IN THE SUPREME COURT OF FLORIDA

DONALD GUNSBY,

Appellant,

vs.

CASE NO. 73,616

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts and adopts appellant's recitation of the case and facts with the following additions or exceptions.

On April 20, 1988, Appellant Donald Gunsby was attending a party when he learned that a friend of his had been in an altercation with "Tony", one of the Middle Eastern proprietors of a nearby convenience store. (R 192, 223)[1] Gunsby went with others to the store, where he told the cashier that if Tony came back he was going to hurt him. (R 254) Shortly thereafter, Gunsby returned to the party and stated that he was "...tired of those damn Iranians messing with the blacks." (R 224) Gunsby again left the party and returned a short time later wearing a camouflage suit. (R 224)

At about 9:30 p.m., Hisham Awadallah was counting a cash register at Sam's Big Apple, a convenience store owned and operated by his father and three brothers. (R 235, 239) There were customers in the store as well as Opal Latson, a cashier who worked there, and Nasser "Tony" Awadallah, the victim's brother. (R 240, 257) Gunsby entered the store alone, wearing a camouflage suit, and without saying a word, fired one fatal shot at Hisham Awadallah and ran. (R 239-240, 256-258) Both Tony and Opal recognized Gunsby as a frequent customer, although they did not know him by name. (R 243, 255) Both witnesses immediately identified appellant from a photo line-up of twenty-three

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[1] (R) refers to the record on appeal. (SR) refers to the supplemental record on appeal. (B) refers to appellant's initial brief.

pictures, and positively identified him as the gunman at trial. (R 249, 259, 334-339, 1035-1043)

Gunsby then returned to the party and said he had taken care of the problem. (R 228)

The medical examiner testified that the cause of death was a gunshot wound to the right side of the chest one and three quarters (1 3/4) of an inch in diameter which caused massive hemorrhage and injury to the right lung, liver and heart. (R 306, 317) An x-ray of the body that was introduced in evidence showed dozens of shotgun pellets in the victim's chest cavity. (R 306, 309-310) The doctor opined that Mr. Awadallah was conscious for up to a minute and died within two to three minutes. (R 313) The muzzle of the shotgun was a few feet away from the victim when fired; a blood spatter expert opined the victim was standing behind the counter when he was murdered. (R 285, 315, 330) This is consistent with the eyewitnesses' testimony. (R 239, 256).

At the close of the state's case, defense counsel stated, "Your Honor, for the record I would make a motion for judgment of acquittal." (R 373) No grounds were given. The motion was denied. After the defense case, but before rebuttal, counsel renewed the motion but again stated no grounds.

After deliberating over four hours, the jury returned a unanimous verdict of guilty as charged.(R 857)

Several weeks later, the jury reconvened for the penalty phase. Four witnesses testified concerning Gunsby's mental condition. One lay witness testified that before and after the murder, appellant's demeanor was normal. (R 559-561) The state

presented testimony from Dr. Umesh Mhatre and Doctors Rodney Poetter and Ira Conley testified for the defense.

Dr. Mhatre's written report determined that Gunsby did not suffer from any mental illness and was competent to stand trial. (SR 16) During the interview, Gunsby "showed good eye contact, providing a lot of spontaneous information. His mood was normal and his affect was appropriate. He denies any auditory or visual hallucinations, neither was there any evidence ...(of) psychosis." (SR 15) Gunsby was oriented to time and place, had good concentration and displayed no evidence of cognitive deficit. (SR 15) Dr. Mhatre testified that in his opinion, Gunsby "clearly knew what he was doing" on the day of the murder "and he suffered no substantial impairment in understanding his legal obligations." (R 570) The lack of paranoid tendencies was underscored by Gunsby's outgoing personality. He frequently invited people to his apartment to lift weights. (R 572-573) The doctor was aware of Gunsby's family history, but found no evidence that Gunsby suffered from any mental illness.

Dr. Rodney Poetter testified that Gunsby appeared "rather slow cognitively thinking," and scored low on vocabulary and intelligence tests. (R 594-597) Gunsby's reading and spelling skills are equivalent to a third or fourth grade level, according to Dr. Poetter. (R 597) On cross-examination, the doctor agreed that Gunsby understood the questions asked of him and responded appropriately. (R 599) He was oriented to time and place and did not claim to hear voices or exhibit signs of persecutory ideation. (R 600) Dr. Poetter found no evidence of delusioned

thinking. (R 601) Gunsby did not suffer from severe or extreme mental or emotional disturbance in Dr. Poetter's opinion and found no mental illness detectable. (R 601-603) When asked about Gunsby's attempt to establish an alibi, Dr. Poetter stated that Gunsby was trying to justify an act that he knew was wrong. (R 605) Dr. Poetter confirmed his written diagnostic impressions that Gunsby was mildly retarded with no other behavioral symptoms other than an antisocial personality and alcohol abuse. (R 607, SR 20)

Dr. Ira Conley, Ph.D., a licensed clinical social worker, diagnosed Gunsby as suffering from schizophrenia, paranoid type with a fragmented thought process and a paranoia dominated by preoccupation with persecutory and grandiose delusions. (SR 7) Dr. Conley found Gunsby incompetent to stand trial, insane at the time of the offense and a candidate for involuntary hospitalization. (SR 7-8)

During cross-examination, Dr. Conley expressed surprise that Gunsby would be socializing at a party before and after the murder. (R 643) He also expressed his disagreement with the American Psychiatric Association's Diagnostic and Statistical Manual, Third Edition Revised which states that mental retardation is mutually exclusive with a diagnosis of schizophrenia, paranoid type. (R 646-649)

Following deliberations, the jury recommended death by a vote of nine to three (R 700, 869). The trial court found three aggravating circumstances: that the murder was committed in a cold, calculated and premeditated manner, that Gunsby had been

previously convicted of a violent felony and that Gunsby was under sentence of imprisonment when the murder was committed. The only factor found in mitigation was nonstatutory, namely, that Gunsby is mildly retarded. (R 902-903) The trial court concluded that the aggravating factors outweighed the mitigating factor and sentenced Donald Gunsby to death for the murder of Hisham Awadallah.

SUMMARY OF ARGUMENT

POINT ONE: At the beginning of voir dire, the trial court asked the venire whether anyone had strong feelings for or against the death penalty that would render them unable to fairly decide the case. The trial court correctly excused for cause potential jurors who answered affirmatively.

POINT TWO: Cross-examination is not a proper vehicle to introduce defense evidence and so the trial court correctly sustained the state's objection during cross-examination of the medical examiner. Any error is harmless because the evidence was introduced through another witness.

POINT THREE: Since Witness Brown could have been relating something she personally observed, the comment complained of was not hearsay and the objection properly sustained. Given the overwhelming evidence of premeditation and lack of any real issue that appellant possessed the gun, no reversible error occurred.

POINT FOUR: The propriety of the jury instructions was not preserved for review by objection.

POINT FIVE: Evidence of Gunsby's possession of guns was properly admitted during the penalty phase. Any error is harmless.

POINT SIX: The sentence of death is proportional to this offense. Gunsby was a self-appointed vigilante who planned and executed a cold-blooded murder of an innocent man. The offered justification that Gunsby was a "misguided avenging angel" provides motive for the murder.

POINT SEVEN: The trial court properly sentenced Gunsby to death. The three aggravating factors were properly found and were

balanced against the single nonstatutory mitigating circumstance of Gunsby's mental condition. Appellant admits the evidence established the premeditation portion of the cold, calculated and premeditated factor. The offered justification is not a reasonable pretense of moral or legal justification, and is only one aspect of this factor. There is no colorable claim of self-defense or personal danger. The objective aggravating factors of prior violent felony conviction and murder committed by person under sentence of imprisonment were also established. The trial court applied the correct standard in weighing the factors found.

POINT EIGHT: The Caldwell claim was not preserved by objection and is therefore precluded from review on appeal. Even if preserved despite lack of objection, the arguments of counsel correctly apprised the jury of their responsibility in recommending sentence.

POINT NINE: None of the "catch-all" complaints grouped together as cumulative error constitute grounds for reversal.

POINT TEN: The death penalty statute is constitutional. Appellant has failed to demonstrate a reason to revisit established precedent.

POINT ONE

THE TRIAL COURT PROPERLY EXCUSED POTENTIAL JURORS WHO AFFIRMATIVELY STATED THAT THEY WOULD BE UNABLE TO FAIRLY DECIDE THE CASE.

Among the preliminary questions addressed to the venire by the trial judge was whether their strong feelings for or against the death penalty would render them unable to fairly decide the case. The trial court liberally excused veniremen who affirmatively stated that they would be unable to discharge their duty as jurors. (R 11-17) The questions were propounded to the entire panel, and each juror who was excused voluntarily gave an affirmative, unequivocal answer. Gunsby suggests that the trial court's inquiry was insufficient, and complains that the veniremen were excused for cause before either party asked any questions.

No objection to this procedure was made below, as appellant candidly admits. Appellant waived his right to challenge the competency of potential jurors by failing to object. See, United States v. Fuentes-Coba, 738 F.2d 1191 (11th Cir. 1984); cert. denied 469 U.S. 1213 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). This is the best evidence that the defense was satisfied with the procedure employed by the trial judge. Appellant contends that the alleged error is reviewable as a potential violation of the fundamental, constitutional right to a jury composed of a fair cross-section of the community. Appellee counters that no error occurred and so no constitutional violation exists.

The trial court has broad discretion in determining the competency of a prospective juror, and in the absence of manifest error, its decision will not be disturbed. Hooper v. State, 476 So.2d 1253 (Fla. 1985). The competency of a challenged juror is a mixed question of law and fact. Christopher v. State, 407 So.2d 198 (Fla. 1981). "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984). If there is a basis for any reasonable doubt as to the juror's ability to render an impartial verdict based solely on the evidence and law, he should be excused by the trial court. Singer v. State, 109 So.2d 7 (Fla. 1959); Hill v. State, 477 So.2d 553 (Fla. 1985). The duty to probe this potential bias devolves upon the trial court. See, Hill v. State, supra.

The procedure employed here was not manifest error. In Slaughter v. State, 301 So.2d 762 (Fla. 1974), this court held that there was no abuse of discretion in denying the defense attorney an opportunity to propound questions to the venire when the court had already asked the same questions. In the instant case there is no evidence that defense counsel was in any way precluded from questioning these veniremen. The lack of objection forces speculation as to what questions defense counsel might have asked, however, assuming the area of inquiry was their preconceived, fixed opinions, no error is presented. See also United States v. Jimenez-Diaz, 659 F.2d 562 (11th Cir. 1981).

The "admittedly...brief" questioning of the venire was sufficient to support "...the conclusion that the jurors' views toward the death penalty would have substantially impaired, if not totally prevented, the proper performance of their duties as jurors." Mitchell v. State, 527 So.2d 179, 180 (Fla. 1988). This court held in Lara v. State, 464 So.2d 1173, 1178-79 (Fla. 1985), quoting Herring v. State, 446 So.2d 1049, 1055-56 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984), that:

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

In this case, each of the excused veniremen stated, "I do," when the entire panel was asked general questions concerning their ability to fairly decide the case because of the potential penalty. Unmistakable clarity is not required to properly excuse potential jurors under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Robinson v. State, 487 So.2d 1043 (Fla. 1986). The unequivocal, affirmative answers raised a reasonable doubt as to these jurors' ability to fairly decide the case.

The procedure employed in this case is similar to that approved in Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464,

91 L.Ed.2d 144 (1986). The trial court in Darden addressed the entire panel with a question concerning whether anyone had strong principles in opposition to the death penalty, and after Murphy said "Yes, I have", he was excused for cause by the court on its own motion. Id. 447 U.S. at 178. The court ruled that no particular inquiry is necessary under Witherspoon. "(D)eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Id. The entire voir dire must be viewed in its entirely. As in Darden, here the venire heard the later questions propounded to the panel. Appellee relies upon Darden as further support that no error occurred.

Not only does appellee contend the trial court acted correctly, a convincing argument can be made that it would have been manifest error to not excuse veniremen who unequivocally stated they were unable to be fair and impartial. See, Moore v. State, 525 So.2d 870 (Fla. 1988); Hamilton v. State, 14 F.L.W. 403 (Fla. July 27, 1989). See also, Hill v. State, supra.

Gunsby relies upon this court's decision in O'Connell v. State, 480 So.2d 1284 (Fla. 1985) by analogy, suggesting that the extent of the trial court's inquiry was insufficient and the error compounded when neither party was permitted to ask questions before the veniremen were excused. In this case counsel was given the opportunity to ask questions; all he had to do was object or otherwise speak up. O'Connell is distinguishable because the attorney objected. Moreover, the error in O'Connell was a due process violation. Only the

prosecutor was permitted to ask questions and not the defense, which this court called a "double standard". No such contention is made here.

Appellant further suggests that death scrupled jurors are more likely to step down voluntarily. (B 22) Appellee disagrees with this premise. Ardent supporters at each end of the spectrum of opinion usually seek an opportunity to influence others which jury duty provides. "Defense-oriented" jurors are just as likely as "death-qualified" jurors to be obstinate and overbearing in attempting to force their opinion on other people. The state fails to perceive any potential problem in any event because this court has repeatedly held that disqualification of "death-scrupled" jurors does not produce a conviction prone jury. Lambrix v. State, 494 So.2d 1143 (Fla. 1986). Masterson v. State, 516 So.2d 253 (Fla. 1988).

Appellant has failed to sustain his burden of demonstrating that the trial court committed manifest error in the procedure employed for excusal for cause of potential jurors who unequivocally stated that they would be unable to decide the case fairly due to the nature of the potential penalty. The questions asked were sufficient to create a reasonable doubt as to those jurors' ability to serve and therefore the trial court correctly excluded them for cause.

Even though not preserved by objection and despite the state's argument that no error occurred, appellee suggests that any perceived error is harmless. In Ross v. Oklahoma, ___ U.S. ___, 108 S.Ct. 2273 (1988) the petitioner argued that reversible

error occurred when he used a peremptory challenge on a Witherspoon excludable after the trial court refused to strike him for cause. The Court noted that if the juror had sat on the jury and if he had preserved the denial of his challenge for cause, the sentence would be overturned. However, the man did not sit on the jury. "Any claim that the jury was not impartial, therefore, must focus not on Huling, but on the jurors who ultimately sat. None of those 12 jurors, however, was challenged for cause by petitioner, and he has never suggested that any of the 12 was not impartial." Id. 108 S.Ct. at 2277. Gunsby's claim is the same: that the exclusion of jurors for cause was improper and not that the empaneled jury was tainted in any way. "Although we agree that the failure to remove Huling may have resulted in a jury panel different from that which would otherwise have decided the case, we do not accept the argument that this possibility mandates reversal." Id. 108 S.Ct. at 2278. The court's preliminary excusal for cause of potential jurors may have resulted in a different tentative jury but counsel had the opportunity to create a new jury. "A defendant is entitled to an array of impartial jurors to whom he may direct his peremptory challenges but, having been provided with such a panel, he suffers no prejudice if a juror, even without sufficient cause, is excused by the court." United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976). No reversible error is presented.

POINT TWO

THE TRIAL COURT CORRECTLY RULED THAT ONE QUESTION ASKED BY DEFENSE COUNSEL WAS BEYOND THE SCOPE OF DIRECT EXAMINATION. ANY ERROR IS HARMLESS.

Gunsby contends that reversible error occurred when the trial court sustained the state's objection to a question propounded to the medical examiner concerning the presence or absence of chemicals detected in the victim's blood during the autopsy. (R 315-317) Appellant suggests that "defensive matters can be presented on cross-examination" (B 26), and therefore the court's ruling violated his constitutional rights. Since the question was beyond the scope of direct examination and did not relate to the witnesses' credibility, the objection was properly sustained. Appellee disagrees that cross-examination is a proper vehicle to introduce "defensive matters". Moreover, even if error is presented, it is harmless because the testimony sought to be introduced reached the jury through another witness.

The state agrees that the right to confront adverse witnesses through cross-examination is a fundamental right. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 374 (1974). However, this right is not unfettered. The purposes of cross-examination are to weaken or test the testimony of the witness on direct and to impeach the credibility of the witness. Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982). Questions on cross-examination must either relate to credibility or be germane to matters brought out on direct examination. Id.

> If the defendant seeks to elicit testimony from an adverse witness which goes beyond the scope encompassed by the testimony of the witness on direct examination, other than matters going to credibility, he must make the witness his own. Stated more succinctly, this rule posits that the defendant may not use cross-examination as a vehicle for presenting defensive evidence. Coco v. State, 62 So.2d 892 (Fla. 1953); Padgett v. State, 64 Fla. 389, 59 So. 946 (1912). Id.

See also, Lambrix v. State, 494 So.2d 1143, 1148 (Fla. 1986). Since the chemical content of the victim's blood was not a matter covered on direct, there was no absolute right for the defense to cross-examine the witness on this issue. Jones v. State, 447 So.2d 570 (Fla. 1983).

Contrary to appellant's assertion, this ruling did not cause him to "abandon the proffered theory of defense". (B 26) See, Steinhorst v. State, supra. Appellant made no attempt to adopt the witness as his own which would have enabled him to present this defensive evidence. See, Jones v. State, supra., Correll v. State, 523 So.2d 562 (Fla. 1988). Therefore, the trial court acted within its broad range of discretion in limiting cross-examination. Id. "The confrontation clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985)(emphasis in original).

Even assuming for the sake of argument that this ruling was error, it is harmless at best. In Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 676 (1986), the Court held:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. Cf. Harrington, 395 U.S., at 254, 89 S.Ct., at 1728; Schneble v. Florida, 405 U.S., at 432, 92 S.Ct., at 1059.

Given the direct, eyewitness testimony establishing Gunsby was the gunman who murdered Mr. Awadallah, the overall strength of the prosecution's case was great. The jury learned that part of a marijuana cigarette was found in the victim's pocket (R 288), and so the medical examiner's excluded testimony was cumulative and corroborated by other witnesses. Although the state must prove the victim died by a criminal act, the medical examiner is not an especially important witness in the state's case. Even assuming arguendo error occurred, it was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT THREE

THE TRIAL COURT CORRECTLY OVERRULED APPELLANT'S OBJECTION DURING WITNESS BROWN'S TESTIMONY BECAUSE THE COMMENT WAS NOT HEARSAY. ANY ERROR IS HARMLESS.

Bennie Brown testified that she was a guest at James Anderson's party and related statements made by Gunsby in her presence. After Gunsby returned to the party dressed in camouflage clothes with smut on his face, Brown testified that she saw the outline of a long barreled gun under his clothing. When asked to clarify what she saw, Brown stated that she was not the only one who saw the gun, at least ten other people at the party saw it too. Appellant contends this remark is hearsay and constitutes reversible error.

Hearsay is defined as a statement, other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted. §90.801(c) Fla.Stat. (1987); Breedlove v. State, 413 So.2d 1 (Fla. 1982). Appellant argues that these other people must have communicated the fact that they saw the guns also, and therefore this statement is hearsay. The state suggests that presumption is not necessarily true. Brown could have observed other people watching appellant, who was provocatively dressed. Brown may have observed the other people also noticing the long barreled gun under Gunsby's clothing. The statement by Brown could have been something that she personally observed and so it was not hearsay.

Even if the objection was improperly overruled, no reversible error is presented. The error, if any, did not

injuriously affect the defendant's substantial rights. §924.33 Fla.Stat. (1987). There is no real issue that appellant possessed a gun on the night of the murder. Two eyewitnesses placed the weapon in his hands during the crime. Moreover, other witnesses testified that appellant possessed a gun an hour after the murder at his apartment complex. When improperly admitted evidence is cumulative to other, properly admitted evidence, no reversible error is committed. See, LeCroy v. State, 533 So.2d 750 (Fla. 1988). Given the other evidence of premeditation, any error is harmless at best. Correll v. State, 523 So.2d 562 (Fla. 1988); Roman v. State, 475 So.2d 1226 (Fla. 1985).

POINT FOUR

APPELLANT WAIVED HIS RIGHT TO CHALLENGE THE JURY INSTRUCTIONS ON APPEAL BY FAILING TO OBJECT BELOW.

Appellant contends reversible error was committed when the jury was instructed on first degree felony murder when he was charged only with premeditated murder. (R 711) The verdict stated that the jury found the defendant "guilty of murder in the first degree as charged in the indictment." (R 857)

This issue is not preserved for appellate review because at no time did counsel object to the instruction: not during the charge conference (R 479), not as the instruction was given to the jury (R 521), and not after the jury retired to deliberate. (R 533). In fact, defense counsel affirmatively approved of the instructions as given. (R 479) Florida Rule of Criminal Procedure 3.390(d) states:

> No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection.

This procedural rule provides an adequate ground to reject the claim as procedurally barred. See, Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 514 (1977); Harris v. Reed, ____ U.S. ____, 109 S.Ct. 1038 (1989). This court has consistently applied this procedural bar in past capital cases.

> (A)pellant's counsel did not object to the instruction as given, and, because no objection was made in accordance with Florida Rule of

> Criminal Procedure 3.390(d), we find that appellant waived his right to challenge the instruction on appeal. Harris v. State, 438 So.2d 787, 795 (Fla. 1983), cert. denied 466 U.S. 963 (1984).

See, also, Foster v. State, 436 So.2d 56 (Fla.), cert. denied 464 U.S. 1052 (1983); Walton v. State, 14 F.L.W. 325 (Fla. June 29, 1989). The state respectfully requests a plain statement by this court that this claim has been defaulted by failure to object. Harris v. Reed, supra.

The need for contemporaneous objection is underscored by the fact that here, any error could have been cured by an instruction to the jury to disregard the felony murder instruction. See, Johnson v. State, 252 So.2d 361 (Fla. 1971); Moten v. State, 391 So.2d 716 (Fla. 3d DCA 1980).

The state contends this issue should be resolved solely upon the procedural grounds advanced above. However, in the interest of completeness, appellee argues that even if this court reaches the merits of this issue, any error was harmless beyond a reasonable doubt. See, Knight v. State, 394 So.2d 997 (Fla. 1981); Adams v. State, 449 So.2d 819 (Fla. 1984). He contends reversible error occurred because it is impossible to determine whether he was convicted of a crime and not charged.[2] Appellant concedes that the evidence of premeditation is so great that heightened premeditation necessary to establish the aggravating

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[2] The state suggests that Gunsby could have been prosecuted under the theory of first degree murder with the underlying felony being burglary. He entered or remained in a structure with the unlawful intent to murder Tony Awadallah. See Turner v. State, 530 So.2d 45 (Fla. 1987).

factor of cold, calculated and premeditated was present. (However, he argues that factor should not have been found for other reasons.) There was substantial evidence of premeditation to support the verdict of guilty as charged. State v. Wilson, 276 So.2d 45 (Fla. 1973). Incited by Anderson's injury, Gunsby announced to party goers that he was tired of perceived abuse of the black community and intended to correct the problem. He went home, changed into combat clothes, returned to the party and made more statements. Then he went to the store, and, in front of two eyewitnesses who positively identified him, murdered Hisham Awadallah. This ample evidence of premeditation insures that the jury was not misled and supports the verdict of guilty as charged.

POINT FIVE

A DEFENSE WITNESS WAS PROPERLY IMPEACHED BY A SPECIFIC ACT OF MISCONDUCT BY GUNSBY. EVEN IF PRESERVED AND IF THE TESTIMONY WAS IMPROPER, ANY ERROR IS HARMLESS.

During the penalty phase, the defense presented testimony from Gunsby's aunt, Johnnie Mae Gunsby. (R 650-651) She related appellant's family history and childhood. (R 651-656) She testified that Gunsby chased away crack cocaine users in their apartment complex. (R 657) Next she related stories of how he always helped other people. (R 658) On cross-examination, the prosecutor asked her if Gunsby had "problems with the law" during his upbringing. (R 661) She agreed there had been problems but could not recall details. (R 661) Then the prosecutor asked if Gunsby had a habit of carrying guns. An objection was posed that this question called for speculation. (R 662) This objection was overruled, and is the only objection in the record. The prosecutor next asked if she remembered an incident when Gunsby carried two guns while working in the yard. (R 662-663) The witness recalled and related the incident. On appeal, Gunsby claims this testimony was improper Williams[3] rule evidence.

There was no objection to this testimony on this ground which precludes appellate review. Harmon v. State, 527 So.2d 182 (Fla. 1988); Phillips v. State, 476 So.2d 194 (Fla. 1985). In order for an argument to be cognizable on appeal, it must have been the specific contention asserted below. Steinhorst v.

[3] Williams v. State, 110 So.2d 654 (Fla. 1959); §90.404 Fla. Stat. (1987).

State. 412 So.2d 332 (Fla. 1982). There was no request for a curative instruction or motion for mistrial. See, Buenoano v. State, 527 So.2d 194, 198 (Fla. 1988); Ferguson v. State, 417 So.2d 631 (Fla. 1982). This claim was not preserved for review.

Even if preserved, no error is presented. The testimony was not similar fact evidence, but rather, proper impeachment of a defense character witness by a specific act of misconduct by the defendant. §90.405(2) Fla. Stat. (1987) There was a good faith basis for the question, as evidenced by the witness' affirmation of the event. Cf. Rhodes v. State, 14 F.L.W. 343 (Fla. July 6, 1989). The question was proper impeachment. See, Smith v. State, 515 So.2d 182, 185 (Fla. 1987).

Assuming further that the testimony was similar fact evidence, considering the relaxed evidentiary standards in the penalty phase, the testimony was admissible. It was relevant to demonstrate lack of mistake, common scheme and general pattern of criminality. §90.404 Fla. Stat. (1987)

Any error is harmless at best, even if the testimony was improperly admitted despite lack of objection. Similar fact evidence errors are subject to harmless error analysis. Craig v. State, 510 So.2d 857 (Fla. 1987). The state suggests that any error was harmless because of the insignificant nature of the collateral evidence, because it did not tend to negate evidence offered in mitigation and because it was cumulative to properly admitted evidence.

The jury learned that at the time this murder was committed, Gunsby had been sentenced to eighteen months'

incarceration for carrying a concealed firearm and possession of a firearm by a convicted felon. His prior convictions for aggravated assault and robbery were properly admitted. These crimes involved the use or threatened use of firearms. Moreover, this evidence did not tend to negate any proffered theory of mitigation. Cf. Castro, supra. There was no suggestion of self-defense or any mitigation concerning guns.

In Garron v. State, 528 So.2d 353 (Fla. 1988), this court reversed the sentence based upon many errors, including improper cross-examination of the defendant's sister that Garron killed someone in Turkey or Greece. Similarly, in Castro v. State, 14 F.L.W. 359 (Fla. July 13, 1989), the sentence was reversed for improper consideration of collateral evidence of threats of murder. These crimes are substantially more serious than the third degree felony of carrying a concealed firearm. This crime is more like collateral evidence of drug use. See, Johnston v. State, 497 So.2d 863 (Fla. 1986); Harmon v. State, 527 So.2d 182 (Fla. 1988). "In light of the ample evidence establishing (Gunsby's) guilt...and the admissible testimony of the prior assaults committed by (him, there is no) reasonable possibility that the jury was unduly or improperly influenced by references to guns..." Jackson v. State, 522 So.2d 862, 806 (Fla. 1988).

POINT SIX

GUNSBY'S SENTENCE OF DEATH IS PROPORTIONAL TO THE OFFENSE AND COMMENSURATE TO OTHER DEATH PENALTY CASES.

Gunsby claims that he does not deserve the death penalty for the murder of Hisham Awadallah because he is a "misguided avenging angel...(who) responded in an admittedly inappropriate manner...(which was) not surprising." (B 46, 48) He argues that the court erred in finding one aggravating circumstance and failed to give appropriate weight to the nonstatutory mitigating circumstance of Gunsby's mental and emotional condition. (See Point 7, infra) He likens this case to those cases involving heated domestic disputes. Wilson v. State, 493 So.2d 1019 (Fla. 1987); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988).

Appellant places great relevance upon the mental health evaluations, in particular, that of Dr. Conley, who was alone in finding that Gunsby suffered from mental illness. Conley's opinion should be discounted because it is at odds with the universally accepted treatise on mental disorders, and because all other evidence indicated that Gunsby was friendly and sociable. Even Dr. Conley expressed surprise that Gunsby would attend a party on the day of the murder. The trial court properly rejected Conley's diagnosis which conflicted with all other evidence presented. See, Rogers v. State, 511 So.2d 526 (Fla. 1987); Hardwick v. State, 521 So.2d 1071 (Fla. 1988).

Furthermore, the evidence presented does not support appellant's contention that he "...saw himself as a protector of

the black community." (B 45-46). The expert testimony of Gunsby's so-called grandiose delusion was specifically related to drugs and Gunsby's mission to rid the community of drugs and drug users. This murder had nothing to do with drugs. Rogers, supra. There is absolutely no evidence that Gunsby was aware of any "racial tensions" that existed between the Awadallahs and the predominately Afro-American neighborhood.

Although appellee agrees that the trial court found as fact that Gunsby functions on a third or fourth grade level, he does not suffer from "severe intellectual and social deficiencies." Gunsby was raised by an aunt who loved and cared for him. His home was a social center. He was employed as a gardener and later as a mechanic until an on the job injury permitted him to obtain periodic payments. Gunsby presents himself as a Pied Piper who loves children and cares for the elderly. This image is inconsistent with paranoid schizophrenia or any other mental illness.

Recently in Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934 (1989), the United States Supreme Court rejected the notion that execution of mentally retarded persons was cruel and unusual punishment because the penalty was disproportionate to their culpability. Penry, like Gunsby, was mildly mentally retarded with an IQ of 50-63 and a developmental age of six and one half years. Id., 109 S.Ct. at 2939. The Court noted the common law prohibition against punishing "idiots" and "lunatics", but determined that, "(s)uch a case is not before us today." Id. 109 S.Ct. at 2954. Penry was found competent to stand trial and the

jury rejected his insanity defense. "In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty." Id. 109 S.Ct. at 2957.

The state disagrees that this murder is analogous to the "passionate obsession" of a domestic quarrel. Fead v. State, 512 So.2d 176 (Fla. 1987). "(Gunsby) did not kill this victim in a domestic confrontation, heated or otherwise." Hudson v. State, 538 So.2d 829, 831 (Fla. 1989). The other two cases relied upon by appellant are also distinguishable. Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988); Livingston v. State, 13 F.L.W. 187 (Fla. March 10, 1988). First of all, Livingston is not final and has been pending on rehearing for nineteen months. Gunsby's childhood was not deprived; he was raised by an aunt in an extended family who loved him. Gunsby was not a youth when this murder was committed as he was 47 years old. Livingston's crime was committed for money but apparently, Gunsby murdered for attention and respect. These motives are equally disturbing and antisocial. Fitzpatrick is distinguishable in that "Gunsby's mental and emotional problems (were not) as well documented as Fitzpatrick's..." (B 48) The evidence in mitigation was much more compelling in Fitzpatrick's case than in the instant case.

The state suggests that most cases which are reversed due in part to the defendant's mental and emotional condition are overrides of a jury recommendation of life. See, Fead, supra;

Brown v. State, 526 So.2d 903 (Fla. 1988); Freeman v. State, 14 F.L.W. 400 (Fla. July 27, 1989). In this case, the jury was well advised of the evidence offered in mitigation, yet recommended death by a vote of nine to three. Appellee suggests that this sentence is proportionate to other death sentences affirmed by this court. See, e.g. Rogers, supra; Hudson, supra. Gunsby was not a "misguided avenging angel". He was self-appointed vigilante who dressed up like Rambo and murdered an innocent man in cold blood. This crime was not the product of a split second mistake but a well though out plan which was announced in advance and calmly carried out. If Gunsby was enraged by Tony pushing his friend, given his size, he could have easily retaliated in like kind. Instead, he took it upon himself to execute an innocent man. Vigilantism cannot be tolerated in a modern society governed by law. Donald Gunsby deserves to die for the murder of Hisham Awadallah.

POINT SEVEN

THE TRIAL COURT PROPERLY FOUND THREE AGGRAVATING FACTORS BASED UPON COMPETENT, SUBSTANTIAL EVIDENCE, CORRECTLY BALANCED THEM AGAINST A SINGLE NONSTATUTORY MITIGATING FACTOR AND IMPOSED A SENTENCE OF DEATH.

The jury recommended death as the appropriate penalty by a vote of nine to three. (R 869). The trial court found three aggravating factors: the murder was committed while Gunsby was under sentence of imprisonment, Gunsby had been previously convicted of violent felonies, and the murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (R 901-904) Gunsby's mild mental retardation was found to be a nonstatutory mitigating factor. Appellant contends two of the aggravating factors were improperly found and that the court erred in not finding additional mitigating circumstances.

A. Cold, calculated and premeditated

Appellant concedes that the evidence in this case "probably" supports the heightened premeditation necessary to support this aggravating circumstance, but contends that his "pretense" of moral justification precludes application of this factor.

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this court concluded that this factor was improperly found because "(t)here 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." Id. at 533. In Gunsby's case, the evidence

establishes that murder was his sole purpose. Upon learning of his friend's altercation, Gunsby went home, changed clothes, retrieved a weapon and returned to the party to announce his plan. The premeditation in this case extended over several hours and culminated in the execution-style murder of Mr. Awadallah.

Although admitting that his actions establish premeditation, appellant suggests at least a pretense of moral and legal justification. In Christian v. State, 14 F.L.W. 466 (Fla. September 28, 1989), this court reversed a Tedder[4] override based upon this argument, and enunciated the standard as follows:

> In *Cannady v. State*, 427 So.2d 723 (Fla. 1983), this Court addressed the issue of what constitutes a "pretense" of moral or legal justification. We found that Cannady had such a pretense because, during his confessions, he repeatedly stated that he never intended to harm the victim. The evidence corroborated these statements, since it showed that Cannady had shot the victim only after the victim jumped at him. There was no evidence to disprove these contentions.
>
> Similarly, in *Banda v. State*, 536 So.2d 221 (Fla. 1988), *cert. denied*, 109 S.Ct. 1548 (1989), we also found a pretense of justification. There, we were swayed by evidence of the victim's violent nature and apparent ability to harm Banda, which caused a plausible fear in Banda that the victim would try to kill him. We then concluded that a "pretense" of moral or legal justification could consist of any "colorable claim...that [the] murder was motivated out of self-defense, albeit in a form clearly

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[4] Tedder v. State, 322 So.2d 908 (Fla. 1975)

> insufficient to reduce the degree of the crime. *Id.* at 225.
>
> On the other hand, this Court has upheld a finding of no pretense of justification in a prison killing when the victim was attacked by surprise and repeatedly stabbed, when there was no evidence the victim had engaged in prior threatening acts. *Williamson v. State*, 511 So.2d 289 (Fla. 1987), *cert. denied*, 108 S.Ct. 1098 (1988).

This court concluded that if the "record discloses at least a colorable claim that the murder 'was motivated out of self-defense,' although in a form legally insufficient to serve as a defense to the crime....(then the) facts establish a 'pretense' of moral and legal justification..." Id.

In the present case, there was absolutely no evidence that Gunsby was harassed or threatened in any way. Gunsby is 6'5" tall and weighs about 250 pounds. (R 712) He presented testimony that he liked children and threatened drug dealers, but nothing was presented to establish a pretense of justification for the murder of Mr. Awadallah. Dr. Conley testified that Gunsby had a grandiose delusion concerning drugs (R 641), but this murder was not drug related. Gunsby was never personally threatened or harassed by the Awadallahs and so no colorable claim of legal or moral justification is presented.

The trial court correctly found that this murder was committed in a cold, calculated and premeditated manner. The defendant "planned violence to the victim...(and) brought a weapon to the scene." Lamb v. State, 532 So.2d 1051, 1056 (Fla. 1988) The victim did not resist or provoke Gunsby. Swafford v.

State, 533 So.2d 270 (Fla. 1988). Gunsby calculated to murder Mr. Awadallah, prepared himself, announced his intentions and carried out his plan. Rogers v. State, 511 So.2d 526 (Fla. 1987).

B. Murder committed while under sentence of imprisonment.

In early March, 1988, Gunsby was sentenced to eighteen months' incarceration for firearms charges. When he failed to report to jail, a warrant was issued for his arrest, which was outstanding when the murder was committed on April 20, 1988. (R 901) Based upon this sentence which Gunsby was supposed to be serving, the court found that the murder was committed while he was under sentence of imprisonment. §921.141(5)(a) Fla. Stat. (1987) He argues that his case is more like murderers on probation than murderers on parole or who escape. Peek v. State, 395 So.2d 492 (Fla. 1981); Straight v. State, 397 So.2d 903 (Fla. 1981). The state respectfully disagrees.

In Songer v. State, 544 So.2d 1010 (Fla. 1989), this court found this factor properly found based upon Songer's nonviolent prison escape. Although the factor was "somewhat diminished" in view of evidence Songer "merely walked away" from prison work release, it was nonetheless properly found. Unlike Songer, here this factor is one of three properly found aggravating factors which the trial court weighed against the nonstatutory mitigating factor of mild mental retardation. Since Gunsby was supposed to be serving a prison sentence when this murder was committed, the trial court properly found that he was under sentence of imprisonment. The defense conceded below that this factor was

properly found. (R 871) He has a lengthy history of violent personal crimes. (R 884)

Appellant concedes that the remaining aggravating factor, prior conviction of a violent felony, was properly found. Even assuming that one aggravating factor was improperly found, this court should nonetheless affirm the sentence. Hamblen v. State, 14 F.L.W. 347 (Fla. July 6, 1989); Rogers v. State, supra.

C. Mitigating evidence was properly considered.

Appellant contends the trial court committed numerous errors in regard to the mitigating factors. He claims that the court erred in failing to find statutory mental mitigating factors, that the court "ignores" other evidence tendered in mitigation and that the court applied an improper standard of review.

The written sentencing order addressed the mitigating circumstances as follows:

> The court also considered the defendant's mental and emotional condition as a mitigating circumstance in imposing sentence. Defendant is mildly retarded and intellectually functions on a third or fourth grade level. Dr. Ira Conley diagnosed defendant as paranoid schizophrenic and determined that the defendant was under the influence of extreme mental or emotional disturbance at the time of the killing. Dr. Conley also opined that the capacity of the defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of society was substantially impaired. Dr. Umesh Mhatre and Dr. Rodney Poetter contradicted these findings. Their opinions are supported by the testimony of witnesses that the defendant did not exhibit any unusual conduct or behavior immediately prior to the shooting. Further, defendant's actions suggest that his capacity to

> appreciate the criminality of his conduct was not impaired. A short time after the murder the defendant attempted to establish an alibi for the time of the shooting. The jury considered the evidence of defendant's mental condition in making their recommendation and the court carefully considered, compared and weighed this information in the light of all the evidence in the case. Although defendant's mental condition was considered as a mitigating circumstance, the court finds that the defendant was not legally insane at the time of the murder nor at sentencing. Viewed in the light of defendant's past history of violence and the circumstances of this case, defendant's mental condition carries little weight. Martin v. State, 420 So.2d 583 (Fla. 1982).
>
> Upon consideration, the court finds that the aggravating circumstances far outweigh the mitigating circumstance and the only appropriate sentence is death...

(R 902-903)

The trial court's factual findings are clear and amply supported by the evidence. It is the judge's duty to resolve conflicts and his determination should be final. Martin v. State, 420 So.2d 583 (Fla. 1982); Lopez v. State, 536 So.2d 226 (Fla. 1988). "Finding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion." Stano v. State, 460 So.2d 890, 894 (Fla. 1984). The order rejects statutory mitigating factors as not factually supported by the record, and further finds that no other facts have mitigating value. Rogers v. State, 511 So.2d 526, 534 (Fla. 1987).

The introduction of the order states that, "The court reviewed sentencing memoranda from the state and defense, the

presentence investigation report, the psychological reports prepared before trial and considered the arguments of counsel." (R 901) The defendant's argument and sentencing memorandum argued all of the facts he now suggests the trial court overlooked, including the proffered facts of Gunsby's family history, kindness to children, and dislike of drug users. (R 873-875) The court's order states that these matters were considered, but only one nonstatutory factor was found to exist. The evidence was considered and found to have no mitigating value.

In rejecting the statutory factor that the defendant was under the influence of extreme mental or emotional disturbance at the time of the killing, the court weighed conflicting expert testimony. The trial judge correctly stated that both Doctors Mhatre and Poetter specifically rejected this mitigating circumstance. (R 569-570, 601, 603-604) The court found that the defendant was not under extreme mental disturbance during the murder based upon testimony from several witnesses who indicated that Gunsby did not exhibit unusual conduct or behavior at the party immediately before and after the murder. Opal Latson and Nasser Awadallah also did not observe indications of extreme disturbance during the murder. Although appellant is correct that Dr. Poetter found Gunsby to be mentally retarded, he specifically contradicted the opinion of Dr. Conley as to the statutory mitigating factors. (R 601, 603-4)

The trial court also properly rejected the mitigating factor that Gunsby's ability to appreciate the criminality of his

conduct and to conform his conduct to the requirements of the law was substantially impaired. Doctors Mhatre and Poetter agreed that this factor was not present. The attempt to formulate an alibi demonstrates that Gunsby knew his conduct was wrong.

Appellant suggests that findings by Dr. Poetter of "mild retardation without other behavior symptoms" (R 607) is the equivalent of serious mental problems. Poetter testified that although retarded, Gunsby was not mentally ill, and displayed no delusional thinking, no severe emotional disturbance and no symptoms of schizophrenia. (R 600-606) Doctor Conley's diagnosis of paranoid schizophrenia must be balanced against all other known evidence. Even Dr. Conley expressed surprise at the thought of Gunsby socializing at a party. A person with a persecutory complex is usually not one who is friendly and helpful as Gunsby claims to be. His apartment was a center for socializing; people met there to lift weights and play pool. His home was not a hermit's retreat one would expect of a paranoid schizophrenic. Finally, the doctor's opinion should be discounted because retardation and schizophrenia are mutually exclusive according to the universally accepted treatise Diagnostic and Statistical Manual of Mental Disorders. Dr. Conley acknowledged this authority, but stated that he disagreed with the conclusion. (R 646) The trial court properly rejected his opinion which is at odds with all other evidence.

Finally, appellant argues that the trial court employed an inappropriate standard in determining the applicability of the statutory mental mitigating factors. He quotes language out of

context from the sentencing order. (R 903) In summarizing the defendant's mental state, the court recounted the evidence, including the finding that the defendant was not legally insane at the time of the murder or at sentencing. This was but one consideration of the total circumstances in the case. Perhaps the court was referring to the pretrial evaluations which found Gunsby competent and not insane. The court did not apply an improper standard, but rather, referred to an additional aspect of the case bearing on appellant's mental and emotional condition. The court's citation to Martin v. State, 420 So.2d 583 (Fla. 1983) demonstrates that the correct standard was applied in rejecting mitigating circumstances.

Appellant has failed to establish an abuse of judicial discretion in the rejection of statutory mental mitigating factors and nonstatutory evidence. Smith v. State, 515 So.2d 182 (Fla. 1987). The trial court considered all the evidence presented, resolved conflicts in the evidence and properly weighed the aggravating and mitigating circumstances in sentencing Donald Gunsby to death. The jury recommended death by a vote of nine to three; this is not a case in which reasons for the jury's recommendation of mercy must be gleaned from the record. See, Freeman v. State, 14 F.L.W. 401 (Fla. July 27, 1989) Although Gunsby is retarded, the crime was deliberate and planned over several hours, and not the product of a split second decision made under stress. The trial court considered all evidence and correctly found three aggravating circumstances and one nonstatutory mitigating factors. "It is not within this

Court's province to reweigh or reevaluate the evidence presented as to aggravating and mitigating circumstances." Hudson v. State, 538 So.2d 829, 832 (Fla. 1989). Donald Gunsby was sentenced to death in accordance with Florida law.

POINT EIGHT

THERE WAS NO OBJECTION BELOW TO ANY REMARKS CONCERNING THE JURY'S ROLE IN SENTENCING. EVEN IF PRESERVED, THE REMARKS WERE ALL PROPER.

Appellant contends that the jury was misadvised of its role in the sentencing process in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). He candidly admits that this claim was not preserved by objection to even one remark of which he now complains. Moreover, the cited instances reveal that the remarks were accurate statements of Florida law.

The lack of objection precludes appellate review. The state respectfully requests a plain statement that this claim is procedurally barred by failure to preserve review by objection. See, Harris v. Reed, supra. The Supreme Court pointed out that this court faithfully applies its procedural bar to Caldwell claims in Dugger v. Adams, ____ U.S. ____, 109 S.Ct. 121 (1989). See, Bertolotti v. State, 534 So.2d 386 (Fla. 1988); Clark v. State, 533 So.2d 1144 (Fla. 1988); Jackson v. State, 522 So.2d 802 (Fla. 1988); Fla. R. Crim. P. 3.390(d). Appellee requests the same holding in this case.

Even if this court proceeds to review the merits despite the total lack of objection below, the comments now complained of are all proper and accurate statements of the law of Florida. Appellant lists some twelve citations to the record on appeal which he claims reveal improper statements of law. (B 65) Four of these cites are to the standard jury instructions at the

various stages of proceedings. (R 529-530, 546, 692-696) This court has repeatedly held that the standard jury instructions accurately state Florida law. Jackson, supra, Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Middleton v. State, 465 So.2d 1218 (Fla. 1985). Four other references are to comments to the effect that the jury recommends the appropriate penalty to the trial judge. (R 83, 96, 131, 676) This constitutes proper argument. See, Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988). A couple of times, the word "advisory" was used, which is also permissible. (R 38, 667, 670) See, Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988); Combs v. State, 525 So.2d 853 (Fla. 1988); Smith v. State, 515 So.2d 182 (Fla. 1987). The remaining record citations are clearly proper as the jury was told their recommendation would be given "great weight." (R 71, 126, 667) There is no error presented in this issue which was not preserved for review.

POINT NINE

APPELLANT CANNOT SEEK REVIEW OF EVERY RULING BELOW UNDER A "CATCH-ALL POINT" ALLEGING CUMULATIVE ERROR; NO ABUSE OF DISCRETION IS DEMONSTRATED.

Under the rubric of "cumulative error", appellant presents a grab-bag of issues which are unworthy of individual consideration. Appellee objects to this attempt to review every ruling made by the trial court during a lengthy trial and sentencing proceeding. Issues which are unconvincing standing alone are no more formidable in a group. No error has been presented.

In a unique turnabout, appellant first claims that the trial court abused its discretion in failing to grant the state's motion for an additional peremptory challenge. (R 141-142) The defense never joined in the state's motion or in any way voiced assent with the state's position. Reversible error cannot be predicated upon a ruling the defendant never requested the trial court to make. See, Clark v. State, 363 So.2d 331 (Fla. 1975). Even assuming that the issue is preserved by the prosecutor's motion, no abuse of discretion has been demonstrated. See, Knight v. State, 338 So.2d 201 (Fla. 1976); Hooper v. State, 476 So.2d 1253 (Fla. 1985).

Next, Gunsby assails evidentiary rulings overruling defense objections or granting the prosecutor's objections. (R 272, 288, 298-300, 417, 431) The first and last citations refer to questions concerning Opal Latson's at-the-scene description of the assailant. Defense counsel later agreed (R 299) that one of

his previous questions was inadmissible hearsay. (R 272) The question at page 288 is clearly hearsay, "Isn't it true that...someone told you..." (R 288-289) In these instances the trial court did not abuse its wide discretion concerning the admissibility of evidence. Welty v. State, 402 So.2d 1159 (Fla. 1981). The prosecutor's objections to cumulative and hearsay testimony were also correctly sustained by the trial court.

After the close of the defense case, counsel stated that certain witnesses which had been listed on the state's witness list but released from subpoena could not be located by the defense. No proffer of these witnesses' testimony appears in the record, precluding reversal. §90.104(1)(b) Fla. Stat. (1987). Even if somehow preserved despite lack of specificity about which witness he was referring to and what they would supposedly say, no error is presented. The state did nothing wrong by releasing its own witnesses. If the defense sought to produce testimony from these people, they could have served them with subpoenas to guarantee attendance. The state is not required to anticipate the defense or insure the appearance of defense witnesses.

Last, Gunsby points to the record at page 476, where he claims counsel's request to approach the bench was denied. At that page, the prosecutor asks to approach the bench and is granted permission. This claim is not supported by the record.

No abuse of judicial discretion has been demonstrated by any of the individual or collective rulings by the trial court.

POINT TEN

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

As the last issue on appeal, appellant suggests that the statute is unconstitutional on its face and as applied. He concedes that each argument has been repeatedly rejected. See, Stano v. State, 460 So.2d 890 (Fla. 1984). Although a statute's facial validity can be assailed for the first time on appeal, the application of the statute to the defendant's case must be raised at the trial level to preserve the issue for appellate review. Trushin v. State, 425 So.2d 1126 (Fla. 1983). Some of the claims raised herein were presented to the trial court; procedural arguments will be addressed as each claim is discussed.

First, appellant argues that the death penalty is imposed based upon factors which should play no part in the consideration of sentence including race, geography and gender. This claim was presented to the trial court. (R 800) McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) decided this issue adversely to petitioner. See also Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 1822 n. 1, 95 L.Ed.2d 347 (1987).

Second, the prosecutor's discretion to seek the death penalty in this and every case is assailed as arbitrary and capricious. This claim was not presented below and is therefore barred from review to the extent appellant seeks to apply the argument to his particular case. The claim was rejected in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); see also McCleskey, supra, 107 S.Ct. at 1768 n. 15. The

broad discretion vested in the prosecutor "rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." Wayte v. United States, 470 U.S. 596, 607, 105 S.Ct. 1527, 1530, 84 L.Ed.2d 547 (1985). Exercise of prosecutorial discretion to seek the death penalty is not improper unless it results solely from the defendant's exercise of a protected legal right rather than the prosecutor's normal assessment of the societal interest in prosecution. United States v. Goodwin, 457 U.S. 368, 380 n. 11, 102 S.Ct. 2485, 2492 n. 11, 73 L.Ed.2d 74 (1982).

Third, appellant maintains his position (R 794) that the adjectives of "extreme" and "substantial" in the statutory mitigating factors unnecessarily limit the reception of evidence. § 921.144(6)(b)(e)(f), Fla. Stat. (1987). Appellant has failed to identify any limitation on mitigating evidence in his particular case. The statute specifies that any matter relevant to the character of the defendant may be introduced into evidence, regardless of its admissibility under exclusionary rules of evidence. § 921.141(1) Fla. Stat. (1987). The jury was instructed from the standard jury instructions that it could consider "any other aspect of the defendant's character or record" in mitigation. (R 694) This claim was impliedly rejected in Proffitt v. Florida, supra.

Fourth, appellant claims that the burden of proof in the penalty phase unconstitutionally shifts to the defendant once an aggravating factor is established. This claim was not presented to the trial court and is therefore not preserved for review.

The procedure for determination and weighing of aggravating factors in Florida's statute has been repeatedly upheld. See Proffitt v. Florida, supra.

Advancing to the boilerplate portion of the argument, appellant's fifth contention is that the statute is unconstitutional for failing to provide a standard for weighing the aggravating and mitigating factors. This claim was not raised below. The constitution does not require a state to adopt specific standards for instructing the jury in its consideration of an advisory verdict. 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).

Next, appellant's argument that the statute has been applied in a "vague and inconsistent manner" is likewise procedurally barred for failing to present it to the trial court. Moreover, the argument has been repeatedly rejected. Proffitt v. Florida, supra; Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986); Palmer v. Wainwright, 725 F.2d 1511 (11th Cir. 1984).

Seventh, appellant alleges that the capital sentencing process does not provide for individualized sentencing determinations through the application of presumptions in violation of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). No application of this argument to this case is suggested; this issue was not raised below. The claim is vague and meritless. See, Hitchcock v. Dugger, supra.

Eighth, the lack of notice of the aggravating circumstances is attacked for the first time in this case. Under Florida law,

no notice is required since the statute lists the aggravating circumstances. See Preston v. State, 444 So.2d 9391(Fla. 1984). A similar claim was rejected in Spinkellink v. Wainwright, 578 F.2d 582, 609 (5th Cir. 1979).

Appellant next contends that execution by electrocution constitutes cruel and unusual punishment. (R 831) This claim has been rejected by state and federal courts. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 2922, 49 L.Ed.2d 859 (1976); Spinkellink v. Wainwright, supra.

Gunsby's tenth constitutional challenge relates to the fact that the advisory verdict need not be unanimous. This claim was never presented to the trial court and is defaulted. Pursuant to Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) it is clear that the constitution does not require that a jury play any part in the capital sentencing process.

The "death qualification" of jurors was not objected to below, most likely in light of the decision of Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).

The defense contends as ground twelve that the "Elledge Rule", Elledge v. State, 346 So.2d 998 (Fla. 1977) would be unconstitutional if interpreted to hold as harmless error any improperly found aggravating factor in the absence of any mitigating factor. This claim is barred for lack of preservation. Further, even assuming the rule is so interpreted, no constitutional infirmity is present. Zant v. Stephens, supra.

Upon conviction of felony murder, appellant argues that a death sentence is automatic. Appellant was convicted of premeditated murder and so lacks standing to raise this issue for the first time on appeal. Moreover, a similar claim was rejected in Lowenfield v. Phelps, ____U.S.____, 108 S.Ct. 546 (1988).

Fourteenth and finally, appellant perceives a "disturbing trend" based upon two decisions that he claims indicate this court is not living up to its responsibility to independently review death sentences. This claim is premature as to this case because this court has not addressed this judgment and sentence. Two cases do not indicate a "trend."

All of the issues raised herein have been repeatedly rejected and appellant has failed to demonstrate any reason to reconsider them.

CONCLUSION

Based upon the argument and authority presented, appellee respectfully requests this honorable court to affirm the judgment and sentence of death in all respects.

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 U.S. Mail to Christopher S. Quarles, Assistant Public Defender, Chief, Capital Appeals, 112-A Orange Avenue, Daytona Beach, FL 32114, this 18th day of October, 1989.

Belle B. Turner

BELLE B. TURNER
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