363). Its relevance lied in the fact that the doctor confirmed that this was the body upon which she had performed the autopsy. Crime scene photographs and those of a victim's head at the autopsy were held to be relevant evidence in Grossman v. State, 525 So.2d 833, 837 (Fla. 1988). "Given the nature of the subject, [the photographs were] not unnecessarily gruesome; relevancy is the test." Id., 837 (citations omitted). Color photographs of the victim at the crime scene were held to be admissible as relevant evidence as well in Patterson, supra, 1260.

The defendant also alleges error because of extended publication of the photographs. While the publication may possibly have been of the duration claimed, the record simply is not conclusive on that issue, Assumptions are made by the defendant without reference to the record for support. The defense states, "...apparently the state posted them on an easel which was in continuous view by the jury." (B 53, emphasis added). No reference to the record is given; nor does the record mention an easel. It is also claimed that the "exhibits remained in continuous view, presumably with the additions of the photographs of Nick Grandinetti until the trial court finally had them turned around (B 54, emphasis added). The trial judge, who did not mention photographs, told the prosecutor to turn the "exhibit" around when not necessary for use by a witness (R 463). However, the exhibit used and discussed immediately before this instruction was the "map that has been marked State's Exhibit No. 1 for identification" (R 460). The defense reads more into the record than is there by relying on actions which "apparently" and "presumably" were taken by the state. Far more than an unsupported interpretation of the record favorable to the defense is required to establish a clear showing of an abuse of discretion.

In a footnote the defense acknowledges that no contemporaneous objection was voiced below concerning state's exhibits 16, 23 and 25 (B 55). Yet, their relevancy is nonetheless challenged. Because no objection was voiced any claim of error was waived. Cf., Castor v. State, 365 So.2d 701

(Fla. 1978); Williams v. State, 414 So.2d 509 (Fla. 1982).[3] Prolonged publication of these photographs is also claimed. As discussed above, the record is inadequate to support such a claim. Putting waiver of error aside, even if one were to accept prolonged publication it would nonetheless be appropriate to defer to the discretion of the trial judge. He was present to perceive undue juror reaction, if any. Therefore, he was in a far better position than a reviewing court to evaluate any prejudicial effect. The display of the photographs in any event was harmless error because of the other overwhelming evidence of guilt.

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[3] Should this issue, or any others infra, be found to be procedurally barred, it is suggested that a plain statement to that effect be included in the opinion to avoid litigation of the issue in later federal proceedings. See, Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1043, ____ L.Ed. 2d ____ (1989).

POINT SEVEN

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO INQUIRE OF A PSYCHIATRIST DURING THE PENALTY PHASE WHETHER THE DEFENDANT WAS ABLE TO DIFFERENTIATE BETWEEN RIGHT AND WRONG, AS WELL AS WHETHER THE DEFENDANT KNEW THE CONSEQUENCES OF HIS ACTS.

The defense of not guilty by reason of insanity and the mitigating factors under section 921.141(6)(b); (f), Florida Statutes (1987) are not mutually exclusive concepts as the defense argument suggests. The questions asked of the doctor, (1) "...whether the defendant knew the difference between right and wrong", and (2) "...ability to understand the consequences of his actions?" (R 1327-1328), unquestionably relate to the insanity defense. Fla. Std. Jury Instr. (Crim.) 3.04(b)2.a and b. However, the questions are relevant as well in determining whether any mitigating circumstances exist under section 921.141(6)(b) and/or (f), Florida Statutes (1987). If the jury found that the defendant did in fact know the difference between right and wrong, as well as the consequences of his actions it would have been reasonable to conclude that any mental or emotional disturbance was not extreme. §921.141(6)(b), Fla. Stat. (1987). Regarding subsection (f), a recognition of the difference between right and wrong is inherent to an appreciation of criminality. Also, knowing the consequences of one's conduct is a necessary predicate to conforming conduct to the requirements of law.

This case is readily distinguishable from those cited by the defense. In Mines v. State, 390 So.2d 332 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981), the trial court refused to consider the same two mitigating circumstances at issue here solely because it had found the defendant to be sane. Id., 337. The trial judge below, on the other hand, considered the mitigating circumstances at length and for the most part independently of the defendant's sanity (R 1835-1837). The trial court in Ferguson v. State, supra, ruled that the mitigating circumstance did not apply because the defendant had been found to be sane under the "M'Naghten Rule." Similarly, the judge below referred to the "M'Naghten criteria" in rejecting the defendant's claim of substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law (R 1836, para. 4). The primary distinction between Ferguson and this case is that M'Naghten considerations were but one of several bases upon which the judge in the instant case founded the rejectian of the factors in mitigation (R 1835-1836).

The defense gives the jury of lay persons far too much credit for what would have had to have been an inherent understanding of legal principles. It is contended, "...the prejudice cannot be minimized since the questions were clearly designed to persuade the jury that so long as Appellant was legally sane any other evidence of diminished or impaired mental condition was of no consequence.'' (B 58). The threshold inquiry should be: How could the jury comprised of lay persons be persuaded by a legal

argument, i.e., one based upon questions on the essential elements of the M'Naghten rule, when the judge did not provide an instruction an the insanity defense at the conclusion of either the guilt or penalty phases? (R 1130-1146; 1365-1370). The questions posed to the doctor by the **state** resulted in no prejudice to the defendant because the jury would have applied common definitions to the words used. As a result, if there was error in permitting the questions it was nonetheless harmless.

POINT EIGHT

THE MURDER OF NICHOLAS GRANDINETTI WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

The trial court correctly found the murder of Nicholas Grandinetti to be especially heinous, atrocious, and cruel (R **1834-1835).**

> ...[T]he test set forth in Dixon...requires that the murder be accompanied by additional acts that make the crime pitiless and unnecessarily torturous to the victim. Hildwin v. State, 531 So.2d 124, 128 (Fla. 1988), citing, State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

Nicholas Grandinetti was still alive and moaning after Ponticelli had shot him in the back of the head (R 479). Ponticelli then beat Nicholas' head with the butt of the gun because he did not have any bullets left (R 655). Yet, he still left the victim alive to suffer. Nicholas was discovered hours later, face down on the floor of the car and having difficulty breathing (R 309-312). One witness described Nicholas' suffering as "pretty bad." (R 321). There was a burn on his right ear (R 347-348; 386). He was conscious and moaning (R 349-350). The doctor who had performed the autopsy on the body testified that Nicholas would have been in pain until he went into a coma (R **399).** This was far more than mere murder by shooting (B 60). Ponticelli's additional acts and omissions subsequent to the shooting served to set this murder apart from the norm, and were unnecessarily torturous to the victim.

The finding of this aggravating factor was upheld in Huff v. State, 495 So.2d 145, 153 (Fla. 1986). That appellant had shot his mother in the head, but she remained conscious. He then struck her eight or nine times with the pistol before killing her with a third shot. In Lamb v. State, 533 So.2d 1051 (Fla. 1988), the finding of aggravation was affirmed. The victim had been struck in the head six times with a hammer. However, he did not die instantaneously and moaned until he was kicked in the face. Id., 1053. The opinion cited Thomas v. State, 456 So.2d 454 (Fla. 1984), which had held that a "bludgeoned skull supports finding that murder was heinous, atrocious, and cruel." Id.

In sum, it was not the shooting in the back of the head which made this an aggravated murder. However, it reached that level upon the defendant beating the victim about the head with the butt of the gun. A fortiori, it unquestionably was especially heinous, atrocious and cruel of Ponticelli to then callously leave a moaning Nicholas Grandinetti face down on the hot floor board of the car to die a slow, torturous death.

Should this court decide that this aggravating circumstance does not properly apply here, the death penalty is nonetheless appropriate. "[T]he elimination of this aggravating circumstance would not have resulted in [Ponticelli] receiving a life sentence." Cf., Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988). It has been held that a second contemporaneously committed homicide can be aggravated by the commission of the first. Cook v. State, 14 F.L.W. 187, 190 (Fla. 1989); LeCoy, supra, 755; Correll, 523 So.2d 562, 568 (Fla. 1988). Further,

the cold, calculated, and premeditated manner in which the murder was committed outweighs any possible mitigating factors.

POINT NINE

THE MURDERS WERE COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

Earlier in the day of the murders Ponticelli showed a gun to witnesses whom he told he was going to kill the victims (R 473-474; 537). Later, at the victims' trailer, the defendant's debt to the victims was discussed (R 416). He said that he would sell cocaine to settle it, and placed two unanswered phone calls. At that point Ralph Grandknetti said that they would just take him home. The defendant, however, persisted in his claimed desire to settle the debt that night (R 419). The three left in a car, the victims seated in front and the defendant in back. After the car pulled over Ponticelli pulled out the gun and shot both victims in the back of the head (R 473-474).

The sequence of events in this case resembles that in DuFour v. State, 495 So.2d 154, 164 (Fla. 1986), cert. denied, ____ U.S. ____, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1986), in which this court held:

> ...[A]ppellant's announcement of his intention to commit a murder and the subsequent execution-syle shooting sufficiently established a cold, calculated and premeditated murder with no pretense of any moral or legal justification.

Similarly:

> In McCray v. State, 416 So.2d 804, 807 (Fla. 1982), this Court stated that this aggravating factor "ordinarily applies in those murders which are characterized as

> executions or contract murders, although that description is not intended to be all-inclusive. Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988).

Like the holding in Jackson v. State, 522 So.2d 802, 810 (Fla. 1988):

> The fact that [Ponticelli] had ample time during this series of events leading up to the murder[s] of [the Grandinetti brothers] to reflect on his actions and their attendant consequences was sufficient to evidence the heightened level of premeditation necessary under section 921.141(5)(i).

This case is also analogous to Huff, supra. Ponticelli knew well in advance that he would be riding with the victims in their car. His "preparation and heightened premeditated design was evidenced by the fact that appellant must have brought the murder weapon with him into [the] car that day." Id., 153 (citations omitted).

In short, Ponticelli had laid out an intricate plan, upon which he later acted. He announced his intentions to others, deceived the victims, and shot them both in the back of their heads execution-style.

In the event that it is concluded that this factor is inapplicable in this case the death penalty should stand. Elimination of the aggravating factor would not have led to the imposition of a life sentence below. Hamblen, supra, 805. The murder of each victim stands in aggravation of the murder of the other. Cook; LeCroy; and Correll, supra. Further, regarding

Nicholas Grandinetti, the especially heinous, atrocious, and cruel nature of his murder outweighs any possible mitigation.

P INT TEN

THE FLORIDA DEATH PENALTY STATUTE IS CONSTITUTIONAL IN THAT §921.141(5)(h) AND §921.141(5)(i), FLA. STAT. (1987), ARE NEITHER VAGUE NOR APPLIED ARBITRARILY OR CAPRICIOUSLY.

PROCEDURAL DEFAULT

Despite the fact that the **cases** it now relies upon for its constitutional arguments predated the the August 1988 trial, the defense failed to voice an objection at trial (B 66). Generally, a contemporaneous objection is required to preserve an issue for review. Castor; Williams, supra. Failure to object even to constitutional error, unless of a fundamental nature, results as well in waiver of appellate review. D'Oleo-Valdez v. State, 531 So.2d 1347, 1348 (Fla. 1988), citing, Clark v. State, 363 So.2d **331, 333 (Fla.** 1978); Ray v. State, **403** So.2d 956, **960** (Fla. 1981). A portion of the defense argument focuses upon the limited instruction at the penalty phase (B 69). However, requests for specific instructions or objections to those given are required to preserve the issue for review. Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied, 475 U.S. 1103, 106 S. Ct. 1505, 89 L.Ed.2d 906 (1985).

The constitutional challenges of the defense may, however, be entertained to a limited extent by this court. It is proper for allegations of facial unconstitutionality to be resolved, but not those claiming unconstitutional application of statutes. Trushin v. State, 425 So.2d 1126, 1129-1130 (Fla. 1983). Therefore, all arguments now asserted for the first time which claim the

unconstitutional application af the death penalty statute are procedurally barred. Again, should the court agree, it is recommended that a plain statement to that effect be included in the opinion to avoid subsequent litigation of the issue(s) in federal courts. In the event that the issues are not held to be procedurally barred, a discussion on the merits follows.

ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL

In Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the United States Supreme Court held that §921.141(5)(h) "provides [adequate] guidance to those charged with the duty of recommending or imposing sentences in capital cases." Id., S.Ct. at 2968. The court explained:

> These provisions must be considererd as they have been construed by the Supreme Court of Florida.
>
> That court has recognized that while it is arguable "that all killings are atrocious, ...[s]till, we believe that the Legislature intended something 'especially' henious, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So.2d at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Id., S.Ct. at 2968, quoting, State —v. Dixon, supra; also cited, Alford v. State, 307 So.2d 433, 445 (Fla. 1975); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). See also, Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 3426, 77 L.Ed.2d 1134 (1983); Palmes v. Wainwright, 725 F.2d 1511, 1523-1524 (11th Cir. 1984).

Attacks upon aggravating factors under capital punishment statutes alleging vagueness or aribitrary and capricious application were discussed in Maynard v. Cartwright, ____ U.S. ___, 108 S.Ct. 1853, 98 L.Ed.2d 152 (1987).

> Furman [v.Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1973)] held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not ... Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbibrary and capricious action. Id., S.Ct. at 1858 (citations omitted).

It was pointed out that aggravating factors are used as "a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion" in Lowenfield v. Phelps U.S. , 108 S.Ct. 546, 554, ____ L.Ed.2d 2d ____, rehearinq denied, ____ U.S. ___, 108 S.Ct. 1126, 99 L.Ed.2d 286 (1988). The supreme court evaluated, among others, the Florida capital-sentencing scheme and held that it passed constitutional muster because "the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition." Id. After specifically discussing the validity of Florida's capital-sentencing scheme, the court concluded that the constitution requires no more than that the process "narrows the

class of death eligible murderers and then at sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion." Id., 555.

The defense's reliance on a number of cases is misplaced. Oklahoma's identically worded aggravating factor was held to be unconsititutionally vague in Maynard, supra. The holding was based not only upon the finding that the words "especially heinous, atrocious, and cruel" facially did not provide adequate guidance, but, further, the Oklahoma appellate courts, unlike Florida's, had not previously construed the words to provide notice to one who faced the death penalty. Oklahoma's process was held to be constitutionally infirm for virtually the same reason that Georgia's had been in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980):

> ...[A]s a result of the vague construction applied, there was no "principled way to distinguish this case, in which the death penalty was imposed from the many cases in which it was not." Maynard, S.Ct. at 1859, citing, Godfrey, U.S. at 433, S.Ct. at 1767.

Significantly, the court suggests Proffitt v. Florida, supra, for comparison, This court is provided with specific factual findings by the trial courts. Therefore, unlike the Oklahoma courts, this court has a basis for review from which it may conduct a proportionality analysis. Unlike the procedure discussed in Furman and Godfrey, supra, Florida's process has expressly been found to be constitutionally sound:

> The court twice has concluded that Florida has struck a reasonable balance between sensitivity to the individual and his circumstances and ensuring that the penalty is not imposed arbitrarily or discriminatorily. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 3156, 82 L.Ed.2d 340 (1984).

The above quote squarely rejects the defense contention that this aggravating factor "is unconstitutional since it is susceptible to arbitrary and capricious application." The defense inaccurately states that the finding of an especially heinous, atrocious, and cruel murder was upheld in Raulerson v. State, 358 So.2d 826 (Fla. 1978). The factor was discussed, but no conclusion was stated on the issue. Id., 834. The conclusion ultimately reached, after other factors were also considered, was that the mitigating circumstances were outweighed by the aggravating circumstances. Id., 835. In the second Raulerson v. State, 420 So.2d 567, 571, 572 (Fla. 1982), this court addressed the issue and expressly held that the appellant's argument was meritorious. This does not establish an inconsistency, however, because the ultimate holding was essentially the same as that in its predecessor. "There being no finding of mitigating circumstances, the error was harmless." Id., 572 (citation omitted).

The defendant offers three other cases in addressing "[a]nother example of patent inconsistency ... in the subjective view of what additional facts separate a murder from the norm" (B 70). The argument suggests that the finding or rejection of the

aggravating factor in each case resulted from a focus solely upon the fact that the murder had occurred in the home of the victim(s). In Troedel v. State, 462 So.2d 392, 397-398 Fla. 1984), the factor was upheld not only because the murder had taken place in the victims' home, but also because one victim had been deliberately tormented by being shot in the legs before being killed. Nor did the location of the murder in and of itself justify the aggravation finding in Breedlove v. State, 413 So.2d 1 (Fla. 1982). Although the victim died from a single stab wound, the murder had been committed during a burglary and while the victim was asleep in his bed. The victim did not die immediately and suffered considerable pain. Id., 9. The third case, Simmons v. State, 419 So.2d 316 (Fla. 1982), is not at odds with the other two cases despite its holding that the fact that the victim had been murdered in his home did not support the finding of an aggravating circumstance. There was no evidence that the victim knew he was about to be attacked. Further, his death was most likely instantaneous. Id., 319. Simmons, unlike the other two, did not involve aggravation by facts independent of the location of the murder in the home of the victim(s). In short, the defense argument fails to establish an "inconsistent, arbitrary and capricious application of this aggravating circumstance" (B 70).

COLD, CALCULATED, AND PREMEDITATED

The general constitutional principles discussed above apply to §921.141(5)(i) as well. A federal appellate court has reviewed this aggravating factor specifically and held in relevant part:

> While most capital murders require premeditation, the Florida courts have construed §921.141(5)(i) to require a greater degree of premeditation **and** cold-bloodedness than is required to obtain a first degree murder conviction. See Brown v. State, 473 So.2d 1260, 1268 (Fla.) ("[cold, calculated] factor places a limitation on the use of premeditation as an aggravating circumstance in the absence of some quality setting the crime apart from mere ordinarily premeditated murder"), cert. denied, ___ U.S. ___, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985). Given this limiting construction, §921.141(5)(i) is a facially valid aggravating circumstance because it genuinely narrows the class of persons **eligible** for the death penalty. Harich v. Wainwright, 813 F.2d 1082, 1102 (11th Cir. 1987), adopted in, Harich v. Dugger, 844 F.2d **1464, 1468-1469** (11th Cir. 1988).

The defense claims that this court has been inconsistent in its interpretation of §921.141(5)(i). The argument presents a dichotomy, i.e., "manner" of killing vis-a-vis "state of mind" (B 70-71). The terms are inappropriate for contrast. "Manner" is an inclusive term taken directly from the statute:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. §921.141, Fla. Stat. (1987) (emphasis added).

The proper terms for a comparative analysis were provided in Johnson v. State, **465** So.2d 499 (Fla. 1985), cert. denied, 474 U.S. **865,** 106 S.Ct. 186, 88 L.Ed.2d 154 (1985):

> The finding that the murder was committed in a cold, calculated, and premeditated manner, without pretense of moral or legal justification was also supported by the evidence. This factor focuses more on the perpetrator's state of mind than on the method of killing. Id., 507 (emphasis added).

Hence, the "manner" includes both "state of mind" and the "method of killing" considerations. Caruthers v. State, 465 So.2d 2d 496 (Fla. 1985), which held that this "factor applies to a manner of killing characterized by a heightened premeditation beyond that required to establish premeditated murder", is not contrary to Johnson because a premeditation analysis requires the consideration of both the perpetrator's state of mind and the method of killing:

> Premeditation can be shown by circumstantial evidence ... Premeditation is, a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Provenzano v. State, 497 So.2d 1177, 1181 (emphasis added) (Fla. 1986), cert. denied, 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 517 (1986).

Although other dicta in Provenzano appear to use "manner" in lieu of "method of killing", the analysis applied by the court is consistent with the state's position asserted here. None of the cited cases suggests that either the perpetrator's state of mind or the method of killing represents the sole appropriate means of analysis to the exclusion of the other. On the contrary, the

cases all suggest that both should be considered, or at least that neither should be excluded from consideration, in determining whether a murder was committed in a cold, calculated, and premeditated manner.

The defense contends "there is a patent inconsistency in application of the second prang of the cold calculated or premeditated, [sic] without any pretense of moral or legal justification factor" (B 71, emphasis in initial brief). A passage from Banda v. State, 536 So.2d 221, 225 (Fla. 1982), is quoted by which the defense implies, through the emphasis of "any", that any claim of justification or excuse is sufficient to preclude a court from finding this aggravating circumstance (B 71). However, the passage, in relevant part, provides preclusion only for "... any claim ... that ... rebuts the otherwise cold and calculating nature of the homicide." Id. (emphasis added). Furthermore, if the construction urged by the defense were to be accepted any murderer could avoid this aggravating factor simply by raising a frivolous claim of justification or excuse. Inconsistency is not established by the other cited cases either. The differing holdings in Cannady v. State, 427 So.2d 723 (Fla. 1983); Provenzano, supra; and Turner v. State, 530 So.2d 45 (Fla. 1988), resulted simply from the different underlying factual situations. There is a fundamental flaw in the defense argument:

> In short, [Ponticelli's] attempts to compare cases which share some, but not many, characteristics is unpersuasive. Qualitatively ranking murders is, to be sure, an imprecise business. Harich, supra, 1103.

Incredibly, the defense also claims "[t]his court itself has recognized the inconsistency and arbitrariness of its application of this aggravating circumstance" (B 72). The basis for this contention is that Rogers v. State, 511 So.2d 526 (Fla. 1987) disapproved the application of (5)(i) as was done in Herring v. State, 446 So.2d 1049 (Fla. 1984). First of all, this court receded to the limited extent it did based upon a substantive analysis of §921.141(5)(i), not because it found unconstitutional arbitrariness in its prior applications of the statute. "Since we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in Herring ... to the extent it dealt with this question." Rogers, 533. Even if one were to accept the defense's strained interpretation of the effect of Rogers, it is not suggested that the perceived constitutional infirmity still exists or that the decision below was affected by Herring. The intervening Rogers decision no doubt corrected any problem of constitutional dimensions which may have been created by Herring.

POINT ELEVEN

THE TRIAL COURT GAVE ADEQUATE CONSIDERATION TO MITIGATING FACTORS.

The sentencing order contains a protracted analysis of mitigating circumstances (R 1835-1837). The defense complains that "it is unclear whether the trial court found this factor [i.e., lack of significant criminal history] as a mitigating factor (B 76). In Brown v. State, 473 So.2d 1260 (Fla. 1985), cert. denied, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985), this court held:

> That the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered. The trial court obviously rejected appellant's showing as having no valid mitigating weight. Id., 1268; see also, Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986), cert. denied, ____ U.S. ____, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1986); Johnson v. Wainwright, 778 F.2d 623, 629 (11th Cir. 1985), cert., denied, ____ U.S. ____, 108 S.Ct. 210, 98 L.Ed.2d 152 (1987).

Further, a trial judge is not obligated to find mitigating factors. Suarez v. State, 481 So.2d 1201, 1210, citation omitted (Fla. 1985), cert. denied, ____ U.S. ____, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986). The defense draws a spurious distinction between this case and Quince v. State, 414 So.2d 185 (Fla. 1982), cert. denied, 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed.2d 155 (1982), in claiming its challenge is aimed at the court's evaluation of the mitigating factors rather than the weight afforded them (B

75). Nonetheless, "[m]ere disagreement with the force to be given [mitigating circumstances] is an insufficient basis for challenging a sentence." Echols v. State, 484 So.2d 568, 575 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1987), citing, Quince.

The defense also assigns error because the trial court allegedly refused to consider unrebutted testimony by Dr. Mills (B 78). While the testimony went unrebutted during the penalty phase, it was controverted by the evidence presented by other experts earlier in the proceedings. The court obviously did consider the doctor's testimony, but nonetheless rejected it (R 1835-1836). The court accurately concluded that the testimony was "mere speculation" (R 1835).

The last issue raised by the defense is the trial court's reference to the "M' Naghten criteria" (B 78; R 1836). Refer to Point Seven, supra, for a detailed analysis of this issue. Stated succinctly, there are a number of considerations common to both the elements of not guilty by reason of insanity and the mitigating factors under §921.141(6)(b) and (f).

POINT TWELVE

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

The general allegations have already been addressed under Point Ten, supra. Stated simply, the Florida capital sentencing statute is constitutional both on its face and in its application. It provides a process which narrows the class of death eligible murderers. It also provides for the consideration of mitigating circumstances and for the exercise of discretion at sentencing. Further, in this case there was no pretrial motion filed challenging the constitutionality of the statute. Nor was this argument advanced at any time during the proceedings below. As a result, any arguments directed at the alleged unconstitutional application of the statute are procedurally barred. Again, if this court so finds, a plain statement to that effect should be included in the opinion. The following argument will respond to the additional arguments made.

The defense concedes that the boilerplate list of challenges has been repeatedly rejected. This point is repeated virtually word-for-word in every death penalty case; See, e.g., Stano v. State, 460 So.2d 890 (Fla. 1984), in which these "grab bag" claims were rejected. Id., 894-895. However, unlike some other cases, in addition to being meritless, most of the defendant's claims were never raised in the trial court, and thus are not preserved for review. See, e.g., Eutzy v. State, 458 So.2d 755 (Fla. 1984).

The constitution does not require a state to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). As the court in Spinkellink recognized, Florida has provided that aggravated circumstances must be found beyond a reasonable doubt. However, those in mitigation need not rise to that level. Further, since no objection to the instructions below was voiced, the issue is procedurally barred from review. Adams, supra.

Ponticelli's "vague and inconsistent" application argument is barred as well. D'Oleo-Valdez, supra. As pointed out earlier, the United States Supreme Court rejected just such an argument in Proffitt v. Florida.

The claim that there was an error under Lockett v. Ohio, 438 U.S. 586, is also barred because no objection was voiced. Assuming, arguendo, that the issue is not barred, it is nonetheless without merit. Individualized sentencing determinations are provided for and were made below. Any doubt regarding that can be resolved by referring to the judgment and sentence (R 1833-1837).

Ponticelli's fourth constitutional challenge relates to the fact that the statute failed to provide him with notice of the aggravating circumstances which could be found. No such notice is required as the statute itself is sufficient on this score. See, e.g., Sireci v. State, 399 So.2d 964 (Fla. 1981); Preston v.

State, 444 So.2d 939 (Fla. 1984). A similar claim was rejected in Spinkellink v. Wainwright, 578 F.2d 582, 609 (5th Cir. 1978).

The punishment of death by electrocution as provided under Florida's death penalty statute is neither cruel nor unusual punishment. Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982); Proffitt, supra, S.Ct. at 2964; Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 2922-2932, 49 L.Ed.2d 859 (1976).

Defense counsel below failed to argue that the sentence was improper because the sentencing recommendation is not required under the statute to be rendered by a unamimous or substantial number of the jurors. As a result it is barred here. Further, Ponticelli lacks standing to raise this issue because he was not adversely affected by this part of the statute because a substantial majority of the jurors, nine to three against, recommended the death penalty (R 1372). State v. Hagan, 387 So.2d 943, 945 (Fla. 1980); Sandstrom v. Leader, 370 So.2d 3, 4 (Fla. 1979). Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), held that there is not even a "...constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." S.Ct. at 3165.

The defense did not object to the "death qualification" of the jurors below, thereby waiving assignment of error. Even if it had, such a jury is constitutionally sound. Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 1765, 90 L.Ed.2d 137 (1986).

The defense contends that the "Ellege Rule", Elledge v. State, 346 So.2d 998 (Fla. 1977), would be unconstitutional "if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor" (B 82). The defense simply does not show that the case is to be so interpreted in the instant case. Cf., Hamblen, supra.

The defense lacks standing to argue that §921.141(5)(d), Fla. Stat. (1987), results in an automatic death sentence in felony murder cases. This is not a felony murder case, and, as a result, Ponticelli is not adversely affected by this portion of the statute. Further, a similar claim was rejected in Lowenfield, supra, S.Ct. at 554.

The defense argues that "a disturbing trend" is apparent in the review of capital cases by this court (B 82). This sweeping conclusion is based upon "two cases" which allegedly "clearly demonstrate" that "the death penalty as applied in Florida leads to inconsistent and capricious results" (B 83-84). A more substantial sample of cases is required to support such a claim. More fundamentally the issue is prematurely raised as this court has not addressed this case yet. There simply is no issue in controversy on this point at this time.

The last constitutional issue raised is procedurally barred and the defendant lacks standing. No objection was voiced that the statute as applied had a prejudicial effect upon the defendant because of his race. Such an objection would have been absurd as Ponticelli and his two victims, the Grandinetti

brothers, are all caucausians (R 1377; 1382). As he cannot show prejudicial impact, he lacks standing to raise this issue. Also, this claim, like the others, has been previously rejected. Cf., Stewart v. Dugger, 847 F.2d 1486, 1495 (11th Cir. 1988), citing, McCleskey v. Kemp, ___ U.S. ____, 107 S.Ct. 1756, 95 L.Ed. 2d 262 (1987); Ford v. Strickland, 734 F.2d 538, 541 n.2 (11th Cir. 1984).

In sum, all of the issues raised under this point have been previously rejected. The defendant has failed to present a valid reason for this court to reconsider its prior holdings.

CONCLUSION

Based upon the foregoing argument and authorities cited therein, the appellant respectfully requests this honorable court to affirm the judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by mail to: Michael S. Becker, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014 on this 28th day of June, 1989.

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