IN THE SUPREME COURT OF FLORIDA

ANTHONY A. HALL
Appellant

v. CASE NO. 74,061

STATE OF FLORIDA
Appellee
_____/

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVID S. MORGAN
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 651265
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

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AUTHORITIES CITED:

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STATEMENT OF CASE AND FACTS

The state's disagreement with the statement of the facts in the initial brief is limited to the omission of material facts.

The Satanic Bible was obtained on the day of the murder (R 704). The defendant, Anthony Hall, never read it (R 704).

Hall and his codefendants planned for three days prior to the crime to abduct a motorist in order to get to a carnival in Virginia (R 533, 572). The plan was carried out by the two women accomplices wearing loose fitting garments in order to lure an unsuspecting motorist (R 533).

When the victim, Ngoc Van Dang, pulled his car over he was kidnapped at gunpoint (R 471, 495 - 496). His hands, feet, and mouth were bound with tape before he was placed in the trunk (R 472, 535). He was driven from Orlando to Volusia County (R 494, 461). As the car was leaving the interstate codefendant Bowen said that the victim would be killed (R 472, 538, 721). Hall assisted in removing the victim from the trunk and placing him on the ground (R 722 - 723). Dang was dragged into a wooded area (R 539). The defendant was aware that codefendant Dixon planned to make the victim a sacrifice to Satan (R 598). Hall placed his foot on the victim's chest while Dixon carved an inverted cross on Dang's chest and abdomen (R 473, 487, 723). After the victim raised his feet in a defensive gesture Bowen told him to lower them as they were not going to shoot him (R 723, 763). Hall then shot the victim (R 474, 539 - 540, 729). Hall fired until his pistol was empty (R 764). His weapon, the .22 caliber, inflicted the fatal wounds (R 596, 602, 764).

Money and a credit card were stolen from the victim in addition to the car. Hall stole the credit card (R 543) and he was aware that Dixon took the money (R 563). The money was used in their later travels to purchase gas for the car (R 598).

In addition to admitting his participation in the crimes, without mention of satanic influence over him or duress of any kind (R 495 - 496, 502, 541), the defendant expressed some opinions to the Missouri police. He told the sheriff that he did not believe in Satanism (R 476). He also told a trooper that Bunny Dixon's talk of a 10 year old spirit named David was a "crock of shit" (R 501).

SUMMARY OF ARGUMENT

Point One: The defense of temporary insanity due to satanic influence is not a valid defense in Florida. Accepting error, arquendo, it was harmless because the proffered expert testimony could not establish the defense asserted. Further, the other evidence contradicted the claim.

Point Two: The primary contention by the defense is dependent upon the issue under point one. As the court correctly prohibited the proffered defense, it was proper to limit voir dire on the issue. The other matters were properly limited through the exercise of appropriate judicial discretion.

Point Three: The motions to suppress were correctly denied as the defendant had received and waived the required Miranda warnings prior to answering questions. No warnings were required during the trip back to Florida as Hall was not being interrogated.

Point Four: The claims regarding the defense motions are waived because they are separate issues presented under one point on appeal and because no argument is presented in support of the contentions. Further, each is without merit.

Point Five: The claims raised regarding the jury instructions are waived for the same reasons stated in point four. Some of the claims were also procedurally defaulted below by waiver or by stipulation. In any event, none have merit.

Point Six: The mitigating evidence was properly considered by the court. The evidence at trial contradicted the testimony of the defense witnesses. In any event, even uncontradicted expert testimony may be rejected.

Point Seven: This argument challenging the constitutionality of the capital sentencing statute has been repeatedly rejected by this court.

Point Eight: The death penalty was proportionate because the defendant was not acting under a mental disorder. His degree of culpability was different than his codefendants. Further, the life sentence imposed on Daniel Bowen could not have been considered because he was sentenced at a later date.

Point Nine: The portion of the capital statute regarding the aggravating factor of "especially heinous, atrocious, and cruel" is not unconstitutionally vague because of the narrow construction which this court has given to the words.

Point Ten: There was the required heightened premeditation to find that the murder was cold, calculated, and premeditated. Hall had ample time to reflect upon his course of action while the tape-bound victim was being removed from the trunk, dragged into the woods, and tortured. The facts upon which the defense relies for its contention that there was a pretense of moral or legal justification were correctly found incredible by the trial court.

Point Eleven: The court correctly found that the murder had been committed for pecuniary gain because it was a step in furtherance of the sought after gain.

Point Twelve: The death sentence should stand if any one or more of the aggravating circumstances is upheld because the trial court expressly found that any one, with the possible exception of pecuniary gain, would outweigh the single mitigating circumstance that Hall had been an abused child.

ARGUMENT

Point One

THE TRIAL COURT PROPERLY PROHIBITED THE DEFENSE FROM PRESENTING A TEMPORARY INSANITY DEFENSE BASED UPON SATANIC INFLUENCE.

The satanic defense was not merely a corollary of the temporary insanity defense as the defense contends (B 10), it was an integral part thereof. The defense theory was stated in the following fashion in the notice of insanity defense:

> The nature of the temporary insanity at the time of the offense is that the defendant acted under the influence of Satan and/or Bunny Dixon and therefore was robbed of his free will and did not know right from wrong under the McNaughton Rule at the time of the offense.

(R 1341, emphasis added).[1]

The defense made essentially the same argument at a hearing in which it was seeking the appointment of an assistant professor of religion as an expert witness (R 1468). The trial court denied the motion (R 1330).[2] A subsequent order expressly stated that expert witnesses would not be appointed to advance the theory that the defendant had been insane due to the effects of Satanism because it is not a valid defense in Florida (R 1417).

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[1] References to the record are indicated "(R and page)". Those to the initail brief are denoted "(B and page)". The parties are referred to as the defendant and the state.

[2] Important to note, however, is that the court appointed an expert to assist in the preparation of the defense pursuant to Fla. R. Crim. P. 3.216 (R 1323; 1334 - 1336).

The court reiterated its position at least twice during voir dire. For example, the judge stated:

> I told you I wasn't going to allow a defense of temporary insanity based on Satanism. I'm not going to allow him to say the devil made me do it. . . .

(R 163; see also 165).

The defense rejected the offer by the court to frame a valid insanity defense (R 165). Rather than couching it in a legally cognizable fashion, defense counsel stood by the Satanic insanity defense and stressed that he intended "to argue that evidence including the Satanic Bible, the Ouiga Board, the statements to David, the dead ten year old person in my opening statement and in my closing argument." (R 167). This rigid defense posture invited the ruling of the trial court. "[A]ppellant may not complain of the very situation he created at trial." Herrera v. State, 532 So.2d 54, 56 (Fla. 3d DCA 1988), citing White v. State, 446 So.2d 1031, 1036 (Fla. 1984).

A trial court has broad discretion in determining what subjects may be testified to by an expert and what evidence is admissible. Stano v. State, 473 So.2d 1282, 1287 (Fla. 1985) (citations omitted), cert. denied, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). In Way v. State, 496 So.2d 126 (Fla. 1986), this court found no abuse of discretion by the trial court which had excluded expert testimony regarding the defendant's "toned down personality" and his "low key" nature proffered to explain his outward lack of emotion at the crime scene. Id., 127 . The exclusion of testimony regarding the "battered woman

syndrome" was upheld in Hawthorne v. State, 470 So.2d 770 (Fla. 1st DCA 1985). The case was reversed on other grounds. Regarding the issue of expert testimony the district court held that upon retrial "the trial court has the discretion to determine the qualifications of the expert and whether the subject can support an expert's opinion." Id., 774. See also, Brown v. State, 477 So.2d 609 (Fla. 1st DCA 1985). The exclusion of psychiatric testimony to support an insanity defense based upon "involuntary subliminal television intoxication" was held proper in Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978). The appeals court found the exclusion to have been proper because the expert could not testify whether or not watching television would affect an individual's ability to distinguish between right and wrong. Id., 779.

Although the psychologist in the instant case was prepared to testify that the defendant had been unable to distinguish between right and wrong at the time of the murder (R 1494), this conclusion was irrelevant because it was based upon diminished capacity unrelated to the asserted defense of temporary insanity due to satanic influence (further analysis below within discussion of the exclusion of Dr. Farinacci's testimony). There was no abuse of discretion by the trial court below in refusing to allow the insanity defense based upon Satanism because there is no scientific basis upon which the theory may rest. "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, 542 So.2d 352, 355 (Fla. 1989); Cf. Brown v. State, 477 So.2d 609 (Fla. 1st DCA 1985); Hawthorne v. State, 470 So.2d 770 (Fla. 1st DCA 1985). The insanity defense asserted below is incapable of scientific acceptance because it is metaphysical in nature. That is, it involves ". . . the union and conflict of two very different human impulses, the one urging men towards mysticism, the other urging them towards science." Webster's Third New International Dictionary, p. 1421, Merriam-Webster Inc. (Springfield, MA 1986)(citing Bertrand Russell). The inconsistency of the proffered insanity defense is apparent when the experts whom the defense sought to present are considered. One was a professor of religion and the other was a clinical psychologist (i.e., mysticism vis-a-vis science).

This court has instructed that:

> The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error.

Ramirez, supra, 355 (citations omitted).

The test for admissibility of evidence is relevance. Jackson v. State, 522 So.2d 802, 806 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988). The exclusion of the testimony of Professor Balmer was appropriate. Not only was his proffered testimony unscientific, but he acknowledged in an interrogatory: "I'd have to leave the judgment of insanity to the psychologists. . ." (R 1481). As a result, any testimony by this witness would have been irrelevant because it would not have tended to prove or disprove a material fact. §90.401, Fla. Stat. (1987).

Doctor Farinacci's testimony was properly excluded because it did not tend to prove insanity due to the effects of Satanism. On the contrary, secular conclusions were reached independently of the satanic defense. Although related matters were discussed in the background information of the psychological report (R **1490 - 1491**), the alleged role of satanic influence was not discussed in the doctor's findings (R **1492 - 1494**). In essence the doctor found that Hall functioned with a diminished capacity which resulted in his mechanical response to the whims of his associates (R **1494**). His testimony was properly excluded during the guilt phase because diminished capacity independent of an insanity defense is not a recognized defense in Florida. Chestnut v. State, **538** So.2d **820** (Fla. **1989**). Because the temporary insanity due to the effects of satanic influence was an invalid defense, the trial court properly prohibited the introduction of evidence which would support a claim of diminished capacity. Assuming, arquendo, that the insanity defense proffered was valid, the exclusion of the psychologist's testimony was proper because his conclusions were reached independently of the claimed defense of temporary insanity due to the effects of satanic influence.

The defense relies primarily upon the case of Gurganus v. State, **451** So.2d **817** (Fla. **1984**). However, the extensive reliance on that case is misplaced. Despite the statement in the opinion that ". **. .** evidence of any condition relating to the accused's ability to form a specific intent is relevant", this court later ruled:

> [T]his statement was obiter dictum because that issue was not before the Court. Gurganus simply reaffirmed the long-standing rule in Florida that evidence of voluntary intoxication is inadmissible in cases involving specific intent.

Chestnut v. State, supra, 822.

Applying that holding to the instant case, the affect of Bunny Dixon's alleged influence on Hall's supposed diminshed capacity was not relevant evidence because the proffered insanity defense was invalid.

The defense erroneously contends that the case of Morqan v. State, 537 So.2d 973 (Fla. 1989), is controlling (B 19). Morqan simply is not on point because the issue in that case was ". . . limited to whether mental health experts can testify about Morgan's sanity if their opinion is based in part on information received from hypnotic statements obtained through a medically approved diagnostic technique." Id. The instant case, as the defense concedes (B 19), does not involve hypnosis.

Another shortcoming of the insanity defense below was its temporary nature. In cases dealing with claims of insanity due to intoxication this court has held an insanity defense to be inapplicable when there is not a "fixed and settled frenzy or insanity either permanent or intermittent." Preston v. State, 444 So.2d 939, 944 (Fla. 1984), citing Cirack v. State, 201 So.2d 706 (Fla. 1967). The psychologist's report indicated that Hall had ongoing mental difficulties but, as already pointed out, the psychologist did not attribute the alleged insanity to satanic influences. The religion professor, on the other hand, did.

However, by his own admission he was not competent to testify as to the alleged insanity of Hall.

In any event, if there was any error in not permitting the satanic insanity defense it was harmless. This court has instructed:

> [T]he test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.
> . . . The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.

Ramirez, supra, 356, citing State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

As discussed above, the potential testimony of the psychologist did not tend to establish insanity due to the influence of Satan (see R 1490 to 1494). As a result, had it been admitted it would not have resulted in an acquittal based upon the defense of temporary insanity due to satanic influence. Witness incompetency as to the issue of insanity aside, there is no reasonable possibility that the proffered testimony of the religious scholar would have affected the outcome of the trial either. The professor stated that Satan is not active in the world (R 1480). He also stated that the Satanic Bible derives its power "from the faith and the confidence that the reader invests in the text itself." (R 1484). The fact of the matter is that the book, which had only been obtained on the day of the murder (R 704), had never been read by Hall (R 703).

Standing in contrast to the above evidence was the admissible inculpatory evidence. Hall and his accomplices had planned for three days prior to the crime to abduct and rob a motorist to enable them to travel to Virginia in order to join a carnival (R 533). He personally stole the victim's credit card (R 543). He also was aware that Dixon had taken the victim's money (R 563), which was later used to purchase gas (R 598). The defendant admitted playing an active role in the kidnapping (R 472, 494, 729, 750). He helped put Dang into the trunk (R 718 - 720, 748 - 749). Hall was aware before they reached the scene of the murder that it was going to occur because Bowen had told him so as they left the interstate (R 560, 721). Hall participated in removing the victim from the trunk (R 722). Dang was dragged into the brush (R 473). Hall was aware beforehand that Dixon planned to sacrifice the victim to Satan (R 596). The defendant placed his foot on the victim as Dixon carved the inverted cross on Dang's chest and abdomen (R 473). Hall admitted firing his pistol until it was empty (R 474, 494, 540, 729, 764). There were potentially fatal wounds to the abdomen and head which had been inflicted with a small caliber weapon (R 602). Hall used the .22 caliber pistol while Bowen used the large caliber weapon (R 596, 764). The defendant's own words to the Missouri police belie the claim of insanity due to the influence of Satan. Hall told the sheriff that he did not believe in Satanism (R 476), and he told the trooper that the talk of the 10 year old spirit named David was a "crock of shit" (R 501).

Accepting, arguendo, that error occurred by not allowing the psychologist to testify because his opinion may have established a lack of intent due to Hall's alleged diminished capacity occassioned by his exposure to the influence of Satan via Bunny Dixon, it was similarly harmless. The remarks he made to the authorities in Missouri clearly reveal his complete contempt for and rejection of Bunny Dixon's satanic rantings. Furthermore, the jury would be no more inclined to believe " . . .that Bunny Dixon, a 16 year old whom the defendant knew only for a few days, cast a satanic spell or otherwise deprived the defendant of his senses." (R 1502).

Point Two

THE TRIAL COURT PROPERLY LIMITED THE VOIR DIRE.

The extent of voir dire is subject to judicial discretion. Kalinosky v. State, 414 So.2d 234, 235 (Fla. 4th DCA 1982) (citation omitted). 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.

The primary contention by the defense under point two is dependent upon point one. Inasmuch as the temporary insanity defense due to satanic influence was properly excluded the trial court correctly limited inquiry on that issue during voir dire. Although the court did not allow counsel to question in terms suggesting a legal defense, the judge ultimately ruled that the potential jurors could be asked if the subject of Satanism would affect their ability to render a fair and impartial verdict (R 176).

The defense now claims that statements by two jurors ". . . clearly raise a reasonable doubt whether these jurors could render an unbiased verdict." (B 27). "Any claim that the jury was not impartial . . . must focus . . . on the jurors who ultimately sat." Ross v. Oklahoma, U.S. , 108 S.Ct. 2273, at 2277, 101 L.Ed.2d 80 (1988). Accepting, arquendo, that juror Heist's comments suggested partiality, the defense claim of prejudice (B 24) is tenuous at best because it never moved to

strike Ms. Heist, who ultimately sat on the jury (R 396). The other venireperson, Mr. Brown, was stricken upon motion by the defense, but no motion had been made to strike for cause (R 210). Because Brown's comments bolstered the satanic theory of defense this issue rests upon the resolution of point one. Further, these defense contentions are procedurally barred because "[i]n order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court." Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987).[3] Even if the defense had moved to strike for cause, there still would be no grounds for reversal as no additional peremptories were sought after all peremptories were used. Moore v. State, 525 So.2d 871, 873 (Fla. 1988) (citation omitted).

Some claims of error are waived as well by the manner in which they have been presented on appeal. This court has stated:

> It is elementary that when a decree of the trial court is brought here on appeal the duty rests upon the appealing party to make error clearly appear. . . . An appellant does not discharge this duty by merely posing a question with an accompanying assertion that it was improperly answered in the court below and then dumping the matter into the lap of the appellate court for decision. Under such circumstances it must be held, as we now hold here, that we are under no duty to answer the question.

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[3] Should this issue or any others be found to be procedurally barred, it is respectfully suggested that the opinion contain a plain statement to that effect so as to avoid potential relitigation of the issue(s) in federal collateral proceedings. See Harris v. Reed, U.S.__, 109 S.Ct. 1038 (1989).

Lynn v. City of Fort Lauderdale, 81 So.2d 511, 513 (Fla. 1955); ~~see also~~ Rodriquez v. State, 502 So.2d 18, 19 (Fla. 3d DCA 1986) (citation omitted.)

The defense contends, without supporting argument, that the court erred in not letting counsel inquire regarding the support given to the state attorney, who was personally trying the case, by the potential jurors (B 25). This contention is factually inaccurate as the court permitted direct inquiry regarding financial support (R 127 - 130). The court did not abuse its discretion in allowing the members of the venire panel to maintain confidentiality in their vote. ~~See~~, e.g., §101.28(1)(a), Fla. Stat. (1987). The contentions regarding the jurors' attitudes about the death penalty, procedural bar aside, are also without merit. The court initially limited the defense questions which were stated in the extremes, i.e., whether there was any set of facts under which the jurors would automatically vote for or against the death penalty (R 194 - 195). The defendant suffered no prejudice because the court had earlier asked the potential jurors individually if each would consider both a life sentence and a death sentence (e.g., R 68, 71, 73). Furthermore, defense counsel was later permitted to ask essentially the very same questions (e.g., R 200).

The assertion that the court erred in denying the motion in limine (B 25) is a separate issue which was raised in a similar manner under point four by the defense. The state's response is contained in point four, infra.

Point Three

THE TRIAL COURT CORRECTLY DENIED THE MOTION TO SUPPRESS THE CONFESSIONS.

The defense assertion before this court that error was made regarding the statements made in Missouri is waived by the lack of any argument in its brief regarding its claim. Lynn, Rodriguez, supra.

In any event, the claim is without merit because each and every officer who interrogated Hall gave him the required warnings before taking a statement. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Missouri sheriff who arrested Hall read the warnings to him off of a standard card (R 467 -468). The defendant waived those rights (R 469). A Missouri trooper was also present when Hall gave his initial statements. He also testified that the defendant was given the appropriate warnings (R 492). Hall was later interrogated by an investigator from the Volusia County Sheriff's Office. The investigator advised Hall of his rights again, which he waived in writing (R 1437). The defense renews its claim asserted below that the confessions were not made voluntarily or knowingly (B 28). An objection was voiced at trial in which the grounds asserted previously in the motion to suppress were incorporated (R 470). The defense had claimed involuntariness because the defendant was allegedly under the influence of drugs at the time (R 984, 1034). The trial court specifically found that Hall was not under the influence of drugs or alcohol when he made the statements (R 1040). In Johnson v. State this court held:

> A ruling on a motion to suppress is presumptively correct, and a reviewing court should interpret the evidence and reasonable inferences and deductions drawn from the evidence in a manner most favorable to sustaining the trial court ruling.

438 So.2d 776 (Fla. 1983) (citation omitted); see also Wasko v. State, 505 So.2d 1314, 1315 - 1316 (Fla. 1987). In this case the finding was unquestionably correct. No witnesses were presented by the defense. All three officers who had interrogated Hall testified that he was not under the influence of any drug (R 992, 1009, 1016).

The defense contention regarding the spontaneous statements made by the defendant during the trip back to Florida is also without merit. The investigator acknowledged that no Miranda warnings had been given and he explained:

> No sir. I wasn't asking him anything, I already had a confession from the gentleman; he wasn't telling me anything that he hadn't told me already; and he wasn't telling me anything about the case, other than the fact that he desired to be electrocuted.

(R 1027).

The warnings are required prior to custodial **interrogation.** Miranda, supra, S.Ct. at 1612. The defendant simply was not being questioned during the trip back to Florida. The case of Kight v. State, 512 So.2d 922 (Fla. 1987), is inapposite. It involved an interrogation of that defendant after he had requested counsel. Id., 925 - 926. Further, the officer in that case had responded to the defendant's remark that he was "not

afraid of the chair" by asking "what chair?" Id., 926. Not only had the investigator and his partner not asked Hall questions on the trip back, but he testified that " . . . I really became tired of listening to what he was indicating to us in reference to that he wanted to be electrocuted; that he was going to fry; that he wanted to be fried." (R 1026 - 1026).

Succinctly stated, the trial court correctly denied the defendant's motion to suppress his confessions because Hall had waived his Miranda rights after proper warnings. As to his remarks made while enroute back to Florida, they were properly admitted at trial because he was not being interrogated during the trip.

Point Four

THE ASSORTED CONTENTIONS RAISED BY THE DEFENSE UNDER POINT FOUR ARE BOTH BARRED AND WITHOUT MERIT.

The defense contends that the trial court erred in not granting numerous pretrial defense motions (B 29). The assorted claims are waived because the initial brief contains no argument in support of the contentions made and numerous issues have been presented under one point on appeal. The words of the court in Rodriquez, supra, are applicable here:

> Without delving into the . . . vaguely stated claims of error, suffice it to say that multi-barreled points of this nature fail to raise any judiciable issue for appellate review. "It is well-settled that, in order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely and separately as points on appeal."

502 So.2d at 19.

The "Motion to Order the Death Penalty Inapplicable to this Case " (R 1355 - 1362), as well as the "Motion to Declare Section 921.141(5)(i) Florida Statutes, Unconstitutional" (R 1363 - 1382), and the "Motion to Declare Section 921.141 Florida Statutes (1987) Unconstitutional" (R 1383 - 1385), challenge the constitutionality of the capital sentencing statute. These sentencing issues were argued before trial. (R 4 - 28) However, pretrial argument on a motion is inadequate to preserve an issue. Cf. Whittington v. State, 511 So.2d 749 (Fla. 2d DCA 1987); Crespo v. State, 379 So.2d 191 (Fla. 4th DCA 1980). "In order to preserve an issue for appellate review, the specific legal

argument or ground upon which it is based must be presented to the trial court." Bertolotti v. State, 514 So.2d 1095, 1096 (Fla. 1987) (citation omitted). The arguments were narrowed at sentencing essentially to the following: The aggravating factor of cold, calculated, and premeditated requires heightened premeditation (R 1191 - 1192); the murder was without any pretense of moral or legal justification (R 1250); and the factor of especially heinous, atrocious, and cruel could not be established by mere shots alone (R 1192 - 1193).

In any event the claims were meritless. The motion seeking to have the death penalty ruled inapplicable presented the grab bag of claims which has been repeatedly rejected by this court. Mendyk v. State, 545 So.2d 847 (Fla. 1989); see point seven infra. Section 921.141 (5)(i), Fla. Stat. (1987), which permits aggravation when the murder was committed in a cold, calculated, and premeditated fashion, has withstood similar constitutional challenges before this court. Hamblen v. State, 527 So. 2d 800 (Fla. 1988); see point ten infra. Section 921.141, Fla. Stat. (1987), in its entirety was also attacked on the ground of vagueness. A similar challenge was recently rejected by this court in Smalley v. State, 546 So.2d 721 (Fla. 1989). See point nine infra.

The denial of the "Motion to Use Jury Questionnaire" (R 1386 - 1394) was denied primarily because it had not been submitted sufficiently in advance of jury selection (R 9, 36). The action of the court was a proper exercise of judicial discretion. See point two supra.

The "Motion In Limine Regarding Juror's Attitudes Toward the Death Penalty" was properly denied because it sought to prevent the seating of a death-qualified jury. As this court pointed out:

> [T]he United States Supreme Court specifically determined that the dismissal of prospective jurors on these grounds does not violate the fair cross-section requirement of the sixth amendment nor the constitutional right to an impartial jury.

Masterson v. State, 516 So.2d 256, 258 (Fla. 1987) (citations omitted).

The "Motion to Dismiss Indictment or to Declare that Death is not a Possible Penalty (R 1399 - 1401) was waived below because it was not argued before the court.

However, essentially the same grounds were presented under the "Motion for Statement of Aggravating Circumstances" (R 1402 - 1404; argued at R 19). Contrary to the defense claim before the trial court, the state is not required to provide notice of the aggravating circumstances upon which it intends to rely. Johnson v. State, supra, 779 (citation omitted), cert. denied, 465 U.S. 105, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984).

The defense argued that the "Motion for Individual and Sequestered Voir Dire" (R 1405 - 1409) was required in order to avoid seating a death penalty prone jury (R 11). "[T]he granting of individual and sequestered voir dire is within the trial court's discretion." Jackson v. State, 498 So.2d 406 (Fla. 1986), cert. denied, 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987). Like the defendant in Jackson, the defense here has

failed to demonstrate an abuse of discretion. As discussed under point two, the only juror who may have displayed partiality was never challenged by the defense.

The court did not err in denying the "Motion for Additional Peremptory Challenges" **(R 1410 - 1412).** In Parker v. State, **456** So.2d **436, 442** (Fla. **1984),** the defense claimed an entitlement to additional peremptory challenges because of the serious nature of the case. This court rejected the claim because Parker had failed to establish an abuse of discretion. Id. The same argument was advanced below (R **16 - 17).** The ruling below was rendered without prejudice so that the defense could raise it again if and when it became appropriate **(R 17).**

The "Motion for List of Prospective Jurors in Advance of Trial" (R **1413 - 1414)** was waived because it was not argued to the court. Furthermore, the record reveals that it was untimely served by mail on Thursday, March 9, **1989.** Id. Jury selection began on the following Monday, March **13, 1989 (R 1,** et seq.).

As to the "Motion to Sequester Jury During Trial" **(R 1413 - 1414),** "[t]here is no requirement of sequestration prior to final retirement for deliberation." Livingston v. State, **458** So.2d **235, 237** (Fla. **1984)** (citation omitted). The defense argument to the trial court was based upon mere speculation of prejudice (R **15).** Therefore, the court properly denied this motion; again, without prejudice **(R 16).**

The claim that the court erred in not granting a post-trial motion for directed verdict and acquittal is defaulted because it raises an entirely separate issue. It lacks even the common

thread running through the immediately preceding contentions of having arisen in a pretrial motion. In order to obtain a review on the merits distinct and separate arguments must be presented under a separate point on appeal. Rodriquez, supra. Furthermore, the state did establish venue in Volusia County through the testimony of Investigator Schweers of the Flagler County Sheriff's Office (R 461).

Point Five

THE TRIAL COURT CORRECTLY DENIED THE REQUESTED JURY INSTRUCTIONS.

All of the issues presented by the defense in the first paragraph are waived because of the lack of argument and because they are separate issues. Rodriquez, supra.

In any event, the instructions were correctly denied. The defense of temporary insanity due to the influence of Satanism had been excluded (see point one supra). Therefore, the court properly did not instruct upon the insanity defense.

Instructions on self defense, defense of others, and justifiable use of deadly force were unwarranted. Hall was actively involved in the kidnapping of the victim. He was directly involved in the initial abduction at gunpoint (R 471, 495 -496); participated in taping the victim's hands, feet, and mouth (R 472); helped place Dang into the trunk (R 535); and at the scene he removed the victim from the trunk before dragging the tape-bound victim into the brush (R 722 - 723; 539). Section 776.041(1), Fla. Stat. (1987), provides that these justifications are not available to a person who "[i]s attempting to commit, committing, or escaping after the commission of a forcible felony . . ." See also Fla. Std. Jury Instr. (Crim.) 3.04(d). Cf., State v. Perkins, 14 F.L.W. 2576, 2577 (Fla. 3d DCA November 7, 1989).

The defense now suggests that the court should have inserted Bowen's name as the alleged aggressor in the instruction relating to justifiable use of deadly force rather than the victim's name because the evidence at trial warranted it (B 31). The only

evidence at trial suggesting that Bowen was an aggressor was the self-serving, uncorroborated testimony of the defendant which was at complete odds with the statements that he had made to the police shortly after the crime. He said that no one had threatened him (R 475, 541, 591). He also admitted that he had not killed the victim in self defense. (R 494). He did not indicate that he had acted out of fear or out of concern for his sister (R 495). Even if the evidence were as the defense claims, there is no support in the law for such an instruction. Section 776.012, Fla. Stat. (1987), provides justification for the use of deadly force against an aggressor. The standard jury instruction, (Crim.) 3.04(d), specifically directs the court to insert the victim's name, not a codefendant's.

Although the defense stated that it wanted an instruction on sudden impulsive act (R 783 - 784), defense counsel acquiesced when the trial judge said that the issue could be argued during closing argument but there would be no instruction on it (R 816). Waiver aside, the requested instruction was not necessary. The defense argued that such an instruction should be given so the jury could consider whether the murder was committed under circumstances indicating a lack of premeditation (R 784). The case of Spaziano v. State, 425 So.2d [1201] (Fla. 2d DCA 1983) was cited in support. However, that case is not on point because it merely held that a lack of premeditation might be established by the circumstances surrounding a sudden, impulsive act. The court was reviewing the denial of a motion for a judgment of acquittal and the jury verdict for sufficiency of evidence. It

did not address the issue of whether a separate instruction in addition to the premeditation instruction was required. The court below properly instructed the jury on premeditation in exact conformance with the standard first degree premeditated murder charge (R 892 - 893); Fla. Std. Jury Instr. (Crim.).

The defense correctly contends that it had initially objected to the duress instruction (B 31). However, the next day an instruction on duress was formulated which was agreed to by all parties (R 845). As a result, this contention is barred. Craig v. State, 510 So.2d 857, 865 (Fla. 1987). Furthermore, the defense of coercion is not available in a homicide case. Cawthorn v. State, 382 So.2d 796, 797 (Fla. 1st DCA 1980), rev. denied, 388 So.2d 1110 (Fla. 1980); see also Chestnut v. State, 505 So.2d 1352, 1354 (Fla. 1st DCA 1987), affirmed, 538 So.2d 820 (Fla. 1989.) More specifically, "[c]oercion is a recognized defense to a criminal charge except where an innocent life is taken." Corujo v. State, 424 So.2d 43, 44 (Fla. 2d DCA 1982), rev. denied 434 So.2d (Fla. 1983). There was no evidence whatsoever that Dang was anything other than a completely innocent victim.

This court in Craig, supra, 865, held also that it is error to instruct on the minimum and maximum penalties for all lesser included offenses. Therefore, the trial court correctly refused to give such an instruction.

Point Six

THE TRIAL COURT PROPERLY CONSIDERED THE MITIGATING CIRCUMSTANCES.

The trial judge is not obligated to find mitigating circumstances. Suarez v. State, 481 So.2d 1201, 1210 (Fla. 1985) (citation omitted), cert. denied, 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986.) The defense concedes that the mitigating factors were "carefully analyzed" by the judge (B 32). This is what is required. See, e.g., Kight v. State, supra, 933. Among the defense contentions under this point is that the trial court refused to "apportion proper weight" to the evidence of mitigating circumstances (B 35). However, "[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) (citation omitted), cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1987.)

The defense characterizes the testimony of its expert witnesses as uncontroverted. Nonetheless:

> The trial court has broad discretion in determining the applicability of mitigating circumstances urged. . . . In determining whether mitigating circumstances are applicable in a given case, the trial court may accept or reject the testimony of an expert witness just as he may accept or reject the testimony of any other witness. . . . (Expert testimony is not conclusive even where uncontradicted).

Roberts v. State, 510 So.2d 885, 894 (Fla. 1987) (citations omitted, emphasis added).

While the testimony went unrebutted during the penalty phase, it was controverted by the physical evidence and testimony given by witnesses for the state during the guilt phase. The trial court stated expressly so in its findings (R 1502). The court rejected the defense contention that Hall could have been deprived of his senses in a few short days by 16 year old Bunny Dixon. Id. It was found to be significant that the defenses based upon Satanism and duress had not been asserted by the defendant initially and that he had described the former as a "crock of shit". Id. The court expressly found that Hall had not committed the crime while under the domination of another. Id. The defendant was found to have been a major participant in the crimes and to be the individual who had executed the innocent victim. Id.

In sum, the trial court properly considered all of the mitigating circumstances and its findings are borne out by the record.

Point Seven

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

As the defense concedes (B 36), this court has repeatedly rejected these defense contentions. In the recent case of Mendyk v. State, 545 So.2d 847 (Fla. 1989), this court again stated so expressly. Id., 850, citing, e.g., Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S. Ct. 2347, 85 L.Ed.2d 863 (1985). The concluding words of the opinion in Stano are equally applicable here:

> [W]e have rejected these challenges in previous cases. We see no reason to reconsider them here and find this point to have no merit.

Id., 895.

Similarly, there is no reason to reconsider them now as the defense has not presented any new grounds which justify revisiting the issues.

Point Eight

THE DEATH PENALTY IS PROPORTIONATE.

The trial court found four aggravating factors. (R 1500 - 1501). The first, which is unchallenged here, is that the murder was committed while the defendant was engaged in a kidnapping. §921.141(5)(d), Fla. Stat. (1987). The others, which are discussed at length infra, is that the murder was committed for pecuniary gain, §921.141(5)(f), Fla. Stat. (1987); the murder was especially heinous, atrocious, or cruel, §921.141(5)(h), Fla. Stat. (1987); and it was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification, §921.141(5)(i), Fla. Stat. (1987). Only one mitigating circumstance was found. (R 1501). The court expressly held that any one of the aggravating circumstances, with the possible exception of pecuniary gain, would far outweigh the one in mitigation, which was "relatively weak". (R 1502).

The argument of the defense that the death sentence is disproportionate in this case is dependent upon its assertion that the defendant had been functioning under a mental disorder, which the trial court properly and expressly rejected. See point six, supra. Further, there is no way to compare the Tampa case which the defense relies on, State v. Cantero (no citation given, R 1052; B 39), to this case. Counsel obtained the information from a newspaper rather than an official reporter (R 1052). That defendant had pled guilty and received a life sentence. Id. As a result, the facts of that case were not fully developed, and those facts which were presented to the trial court are readily

distinguishable. Cantero's victim was his own mother, rather than an innocent victim who had been unknown to the murderer prior to the crime. Cantero had stabbed his mother 40 times, which more convincingly implies a defendant who had functioned with a mental aberration. In any event, prosecutorial discretion is permissible and:

> [A]n exercise of mercy on behalf of the defendant in one case does not prevent the imposition of the death by capital punishment in the other case.

Garcia v. State, 492 So.2d 360, 369 (Fla. 1986) (citation omitted), see also Diaz v. State, 513 So.2d 1045, 1049 (Fla. 1987).

The sentence imposed upon codefendant Daniel Bowen is also pointed to by the defense (B 39). It was impossible for the jury and judge to consider Bowen's sentence as he had not yet been sentenced. Cf. Garcia, 368. Also, Bowen and a codefendant other than Hall later led the police to the murder scene (R 427). Further, "it is permissible for different sentences to be imposed on capital co-defendants whose culpability differs in degree." Williamson v. State, 511 So.2d 289, 293 (Fla. 1987). The defense relies on the defendant's own self-serving testimony in contending that Bowen was the leader (B 39). The court, however, found that his claim that he had been forced at gunpoint to shoot the victim was not borne out by the evidence (R 1502). The court also found that the defendant had not acted under the domination of another. Id. Hall was a principal to all actions taken. He also took actions beyond those taken by Bowen. The defendant

placed his foot on the victim's chest while Dixon carved the inverted cross on Dang's chest and abdomen (R 473). He fired his pistol until it was empty (R 764). The fatal shots were fired from his .22 caliber pistol (R 596, 602, 764). In Garcia this court stated:

> Even if we accept arguendo that one of the accomplices was also a trigger-man, there is no error in sentencing appellant to death where, as in this instance, the evidence supports the sentencing judge's conclusion that the aggravating factors outweigh the mitigating factors.

Supra, 368 (citation omitted).

In short, the death sentence was appropriate because of the aggravated manner in which it was committed and because Hall simply was not suffering from any mental impairment.

Point Nine

SECTION 921.141(5)(h), FLA. STAT. (1987), IS NOT UNCONSTITUTIONALLY VAGUE AND THE COURT CORRECTLY FOUND THAT THE MURDER HAD BEEN ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL.

The defense contends that §921.141(5)(h), Fla. Stat. (1987), is unconstitutionally vague (B 40 - 41). Essentially the same constitutional challenge was considered and rejected recently by this court in the recent case of Smalley v. State, 546 So.2d 721 (Fla. 1989). As the opinion points out, Florida's death penalty statute has withstood constitutional attacks because of the narrow construction given this factor which requires that the murder to have been especially heinous, atrocious, and cruel. 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." Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976).

Oklahoma's capital sentencing process was held to be unconstitutional for virtually the same reason as 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 v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 1859, 98 L.Ed.2d 152 (1987).

Significantly, the Maynard opinion suggests Proffit v. Florida for comparison. In an earlier case, Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 3156, 82 L.Ed.2d 340 (1984), it was noted that:

> 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.

The Court in Lowenfield v. Phelps 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." U.S.___, 108 S.Ct. 546, 555; rehearing denied U.S.___, 108 S.Ct. 1126, 99 L.Ed.2d 286 (1988). Florida's capital sentencing scheme was pointed to by the Court to illustrate constitutionally sound means of imposing the death penalty. Id., S.Ct. 554 - 555.

Contrary to the defense contention (B 42), the murder was especially heinous, atrocious, and cruel. The defendant and his accomplices staged a hitchhiking by the women to lure an unsuspecting motorist (R 470, 533). When Dang stopped he was kidnapped at gunpoint by Hall and Bowen (R 471, 495 - 496). The victim's hands, legs, and mouth were taped before he was placed in the trunk of his car (R 472, 535). The abduction took place in Orlando (R 533). After driving all the way to a secluded area in Volusia County the victim was removed from the trunk (R 494); cf. Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987). While Dixon

carved an inverted cross on the victim's chest and abdomen Hall held him down by placing a foot on his chest (R 473, 487). Dang was dragged into a wooded area (R 539). The victim raised his feet up, and was told to lower them by Bowen who assured him that he would not be shot (R 723, 763). After he lowered his feet he was shot to death (R 542)."

The killing clearly meets the test set forth in Dixon, which 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.) In the case of Swafford v. State , 533 So.2d 270, 277 (Fla. 1988), this court noted that it has held in numerous cases that ". . . this aggravating factor could be supported by evidence of other actions of the offender preceding the actual killing, including forcible abduction [and] transportation away from possible sources of assistance and detection . . ." When the victim is tortured, either physically or emotionally by the killer the application of this aggravating factor generally is appropriate. Cook v. State, 542 So.2d 964, 970 (Fla. 1989). Fear and emotional strain immediately preceding the murder also supports the finding of this factor. Swafford, supra, 277; Parker v. State, 476 So.2d 134, 139 (Fla. 1985) (citation omitted). Defensive gestures by the victim support a finding of this aggravating factor. Cf. Lamb v. State, 532 So.2d 1051 (Fla. 1988).

Stated simply, this aggravating factor was appropriately found. The victim, who was bound like an animal going to slaughter, was cruelly tortured. Also, he had pulled his legs up in a defensive posture immediately before being shot to death. Unquestionably he was in fear and under emotional strain.

In the event that this court should find that this aggravating factor was improperly found the death sentence should nonetheless stand. In Cherry v. State, 544 So.2d 184 (Fla. 1989), this court affirmed a death sentence despite its striking of one aggravating factor because of improper doubling. It was held that the sentence of death was appropriate in light of the three remaining aggravating factors. Two sentences of death were affirmed in Harvey v. State, 529 So.2d 1083 (Fla. 1988), on the basis of three aggravating factors despite the mitigating circumstances that the defendant had a low I.Q. and poor educational and social skills. The other three factors here are: 1) the murder was committed while Hall was engaged in a kidnapping; 2) it was committed for pecuniary gain; and 3) it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial court held that any one of the aggravating factors, with the possible exception of pecuniary gain, would far outweigh the single mitigating circumstance. (R 1502).

Point Ten

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

The trial court correctly found that this murder was cold, calculated, and premeditated because there was heightened premeditation. Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988), citing Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, U.S.___, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The defense inaccurately argues that there was no evidence that the defendant knew that the victim would be killed (B 44). Hall and his accomplices had abducted Dang and drove from Orlando to Volusia County with the tape-bound victim in the trunk of the car (R 461, 471, 472, 494, 495 - 496, 535). Prior to leaving the interstate Bowen said that the victim would be killed (R 472, 538, 721). Hall participated in removing the victim from the trunk and in placing Dang on the ground (R 722 - 723). He knew beforehand that Dixon planned to sacrifice the victim to Satan (R 598). He placed his foot on Dang's chest as Dixon carved an inverted cross on the victim's chest and abdomen (R 723). Bowen told the tape-bound victim, who had raised his feet in a defensive posture, to lower them because he was not going to be shot (R 723, 763). After the victim lowered his feet Hall shot him (R 474, 539 - 540, 729). He fired his pistol until it was out of ammunition R 764).

This court pointed out in Hamblen, supra, that this factor may appropriately be found in ". . . cases in which robbery victims have been transported to other locations and killed

sometime later . . ." Id., 805, citing Parker v. State, 476 So.2d 134 (Fla. 1985); Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied. 462 U.S. 1145, 103 S. Ct. 3129, 77 L.Ed.2d 1379 (1983). In DuFour v. State, the finding of this factor was upheld because the appellant had announced an intention to commit the murder prior to its execution style commission. 495 So.2d 154, 164 (Fla. 1986), cert. denied, ___U.S.___, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1986). This court has instructed that "this aggravating factor 'ordinarily applies in those murders which are characterized as executions . . .'" Scull v. State, 533 So.2d 1137 (Fla. 1988) (citation omitted). The trial court expressly found that there was heightened premeditation and that this was an execution style slaying (R 1501).

This factor was correctly found as well because the murder was committed "without any pretense of moral or legal justification." Banda v. State, 536 So.2d 221, 224 (Fla. 1988). The defense argues here that the murder was justified because Hall had to ". . . get these other three violent and armed persons away from his pregnant sister." (B 44). It also claims that "Hall only shot at Dang under duress, coercion, or self defense as he claimed at trial." Id. This court held that a trial court may find "that no pretense existed where the defendant's statements are wholly irreconcilable with the facts of the murder." Id., 225. The trial judge expressly rejected these contentions in his findings of facts:

> The physical evidence shows the defendant himself was the one who executed Ngoc Van Dang. His theory of being forced at gunpoint by Bowen

> to shoot the victim is not born [sic] out by the forensic evidence. It was not mentioned in his Missouri statements.

(R 1502).

The evidence supported these findings. Hall fired the .22 calibre pistol which inflicted the fatal wounds (R 596, 602, 764). Hall told the police that he had not been threatened (R 475, 541, 591). He did not indicate that he feared that either he or his sister would be harmed (R 495).

In summary, this factor was properly found because the defendant had participated in the transportation of the victim to the isolated crime scene and there was an ample period of time to reflect upon the announced plan of murdering Dang made while leaving the interstate and the actual murder. Among the events which occurred during this time span were the continued driving and parking of the car, the removal of the victim from the trunk, the dragging of him, his torturing in which Hall was a direct participant, and the defendant's indifference as the victim raised his feet in a defensive gesture immediately before he was murdered. Despite the extended period of time to reflect Hall murdered the innocent victim, evidencing clearly that the crime was cold, calculated and premeditated, without any pretense of moral or legal justification.

As discussed under the previous point, should this court rule that this aggravating factor was improperly found, the death sentence should nonetheless stand in light of the three remaining aggravating factors. Those factors are: 1) the murder was committed while the defendant was engaged in a kidnapping; 2) it

was committed for pecuniary gain; and 3) it was especially heinous, atrocious, or cruel. The trial court held that any one of the aggravating circumstances, with the possible exception of pecuniary gain, would far outweigh the single mitigating circumstance. (R 1502).

Point Eleven

THE TRIAL COURT CORRECTLY FOUND THAT THE MURDER HAD BEEN COMMITTED FOR PECUNIARY GAIN.

The trial court found that the murder had been committed " . . . in order to obtain the victim's money, car, and other belongings." (R 1500). Hall and his accomplices had planned three days prior to the crime to lure and abduct a motorist in order to get to Virginia to join a carnival (R 533, 572). The victim's car was stolen in the process of the kidnapping (R 472). The defendant personally stole the victim's credit card (R 543). He was also aware that Dixon had stolen Dang's money (R 535, 563). The money was used to buy gas for the car in their later travels (R 598). This case is similar to Hildwin v. State, 531 So.2d 124 (Fla. 1988), in which the finding of this factor was upheld. The evidence revealed that Hildwin had no money before the murder and after it he had the victim's property. He had also forged and cashed one of her checks. Id., 129. This aggravating factor was properly found because the murder of Dang was "a step in furtherance of the sought-after gain." Rogers, supra, 533 (citation omitted); Hardwick v. State, 521 So.2d 1071 (Fla. 1988) (citations omitted).

The defense contends that there was an impermissible doubling of aggravating factors. The defense mistakenly claims that the state had relied on the kidnapping charge to support the felony murder charge and then relied upon the robbery charge to justify the aggravating factor of pecuniary gain (B 45). This is inaccurate, the state relied upon the kidnapping, not the

robbery, in seeking the aggravating factor (R 1232 - 1235). The "doubling of aggravating circumstances is improper where they refer to the 'same aspect' of the crime." Cherry, supra, 187 (citations omitted). The case of Parker v. State, 476 So.2d 134 (Fla. 1985) contained essentially the same challenge as presented here. The trial court found as aggravating factors that the murder had been committed in the course of a robbery and kidnapping, as well as for pecuniary gain. The holding there is equally applicable here:

> The kidnapping aspect of this crime is totally separate from that of pecuniary gain and, consequently, the use of both aggravating factors was proper.

Id., 140.

In the instant case there simply was no improper doubling because the trial court based its finding of aggravation under §921.141(5)(d), Fla. Stat. (1987), upon the underlying felony of kidnapping, independently of the robbery (R 1500). As a result, the separate finding in aggravation under §921.141(5)(f) that the murder had been committed for pecuniary gain was proper.

The death sentence should stand even if this court finds that this aggravating factor was not properly found. There are three other aggravating factors: 1) the murder was committed while the defendant was engaged in a kidnapping; 2) it was especially heinous, atrocious, or cruel; and 3) it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Point Twelve

> THE SENTENCE OF DEATH IMPOSED BY THE TRIAL COURT SHOULD STAND SO LONG AS ANY ONE OR MORE OF THE AGGRAVATING FACTORS IS HELD TO BE VALID.

The trial court concluded it findings of facts by stating:

> The aggravating circumstance[s] overwhelm the mitigating. In fact this Court finds any of the aggravating circumstances alone, with the possible exception of pecuniary gain, would outweigh the relatively weak mitigating circumstance.

(R 1503).

As "[i]t is within the province of the trial court to decide the weight to be given particular mitigating circumstances and whether they offset the established aggravating circumstances", Swafford v. State, 533 So.2d 270, 278 (Fla. 1988) (citation omitted), the death sentence should stand so long as any one of the aggravating circumstances, with the possible exception of pecuniary gain, is found to be proper.

CONCLUSION

The judgment of guilt and the sentence of death should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVID S. MORGAN
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 651265
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL **32114**
(904) 238-4990

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing answer brief has been furnished by U.S. mail to Gerard F. Keating, **Esq.**, 444 Seabreeze Blvd., Suite 346, Daytona Beach, FL **32118** this 28th day of December, 1989.

DAVID S. MORGAN
Assistant Attorney General