IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOHNNY L. ROBINSON,

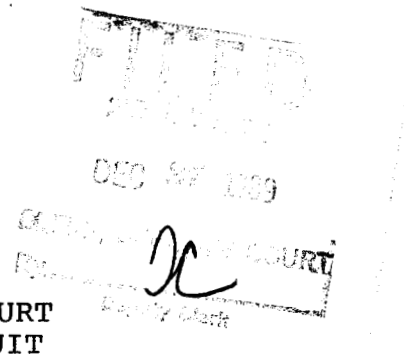
Appellant,

v. Case No. 74,113

STATE OF FLORIDA,

Appellee.

_____/



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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Robinson's recitation of the case and facts with the following additions. The statement of the facts of the crime in the next three paragraphs is taken from the first appeal in this case, Robinson v. State, 520 So.2d 1 (Fla. 1988):

On August 12, 1985, the body of Beverly St. George was found in Pellicer Creek Cemetery in St. Johns County, Florida. An autopsy revealed that she had died early that morning as a result of two gunshot wounds, one to the forehead and one to the left cheek. The medical examiner testified that the wound to the forehead was caused by discharge of a gun that was six inches to two feet away from the skin; the other wound was caused by a gun in contact with the cheek when fired. The sequence of the wounds could not be determined. The medical examiner testified, however, that either shot would have killed her virtually instantly.

Johnny Robinson and Clinton Bernard Fields, a juvenile, were arrested for the murder on August 17. Upon arrest, Robinson waived his rights and gave a sworn statement to the police. According to his statement, Robinson and Fields left a party around 11:30 P.M. on the evening of August 11, 1985, and headed towards Orlando to visit Robinson's girlfriend. On the way, they saw a car pulled off on the side of the road and stopped to help. The woman told them that she was tired and had stopped to rest. Robinson claimed that when the woman noticed that Robinson had a gun, she wished aloud that she had something similar so she could kill her ex-husband. She agreed to go with the two men in their

car to the Pellicer Cemetery. Once there, Robinson and Ms. St. George engaged in consensual sex on the hood of his car. During this activity, Robinson took the gun out of his pants and placed it on the hood. Afterwards, according to Robinson's statement, a scuffle ensued during which the gun went off accidentally, hitting Ms. St. George in the face. He said when he realized what had happened, he shot her again out of fear that no one would believe a black man had accidentally shot a white woman.

Fields testified against Robinson at trial and told a different story. According to Fields' testimony, when they stopped at the car on the side of the road, Robinson ordered Ms. St. George at gunpoint into the backseat of Robinson's car where he handcuffed her. Robinson ordered Fields to go through her purse but he refused. At Pellicer Creek Cemetery, Robinson raped Ms. St. George and then ordered Fields to do likewise. Fields further testified that after the sexual activity, Robinson expressed fear that the woman could identify him and his car and said that the only way she could not make an identification was if she were dead. Robinson then walked up to the victim and put the gun to her cheek. Fields turned his head, heard a shot, and later saw the woman on the ground. Robinson then shot her a second time. They drove to a desolate area where Robinson took money from the woman's purse and then burned the rest of her property.

The convictions for first degree murder, kidnapping, armed robbery and sexual battery were affirmed in the appeal, but "(h)is death sentence is vacated and remanded for a new

sentencing proceeding before a jury." The noncapital sentences were also remanded for resentencing due to the court's failure to articulate reasons for departure.

On March 9, 1988, this court issued its mandate, commanding further proceedings in accordance with the opinion. (R 3) After several continuances, the case was set for February 13, 1989. (R 21, 142)

Counsel for Robinson filed several written motions, which the court labeled "frivolous" and "traps for the court". (R 28-63, 158) These motions included a request for unanimous jury determinations of the statutory aggravating factors (R 28-29); motion to preclude death as a possible penalty on double jeopardy grounds (R 30-33); motion "to prohibit any reference to the advisory role of the jury in sentencing" (R 34-35); motion in limine to prohibit any reference to the history of the case (R 36-37); motion for sequestered voir dire (R 38-41); motion to declare the cold calculated and premeditated and heinous, atrocious or cruel aggravating factors unconstitutionally vague (R 44-63); and requested preliminary instructions, which were read to the jury. (R 42-43, 146)

The defense maintained the stipulation entered during the first proceedings that Robinson fired the fatal shots. (R 182, 322-323).

As its first witness, the state called Clinton Fields, who refused to testify on fifth amendment grounds. (R 277-282) The court ruled that Fields was unavailable, and, after redacting portions, Fields' prior testimony was read into the record by the court reporter. (R 287-321)

Detective Charles West was the state's next witness. (R 321-406) West authenticated a videotape of the crime scene as he discovered it on August 12, 1985. (R 330) The cemetery was in a desolate area with no houses around. (R 343) Evidence he collected was introduced, including shell casings, cigarette butts, empty beer cans, and a black purse strap. (R 340-343) West also testified that he interviewed the appellant on August 17, 1985, and the statement Robinson gave West was introduced without objection. (R 353) After a proffer, another statement from the appellant which was included in West's police report was admitted into evidence. (R 360-364) Appellant stated that he approached the victim's vehicle carrying a gun because "A gun is a sign of power and authority." (R 365)

The medical examiner testified that the gunshot wounds to the victim did **not** cause instantaneous death. (R 429) There was sperm in the victim's vagina and no alcohol in her blood. (R 430) The wound to the victim's cheek was a contact wound. (R 433) The trajectory of the second shot indicated it was delivered while the victim was lying on the ground. (R 436)

SUMMARY OF ARGUMENTS

Points one, two, seven, nine and ten all concern the instructions to the jury. Some of these claims are not preserved for review. The trial court correctly rejected the defendant's proposed jury instructions because the standard jury instructions were adequate and correctly apprised the jury of the law governing their deliberations. Any error is harmless.

The trial court properly sustained the state's objections during the testimony of defense witness Harry Krop. One question called for an answer beyond the witness' personal knowledge, and the other question improperly requested Krop to vouch for Robinson's credibility.

The trial court found six valid aggravating factors which are amply supported by the facts and law. The court considered and properly rejected proffered nonstatutory mitigating evidence. Any invalidation of one or more aggravating factors does not affect the sentence.

The prior decision in this case ordered the court to conduct a new sentencing proceeding, and therefore, appellant is foreclosed from arguing that reimposition of the death sentence violates double jeopardy.

Lack of objection to comments which allegedly denigrate the jury's role precludes appellate review. Even if preserved, the remarks were accurate statements of Florida law.

The alleged cumulative error is nonexistant.

The capital sentencing statute is constitutional on its face and as applied.

POINT ONE

THE TRIAL COURT DID NOT ABUSE HIS DISCRETION BY DECLINING TO GIVE THE GUILT PHASE INSTRUCTION CONCERNING THE USE OF CAUTION IN EVALUATING ACCOMPLICE'S TESTIMONY IN THE PENALTY PHASE BECAUSE RELATIVE CULPABILITY HAD ALREADY BEEN DETERMINED AND BECAUSE THE STANDARD INSTRUCTIONS ENCOMPASS THE REQUEST. ANY ERROR IS HARMLESS.

During the charge conference, the defense requested several preliminary instructions which are normally given in the guilt phase, including the instruction that an accomplice's testimony should be viewed with caution. (R 578) The defense argued that the relative culpability of Fields and Robinson was a nonstatutory mitigating factor. (R 578) The court replied that no such evidence had been presented, and noted that the jury had already found Robinson guilty of murder, kidnapping, and robbery. The requested instruction was denied because it "had nothing to do with" the relative culpability of the two men. (R 579) The court correctly noted that the jury was aware that Fields received a sentence of life for his participation in these crimes. Appellant contends that this ruling constituted reversible error.

At the outset, the state notes that this request was not made in writing as is required by Florida Rule of Criminal Procedure 3.390. Therefore, this issue is not preserved for appellate review.

To the extent that this claim is subject to appellate analysis, the standard of review is whether the trial court abused his discretion. King v. State, 514 So.2d 354 (Fla. 1987) Despite appellant's contention to the contrary, the **credibility** of the accomplice is not the same as the relative **culpability** of the codefendants. The court correctly found that the requested instruction had nothing to do with the proposed nonstatutory mitigating factor. In King, this court reaffirmed the principle that mitigating evidence was not unlimited, it has to be relevant to determining the appropriate punishment. Fields' **credibility** was relevant in the guilt phase. Once the jury found Robinson guilty as charged, implicitly determining that Fields was credible, this issue is no longer relevant. The relative culpability of the two men was addressed at length in argument. The fact remains that the instruction requested did not address the nonstatutory factor alleged: relative culpability of the parties.

The court correctly ruled that the instruction requested did not concern the proposed mitigating factor. Moreover, the ruling was correct because the issue was addressed in the "Weighing the Evidence" charge which was read to the jury. (R 692-693) When a requested instruction is subsumed in the standard instructions, it is not error to decline to give the defendant's charge. Bertolotti v. State, 476 So.2d 130 (Fla. 1986).

The state notes that the defense in this case was that the contact wound to the victim's cheek was inflicted accidently; the

defendant stated that she walked into the muzzle of the gun and it went off. Leaving aside for the moment the inherent impossibility of this version, the defense is significant because Robinson did **not** suggest that Fields was the shooter, or that Fields was more culpable than Robinson. The defendant himself admitted that Fields played a minor role in this crime. Rather, he attempted to convince the jury that **his action** of firing the fatal shot was accidental. This is completely different from laying the blame for the crime on Fields. The trial court correctly noted that there was no evidence to support the requested instruction.

Even if reviewable, and even if the trial court abused his discretion in determining that the requested instruction had nothing to do with the proposed nonstatutory mitigating evidence, any error is harmless beyond and to the exclusion of every reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1987) The state admits that the eyewitness testimony from Fields was particularly compelling evidence, but suggests that even without his testimony, the state could establish its case. It is the rare murder prosecution with eyewitness testimony; most defendants are convicted of first degree murder on circumstantial evidence. In this case, apart from Fields' testimony, there was competent, substantial evidence to sustain the verdict, rendering any error harmless. The defense stipulated that the murder weapon was stolen in a burglary shortly before the murder. The state had compelling evidence that Robinson (and not Fields) was

the burglar. The stipulation that Robinson fired the fatal shots was made in recognition that the state could prove he was the shooter. Robinson's statement to Detective West that "a gun is a sign of power and authority" constitutes an admission. See, Swafford v. State, 533 So.2d 270 (Fla. 1988). Moreover, in his statement to West, Robinson admitted nearly every element of the crime: he admitted he committed the act of killing, but contended it was accidental. The jury could believe that he committed the act and disbelieve that it was accidental. See, Buenoano v. State, 478 So.2d 387 (Fla. 1st DCA 1985); Drake v. State, 476 So.2d 210 (Fla. 2d DCA 1985). Therefore, any error in the consideration of Fields' testimony was harmless given the other evidence in this case. Moreover, the error was rendered harmless by the extensive argument on this precise question. (R 640-643, 650-657, 660-666, 685-686) See, Seckington v. State, 424 So.2d 194 (Fla. 5th DCA 1983).

The trial court correctly ruled that the requested instruction was unrelated to the proposed nonstatutory mitigating factor. The request was encompassed in the standard jury instructions concerning weighing the evidence. Even if error, any error is harmless given the abundance of evidence in this case.

POINT TWO

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY SEPARATELY ON THE NONSTATUTORY MITIGATING CIRCUMSTANCES ALLEGED.

During the charge conference, defense counsel orally requested that "...instead of merely giving the any other aspect general charge, that the eight specific non-statutory ...mitigating circumstances testified to and found by Dr. Krop as applying to Johnny Robinson be specifically read to the Jury in their entirety." (R 594) The trial court correctly ruled that the standard jury instruction adequately addressed the issue of nonstatutory mitigating evidence.

After the jury retired to deliberate, they sent out a question asking for a list of the aggravating and mitigating circumstances which applied to this case. Defense counsel speculated that this request was for the nonstatutory mitigating factors alleged. The prosecutor suggested submitting the written charge which had already been delivered orally. The trial court instructed the jury to rely on their recollection, and told them that the court would reread any portion of testimony or instructions they desired. Appellant alleges error in these rulings.

Florida Rule of Criminal Procedure 3.390(c) requires that all requests for jury instructions must be submitted in writing. As appellant failed to do so, this issue is not preserved for review. Moreover, the requested instruction was misleading as it

suggested that the alleged nonstatutory mitigating circumstances had already been established. The jury was free to reject the proposed nonstatutory evidence as not established. The court properly rejected appellant's suggestion as misleading.

Even if preserved, the trial court followed a long line of established precedent from this court that the standard jury instructions adequately advise the jury that the statutory list of mitigating factors is not exhaustive. Mason v. State, 438 So.2d 374, 379 (Fla. 1983); Delap v State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984); Kennedy v. State, 455 So.2d 351 (Fla. 1984)(Trial court correctly refused to instruct that lack of intent to kill could be a nonstatutory mitigating factor.); Mendyk v. State, 545 So.2d 846 (Fla. 1989)(Standard instructions adequately informed jury that they could consider any aspect of the defendant's character such that specific instruction on nonstatutory factor of co-defendant's sentence unnecessary.) In Jackson v. State, 530 So.2d 268 (Fla. 1988) this court held that the standard instruction on mitigating circumstances complies with constitutional principles and that it was not error for the trial court to refuse to instruct the jury according to a written list of nonstatutory mitigating circumstances alleged by the defendant. See also, Puiatti v. State, 495 So.2d 128 (Fla. 1986); Card v. Dugger, 512 So.2d 827 (Fla. 1987) No error is presented.

Even if preserved, and even if error despite the established precedent from this court, any error is harmless in this case. See, Smith v. Dugger, 529 So.2d 679 (Fla. 1988); White v. Dugger, 523 So.2d 140 (Fla. 1988) There are insufficient mitigating circumstances in this case to offset the multiple valid aggravating factors such that neither the jury nor the trial court would reasonably conclude that any sentence other than death was the appropriate punishment for this murder.

POINT THREE

THE TRIAL COURT CORRECTLY SUSTAINED TWO OBJECTIONS DURING THE TESTIMONY OF A DEFENSE EXPERT

Appellant complains that the trial court sustained two of the prosecutor's objections during the testimony of defense expert Doctor Harry Krop, and contends that this action unconstitutionally restricted his right to present evidence on his behalf. The state contends that the trial court's rulings were entirely proper. One question asked the doctor to vouch for the credibility of Robinson, the other asked a question which was beyond the witness' personal knowledge concerning a matter not requiring expert testimony.

The first instance transpired as follows:

> Q.(Defense) In considering and making a diagnosis, have you arrived at a conclusion or diagnosis as to whether or not on the eveining when he had the encounter with Mrs. St. George, he was in fact, in your opinion, intoxicated?
>
> (State): Judge, I object. That calls for total conjecture on his part.
>
> The Court: Objection sustained. (R 516)

The trial court's broad discretion in the admission of evidence was not abused by sustaining this improper question. Welty v. State, 402 So.2d 1129 Fla. 1981) Section 90.604, Florida Statutes, (1987) prohibits a witness from testifying about a matter of which he has no personal knowledge, except as provided in section 90.702, Florida Statutes (1987). It is undisputed

that Dr. Krop has no personal knowledge of the appellant's state of intoxication on the night of the murder. Expert testimony is permitted in section 90.702 only if scientific, technical or other specialized knowledge is necessary to understand a particular area. Whether someone is intoxicated is not a subject that requires expert testimony. "It takes no great expertise for jurors to determine whether an accused was 'so intoxicated as to be mentally unable to intend anything..." Chestnut v. State, 538 So.2d 820, 823 (Fla. 1989) quoting with approval, State v. Wilcox, 70 Ohio st.2d 182, 436 N.E.2d 523 (1982)See also, Lambrix v. State, 534 So.2d 1151,1154 (Fla. 1988)(In order for an expert to testify as to chemical dependence, it would have been necessary to have actual knowledge of intoxicants imbibed.) Therefore, the trial court did not abuse its discretion in sustaining this objection.

The second "limitation" was proper because it sustained an objection to an admittedly improper question:

> Q. (defense) ...(H)aving spent approximately six hours with him, ...do you lack confidence in the truthfulness of the reports made to you by Mr. Robinson?
>
> (State) Your Honor, I object. That's total speculation, once again, conjecture on his part as to his truthfulness.
>
> The Court: Sustained. He can relate to the jury what he was told by the Defendant. He can relate how he determines whether a man is telling the truth, but he certainly cannot tell this jury whether or not the Defendant is telling the truth. (R 547-548)

Expert witnesses cannot vouch for the credibility of their patients. Tingley v. State, 536 So.2d 202 (Fla. 1988); Glendening v. State, 536 So.2d. 212 (Fla. 1988) No error is presented.

POINT FOUR

THE COURTHOUSE SIGNS DIRECTING JURORS TO A 'CRIMINAL RESENTENCING' DID NOT RENDER THE PROCEEDINGS FUNDAMENTALLY UNFAIR.

Appellant contends that the trial court committed reversible error in failing to grant a motion for mistrial on the basis that the jury was directed to the courtroom by signs containing the word "resentencing", without any reference to the defendant by name. (R 66, 271-272) He speculates that laymen "could easily conclude that Robinson had previously been sentenced to death..." (B 46), and claims that his constitutional rights were infringed.

Appellee disagrees that the jurors would conclude that Robinson had been previously sentenced to death from this sign. This claim is based on sheer speculation. This court cannot presume that an error injuriously affected the substantial rights of the appellant, and therefore, neither this sentence nor the jury recommendation should be reversed. §924.33 Fla. Stat. (1987).

Even if subject to review, appellee agrees that this issue is controlled by this court's decision in Jennings v. State, 512 So.2d 169 (Fla. 1987). No error is presented.

POINT FIVE

THE FINDINGS OF FACT IN SUPPORT OF THE DEATH SENTENCE ESTABLISH THAT THE TRIAL COURT CORRECTLY FOUND SIX AGGRAVATING CIRCUMSTANCES. EVEN IF ONE WAS IMPROPERLY FOUND, IN LIGHT OF THE ABSENCE OF STATUTORY MITIGATING CIRCUMSTANCES AND RELATIVELY INSIGNIFICANT NONSTATUTORY MITIGATING CIRCUMSTANCES, THE SENTENCE SHOULD BE AFFIRMED.

After the sentencing hearing, the jury rendered an advisory sentence of eight to four in favor of the imposition of the death penalty (R 69). The trial judge considered the advisory sentence, then on April 3, 1989, entered the required findings of fact and sentenced Robinson to death (R 109-111).

The trial court found six aggravating circumstances and no statutory mitigating circumstances. Robinson's difficult childhood, including physical and sexual abuse and absence of a mother were cited as nonstatutory mitigating circumstances, although he argues on appeal that other nonstatutory mitigating circumstances were established.

Appellee contends that the trial court's conclusions are entirely correct. Appellant assails only three of the six aggravating circumstances thereby admitting that three were properly found: the capital felony committed while Robinson was on parole, his previous conviction of a violent felony, and the capital felony was committed during a sexual battery and kidnapping. Appellant also concedes that no statutory mitigating circumstances were present. This honorable court has held numerous times that when several valid aggravating circumstances

exist, death is the appropriate penalty. See eg., Peede v. State, 474 So.2d 808 (Fla. cert. denied, 477 U.S. 909 (1985). See also, Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Accordingly, appellee contends that even if appellant's argument is accepted in its entirety, nonetheless, death is the appropriate sentence in this case.

A. The capital felony was especially heinous, atrocious or cruel. §921.141(5)(h), Fla. Stat. (1985).

In support of this aggravating circumstance, the trial court stated:

> Defendant jammed the pistol into the face of Beverly St. George and fired. Prior to her execution she had begged Defendant not to harm her. She obviously was terrorized - having been taken out of her automobile at gun point in the middle of the night by two strange men, handcuffed, taken to a remote cemetery, sexually assaulted three times and shot. Robinson discussed the necessity of killing her in her presence. Her fear of harm or death during the commission of the crimes and prior to her death was proved beyond and to exclusion of reasonable doubt. Swafford v. State, 533 So.2d 270 (Fla. 1988).
>
> This murder was especially wicked, evil, atrocious and cruel (R 111).

Appellant contends that some of these statements are not factually supported by the record, specifically, that the victim begged for mercy, overheard their plan and knew her fate. Appellee disagrees. It was reasonable for the trial court, based on all the circumstances, to infer that the victim suffered immense mental agony. Way v. State, 496 So.2d 126, 129 (Fla.

1986); Swafford v. State, supra. The medical examiner testified that the wound to Ms. St. George's cheek was a contact wound, made while the gun was tightly pressed to her cheek. This fact belies the contention that she "could not have known the (first shot) was coming." (B 51) Further, the victim's abduction at gunpoint, long ride to a remote area, and multiple sexual assaults were established beyond a reasonable doubt. Swafford v. State, supra; Stano v. State, supra.

Appellant contends that since Ms. St. George was probably unconscious after the first gunshot wound, this case is indistinguishable from Teffeteller v. State, 439 So.2d 840 (Fla. 1983). See also, Mills v. State, 476 So.2d 172 (Fla. 1985). These cases are distinguishable in that the victims were shot at close range during a struggle, during a robbery. Although the defendant claimed this killing occurred during a struggle, the jury's verdicts and trial judge's findings rejected this version. The jury accepted Fields' testimony that Robinson announced he was going to kill Ms. St. George, walked over to her, placed the gun against her cheek and fired. To ensure death, he shot her again.

A single gunshot wound to the face does not negate the mental anguish suffered beforehand, during the abduction, robbery, and sexual batteries. Craig v. State, 510 So.2d 857 (Fla. 1987); Mills v. State, 462 So.2d 1075 (Fla. 1985). Mental anguish suffered before death can be considered in establishing this factor. Phillips v. State, 476 So.2d 194 (Fla. 1985); Scott v. State, 494 So.2d 1134 (Fla. 1986). The fear and emotional

strain preceding death may also be considered. Adams v. State, 412 So.2d 850 (Fla. 1986), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); Parker v. State, 476 So.2d 134 (Fla. 1985). The abduction and long ride during which the victim begins to guess at her fate is cruel. Preston v. State, 444 So.2d 939 (Fla. 1984); Routly v. State, 440 So.2d 1257 (Fla.), cert. denied, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984). Far from being reassured, appellee contends that evidence showing Ms. St. George continually asked if they meant her harm indicates she had a well founded fear of death that proved correct. See, Melendez v. State, 498 So.2d 1258 (Fla. 1986); Cf. Bundy v. State, 471 So.2d 9 (Fla. 1985).

The state disputes the characterization of Fields' testimony. Appellant's speculation that if Ms. St. George had overheard Robinson's statement that he would have to kill her she would have fled, ignores the fact that she was unclothed after being raped, and that she had been taken to a remote area from which there was no escape on foot. The pictures of the crime scene reveal that the discussion took place at most a few feet from the victim, well within earshot.

Appellant does not dispute the evidence of multiple sexual batteries before death. Like other physical indignities inflicted before death, sexual battery is physical torture and causes mental anguish. See, Kokal v. State, 492 So.2d 1317 (Fla. 1986); Gore v. State, 475 So.2d 1205 (Fla. 1985). To force someone to spend the last few moments of their life as an unwilling participant in a sexual battery is cruel.

B. The capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. §921.141(5)(i), Fla. Stat. (1985).

The trial court based this finding on the facts that the victim was shot in the face at point blank range, his prior announcement of his intention to kill her, and the second shot into her head while she lay on the ground to ensure death (R 111). Harvey v. State, 529 So.2d 1053 (Fla. 1988). The court continued:

> The killing had the appearance of a killing carried out as a matter of course.
>
> The murder was completely unjustified. Except as a witness Beverly St. George was no threat to Defendant. There was no resistance or provocation. There is no credible evidence to support Defendant's theory of accident. Defendant's statements and actions exhibit a heightened premeditation. Rogers v. State, 511 So.2d 526 (Fla. 1987); Bryan v. State, 533 So.2d 744 (Fla. 1988).
>
> The Court finds beyond a reasonable doubt that this murder was cold, calculated and premeditated; and without any pretense of moral or legal justification (R 111).

The extremely close range shots to the head indicate this was an execution style slaying. Squires v. State, 450 So.2d 208 (Fla.), Cert. denied, 469 U.S. 892, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984); Troedel v. State, 462 So.2d 392 (Fla. 1984); McCray v. State, 416 So.2d 804 (Fla. 1982). The gun was procured in advance, there was no sign of struggle, and the victim was shot in the head, indicating that this murder was cold, calculated and

premeditated. Eutzy v. State, 458 So.2d 755 (Fla.), cert. denied, 471 U.S. ___, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1984).

Robinson chose his victim at random, and there is no pretense of moral or legal justification for this pitiless murder. Appellant suggests that his own sexual abuse "compelled" him to commit sexual batteries, and that this constitutes a "pretense of moral or legal justification." (B 54). There is no colorable claim that the murder was committed in self-defense, and therefore, no pretense of justification. Christian v. State, 14 F.L.W. 466 (Fla. September 28, 1989).

"The facts speak for themselves. This was an execution type slaying. The sentence of death was appropriate and should be affirmed." Sullivan v. State, 303 So.2d 632, 638 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

C. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. §921.141(5)(c), Fla. Stat. (1985).

The trial court found this aggravating circumstance based upon Robinson's statements to Fields that he had to kill Beverly St. George because she could identify him and his car (R 110).

Appellant acknowledges this testimony but claims that "the trial court engaged in impermissible doubling (because) the written findings supporting this aggravating circumstance are practically indistinguishable from the ones utilized by the trial court in support of its findings that the murder was cold, calculated and premeditated (B 56). Provence v. State, 337 So.2d

783 (Fla. 1976). There is nothing improper about utilizing direct statements of a witness elimination motive to support a finding of cold, calculated and premeditated murder. Harvey v. State, 529 So.2d 1083 (Fla. 1988). See also, Dufour v. State, 495 So.2d 154, 163 (Fla. 1986). Further, this fact as but one of several cited to support the other circumstance: the manner indicated heightened premeditation and an execution style slaying, there was no pretense of justification. If each of these two aggravating circumstances are supported by evidence, it is not improper doubling. Cooper v. State, 492 So.2d 1059 (Fla. 1986); Burr v. State, 466 So.2d 1051 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

Appellee recognizes that "the mere fact of death is not enough to invoke this section when the victim is not a law enforcement official." Oats v. State, 446 So.2d 90, 95 (Fla. 1984). "Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." Riley v. State, 366 So.2d 19, 22 (Fla. 1978). It must be clearly shown that the dominant motive for the murder was the elimination of witnesses. Menendez v. State, 368 So.2d 1278 (Fla. 1979). The finding should be based on direct evidence of motive or at least strong circumstantial evidence. Oats, supra.

Robinson's statements before and after the murder provide direct evidence that the primary motive for this murder was to eliminate a witness. Harvey, supra; Cf. Doyle v. State, 460 So.2d 353 (Fla. 1984). A verdict of guilty to premeditated murder, instead of felony murder, helps support his finding. Cf.

Rivers v. State, 458 So.2d 762 (Fla. 1984). The antecedent crimes of robbery and sexual battery were Robinson's primary purpose and he then killed in order to avoid arrest and prosecution for those crimes. Cf. Troedel, supra. Robinson admittedly shot Ms. St. George a second time to make sure she was dead. Burr, supra. The isolated location supports this finding. Card v. State, 453 So.2d 17 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); Cave v. State, 476 So.2d 180 (Fla.), cert. denied, 106 S.Ct. 1241 (1985); Harich v. State, 437 So.2d 1082 (Fla.), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed. 724 (1982). There is no readily apparent motive other than witness elimination. Clark v. State, 443 So.2d 973 (Fla.), cert. denied, 467 U.S. 1210; 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984). The undisputed direct evidence of Robinson's witness elimination motive establishes that he murdered Ms. St. George to avoid arrest. Clark, supra; Johnson v. State, 465 So.2d 499 (Fla.), cert. denied, ___ U.S. ___, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); Kokal v. State, 492 So.2d 1317 (Fla. 1986); Wright v. State, 473 So.2d 1277 (Fla.), cert. denied, 106 S.Ct. 870, 88 L.Ed. 909 (1985).

D. After considering all evidence, the trial court properly found certain nonstatutory mitigating factors and rejected them as unproven, and properly weighed them against six valid aggravating factors.

The court's disposition of the mitigating evidence presented and the weighing of those factors is as follows:

MITIGATING CIRCUMSTANCES

"1. Statutory mitigating circumstances:

There are none.

"2. Any other aspect of Defendant's character or record any or record and any other circumstances of the offense (Non-Statutory Mitigating Circumstances):

"Dr. Harry Krop, a clinical psychologist, spent approximately three (3) hours interviewing Defendant on one occasion and two and one-half (2½) hours on another occasion. He did not do any psychological testing. Most of what he learned about Defendant came from the Defendant.

"Dr. Krop spoke to three individuals the night before he testified on February 14th, 1989. They were J. B. Robinson, Defendant's biological father, Coreen Smith, the mother of a school peer of Defendant and her son, Earl Smith, the school peer. No information of any significance was obtained from J. B. Robinson and minimal information was obtained from the Smiths.

"According to Dr. Krop there are seven nonstatutory mitigating factors:

(1) physical abuse as a child;

(2) emotional deprivation (being raised without a mother);

(3) sexual abuse as a child;

(4) being incarcerated in an adult facility as a child;

(5) intoxicated at time of offense;

(6) psychosexual disorder; and

(7) ability to function in prison without being a management problem.

"There is some evidence that Defendant had a difficult childhood, however, the only source of that information was from the Defendant. That evidence is uncorroborated. Defendant told Dr. Krop and Dr. Krop told the jury and the Court. Despite the paucity of evidence the Court accepts as true that Defendant had a difficult childhood. The Court views physical abuse and sexual abuse on a child to constitute one mitigating factor. There is no evidence as to how the absence of a mother affected Defendant. Nevertheless, the Court assumes it did have an adverse affect upon Defendant.

"Dr. Krop's opinion that Defendant was impaired by alcohol at the time of the offense is not supported by the evidence and the Court rejects that opinion.

"There is no credible evidence that Defendant was incarcerated as a child in an adult prison. That is merely what Defendant told Dr. Krop. No details were furnished, nor was any documentary evidence produced. That mitigating factor is rejected as not proved.

"The Court accepts Dr. Krop's opinion that Defendant has a psychosexual disorder. According to Dr. Krop that diagnosis is given to an individual whose sexual behavior is inappropriate such as forced sex. That definition would apply to all rapists.

"There is no doubt Defendant functions well in prison better than he does in society. He is intelligent. He obviously knows how to stroke the system and it is no surprise he behaved in the Courtroom. He knows how to manipulate the system. The fact that he functions well in prison and is not a behavior problem in the Courtroom is not in mitigation of the crime.

SUMMARY

"The Court finds there are six (6) aggravating circumstances. The aggravating circumstances are overwhelming.

"Defendant has a prior violent felony conviction - second degree rape. He kidnapped Beverly St. George, a total stranger, terrorized her, raped her and murdered her. Finally, he stole her purse and its contents.

"Beverly St. George, except as a witness, was no threat to the Defendant. She was killed for the specific purpose of eliminating her as a witness.

SENTENCE

"It is the sentence of the law and judgment of the Court that you, JOHNNY LEARTICE ROBINSON, are hereby sentenced to death." (R 111-113).

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 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 trial court has broad discretion in finding or not finding nonstatutory mitigating circumstances, so long as all the evidence was properly considered. Hargrave v. State, 366 So.2d 1 (Fla.), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); Pope v. State, 441 So.2d 1073 (Fla. 1983); Porter v. State, 429 So.2d 293 (Fla.), cert. denied, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 310 (1983); Floyd v. State, 497 So.2d 1211 (Fla. 1986). Appellant makes no contention that his presentation of mitigating evidence was restricted in any way. As such, appellant has failed to demonstrate an abuse of the broad discretion afforded the trial judge.

Appellant complains that the trial court did not accept his unsupported claim that he had been incarcerated in an adult prison as a juvenile, and that his use of alcohol impaired his judgment. Although the evidentiary standard for mitigating evidence is relaxed, it does exist. A defendant must produce some credible evidence to support his claim. Robinson failed to do so. Further, the evidence of alcohol use does not compel a finding of substantial impairment. Cooper, supra, Simmons v. State, 419 So.2d 316 (Fla. 1982). Robinson gave a detailed account of the crime, indicating that he was not intoxicated. Cooper, supra; Buford v. State, 403 So.2d 943 (Fla.), cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed. 319 (1982).

Appellant has failed to establish an abuse of judicial discretion in the rejection of 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 Johnny Robinson to death. The jury recommended death by a vote of eight to four; there 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). The trial court considered all evidence and correctly found six aggravating circumstances and three 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). Robinson was sentenced to death in accordance with Florida law.

E. Even if one or more aggravating circumstances was improperly found, the sentence of death should nonetheless be affirmed.

Appellant concedes that at least three aggravating and no statutory mitigating circumstances were properly found. Appellee contends that all six aggravating factors were correctly found to be supported by evidence beyond a reasonable doubt. However, even if this honorable Court disapproves of one or more aggravating circumstances, in light of the multiple aggravating circumstances that remain which are weighed against no statutory mitigating circumstances and nonstatutory mitigating circumstances that the judge determined were entitled to slight weight, appellee respectfully requests the sentence of death be affirmed. Jackson v. State, 498 So.2d 406 (Fla. 1986); Dufour v. State, supra.

This case is factually similar to other cases in which the sentence of death was affirmed. Puiatti v. State, 495 So.2d 128 (Fla. 1986); Marek v. State, 492 So.2d 1055 (Fla. 1986); Mills v. State, 462 So.2d 1075 (Fla. 1985); Doyle, supra; Card, supra; Squires, supra; Ruffin v. State, 397 So.2d 277 (Fla. 1981); Hall v. State, 403 So.2d 1319 (Fla. 1981). Robinson was the primary participant in the murder; it is of no consequence that the coparticipant who was less culpable received a life sentence. Deaton v. State, 480 So.2d 1279, 1283 (Fla. 1985) (and cases cited therein).

POINT SIX

DOUBLE JEOPARDY DOES NOT BAR REIMPOSITION OF THE DEATH SENTENCE.

In the first appeal of this case, the convictions were affirmed, but the sentences were reversed. This court held that the death sentence was infirm because the prosecutor's argument included a nonstatutory aggravating circumstance, lack of remorse, and because of an argument this court held was an impermissible appeal to racial bias and prejudice. Robinson v. State, 520 So.2d 1 (Fla. 1988) Appellant contends that the trial court erred in failing to grant his motion to preclude death as a possible penalty based on double jeopardy. (R 30-33, 152-155)

The last two sentences of the decision of this court in the first appeal state: "His death sentence is vacated and remanded for a new sentencing proceeding before a jury. It is so ordered." Id. at 8. Appellee contends that this issue is foreclosed by this language. The trial court must follow the direct order of this court. This court commanded the trial judge to do exactly what transpired, conduct a new sentencing hearing. Had this court determined that a life sentence was mandated on the facts of this case, then the first decision would have reduced the sentence to life. (R 154)

Even if the prior decision is not dispositive of this issue, double jeopardy does not bar reimposition of the death sentence. There is no claim made that the evidence was insufficient to support the sentence. See, Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Nor is this a case where the state sought a death sentence after reversal of a life sentence.

See, Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). Appellee contends this issue was decided adversely to appellant in the following cases: Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987); Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986); White v. Wainwright, 809 F.2d 1478 (11 Cir.) cert. denied, 108 S.Ct. 20 (1987).

Appellant argues that his case should be controlled by the exception to the general rule that a defendant cannot raise double jeopardy after successfully moving for a mistrial, because he contends that the prosecutor intended to provoke a mistrial. Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). The general rule is that by requesting a mistrial, the defendant foregoes the right to a verdict by the first jury. United States v. Scott, 437 U.S. 82, (1978) When the mistrial is declared without the defendant's consent, the state must establish manifest necessity to prevent a double jeopardy bar to reprosecution, while granting a defendant's motion for mistrial requires no such showing. Id. Even assuming arguendo that the state would have to meet the higher standard, the prosecutor did not intentionally provoke a mistrial. In a similar case, the Eleventh Circuit permitted retrial when the prosecutor's prejudicial reference to "organized crime" in violation of the court's order to refrain from using such a term was not intended to provoke a mistrial. United States v. Dante, 739 F.2d 547 (11 Cir.) cert. denied 469 U.S. 1036 (1984) See also, United States

v. Zielie, 734 F.2d 1447 (11 Cir. 1984); United States v. Countryman, 758 F.2d 577 (11 Cir. 1985). This court has also rejected this argument, and found it to be barred when, as here, the trial court makes no finding of prosecutorial intent. Fuente v. State, 14 F.L.W. 451 (Fla. September 14, 1989) The trial court correctly denied the appellant's motion to preclude reimposition of the death penalty upon double jeopardy grounds.

POINT SEVEN

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S REQUESTED JURY INSTRUCTIONS BECAUSE THE STANDARD INSTRUCTIONS SUFFICIENTLY APPRISE THE JURY

Appellant submitted thirteen written requests for jury instructions. (R 93-99) The court denied all but one request; number 2(b) was read to the jury. (R 94, 590, 695) Appellant predictes several points on appeal on these instructions: points two, nine and ten all address this issue. This issue concerns requested instructions number three, four, five, eight, nine and eleven. Appellee contends that these requests were correctly denied in accordance with established precedent.

Requested instruction number three concerned the doubling of aggravating circumstances. This court held in Suarez v. State, 481 So.2d 1201 (Fla. 1985) that such a jury instruction was unnecessary. "The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment...The judge, on the other hand, must set out the factors he finds both in aggravation and in mitigation, and it is this sentencing order which is subject to review vis-a-vis doubling." Id. at 1209.

Number four told the jury that the aggravating factors were limited to the statutory circumstances. This request is subsumed in the standard instructions, and therefore was properly denied. (R 695) Bertolotti v. State, 476 So.2d 130 (Fla. 1985).

Instructions number five and eleven would have informed the jury that they could recommend a life sentence even in the absence of mitigating factors. There is no duty to so instruct the jury. Dufour v. State, 495 So.2d 154 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987); Lemon v. State, 456 So.2d 885 (Fla.), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1984); Kennedy v. State, 455 So.2d 351 (Fla.), cert. denied, 469 U.S. 990, 105 S.Ct. 981, 83 L.Ed.2d 2983 (1984).

In Hildwin v. Florida, 490 U.S. ___, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), the Court held that there is no constitutional right to a sentence by a jury. Appellant's requested instruction number eight that the aggravating factors must be unanimously determined by the jury was impliedly rejected in Hildwin, and therefore was properly denied.

The last challenge in this issue concerns requested instruction number nine, which informed the jury that the balancing process was not a mere counting process. The standard instruction adequately covers this concept. Jackson v. Wainwright, 421 So.2d 1385 (Fla.), cert. denied, 463 U.S. 1229, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1982).

The trial court correctly rejected the requested instructions at issue because the standard instructions are adequate. The standard jury instructions have been repeatedly upheld and "a trial judge walks a fine line indeed in deciding to depart." Kelley v. State, 486 So.2d 578, 584 (Fla. 1986). No error is presented.

POINT EIGHT

THE DEFENDANT'S STATEMENT WAS ADMISSIBLE, AND THEREFORE, THE TRIAL COURT DID NOT ERR IN DELETING ONE WORD FROM THE STATEMENT.

During the prosecutor's closing argument, he read from the defendant's statement to the police. Included in this statement were the sentences, "Then I shot her again. I had to. How do you tell someone I accidently shot a **white** woman." (R 633-634) On appeal, appellant contends that the trial court's failure to delete this one highlighted word from his statement denied his constitutional right to a fair trial.

At the outset, appellee questions whether this issue is preserved for review. Although appellant objected, he failed to move for a mistrial and did not request a curative instruction. He claims that the trial court should have read a cautionary instruction, but none was requested. The motion for new trial did not raise this claim. (R 89) Appellee contends that a motion for mistrial and request for a curative instruction are necessary to preserve this issue for appellate review. Ferguson v. State, 417 So.2d 639 (Fla. 1982).

Even if preserved, no error is presented. The defendant's statement is unquestionably admissible. The state contends that this issue is analogous to gruesome photographs. Henderson v. State, 463 So.2d 196 (Fla. 1985); Adams v. State, 412 So.2d 850 (Fla. 1982) A defendant can expect to be confronted with his post-arrest statements, and any prejudice suffered therefrom is of his own making. No abuse of judicial discretion can be established. See, Duest v. State, 462 So.2d 446 (Fla. 1985); Huff v. State, 495 So.2d 145 (Fla. 1986).

POINT NINE

THE STANDARD INSTRUCTIONS CORRECTLY APPRISE THE JURY OF THE STATE'S BURDEN OF PROOF REGARDING AGGRAVATING FACTORS SUCH THAT THE DEFENDANT'S REQUESTED INSTRUCTIONS WERE UNNECESSARY AND PROPERLY DENIED.

This point concerns the defendant's requested jury instructions numbers one, six, and ten. (R 93-99) These instructions concerned the state's burden of proof in establishing aggravating factors.

In Arango v. State, 411 So.2d 172, 174 (Fla. 1982), this court rejected the argument that the standard instructions misinformed the jury concerning the state's burden of proof.

> A careful reading of the transcript (of the instructions), however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances. These standard jury instructions taken as a whole show that no reversible error was committed. (emphasis added). Id.

See also, Preston v. State, 531 So.2d 154 (Fla. 1988); Tafero v. Wainwright, 796 F.2d 1314 (11 Cir. 1986) The jury in this case was instructed as follows:

> (I)t is your duty to follow the law that will now be given to you by the Court and render the Court an

advisory sentence based upon your determination as to whether sufficient aggravating factors exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist....

If you do not find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years.

If you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances....

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at a decision. If one or more aggravting (sic) circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as tot he sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be

based upon these considerations. (R 695-699)

This court must look at the instructions as a whole and the focus must be on the manner in which a reasonable juror could have interpreted the instructions. Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) The jury was first informed that sufficient aggravating circumstances must exist to impose death. They were then told that insufficient aggravating circumstances demand a life sentence. Thus the jury could find no factord at all in aggravation and recommend life, or find factors in aggravation that they consider weak and recommend life without weighing mitigating factors at all, or find even strong factors insufficient and recommend life on the facts of the case. Since the jury was told that the aggravating factors had to be established beyond a reasonable doubt, the requirement of "sufficient" aggravating circumstances does not refer to an aggravating factor being proven but rather speaks to the jury's own subjective idea of what mandates a sentence of life or death. The instructions clearly place the onus on the state to establish factors in aggravation before a weighing process is conducted.

The jury was then instructed that even if they find sufficient aggravating circumstances, they may be outweighed by mitigating factors. This is nothing more than telling the jury that even if sufficient aggravating factors are found to exist, they may not be enough to impose death. The jurors were then told to give the mitigating circumstances whatever weight they

felt they deserved. If "weighing" can be equated with "burden of proof", then the jury was given carte blanche to return a life recommendation. If any presumption at all was created, it was in favor of a life recommendation.

Appellant's arguments are nothing more that a reiteration of erroneous contentions which have been previously rejected by this court. Appellant has failed to demonstrate any compelling reason to revisit established precedent.

POINT TEN

SINCE THE TRIAL COURT AMENDED THE STANDARD INSTRUCTION ON THE DEFINITION OF HEINOUS, ATROCIOUS OR CRUEL AS APPELLANT REQUESTED, HE HAS NO STANDING TO CONTEND THAT THE STATUTE IS UNCONSTITUTIONALLY VAGUE.

Appellant concedes that this court has already rejected his vagueness challenge to the aggravating factor set forth in section 921.141 (5)(h), Florida Statutes, (1987) in Smalley v. State, 546 So.2d 720 (Fla. 1989) The Smalley court held that the "especially heinous, atrocious or cruel" (HAC) aggravating factor was given a more precise meaning in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), and with this narrowed construction, was upheld against a vagueness challenge in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

The trial court modified the standard instruction as requested by the defense to incorporate a Dixon definition of this aggravating factor. (R 696-698) As such, appellant has no standing to attack the constitutionality of the standard instruction on HAC.

Even if subject to review, there is no basis for vacating this sentence even if the HAC factor is stricken. The court's sentencing order finds five other valid aggravating factors which were determined to be "overwhelming" by the trial court. (R 113) This court can know that the result of the weighing process would not be different even without this single aggravating factor. See, Dufour v. State, 495 So.2d 154 (Fla. 1986); Lusk v. State, 446 So.2d 1038 (Fla. 1984).

POINT ELEVEN

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). This claim was not preserved by objection to the one remark of which he now complains (R 213); the other citations are to the standard jury instructions, which were also read without objection. (R 196, 695, 703). 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, infra. 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.

Only one of three instances cited is even arguably preserved. During the charge conference, counsel for appellant stated that he thought the standard jury instruction "denigrates the jury's role." (R 592) The state suggests that this comment was insufficient to preserve this issue for review. Counsel failed to object when the instruction was given, and failed to

renew any objection when the jury retired to deliberate. (R 695, 703)

Even if this court proceeds to review the merits despite the lack of objection below, the comments now complained of are all proper and accurate statements of the law of Florida. Appellant lists only three citations to the record on appeal which he claims reveal improper statements of law. (B 88) The first of these cites is to the standard jury instructions at the beginning of proceedings. (R 196-197) 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). Another reference is to comments to the effect that the jury recommends the appropriate penalty to the trial judge. (R 213) 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. 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 jury was told their recommendation would be given "great weight." The jury did not hear the comments by counsel during the charge conference; when the standard instructions were read at the close of the case, there was no objection either when the charge was given or after the jury retired. (R 695, 703) There is no error presented in this issue which was not preserved for review.

POINT TWELVE

THE APPELLANT'S ALLEGATION THAT APPELLATE REVIEW BY THE FLORIDA SUPREME COURT RESULTS IN ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW ALTERNATIVELY, THE CLAIM IS WITHOUT MERIT.

The specific constitutional challenge raised for the first time by the appellant was never presented to nor determined by the trial court to preserve the issue for appellate review. The only motion or argument challenging the constitutionality of the statute presented to and ruled upon by the trial court alleged that two specific aggravating circumstances were unconstitutionally vague and overbroad on their face and as applied (R 44-64).

Appellant included in his pretrial packet of motions a request for a special verdict form to allow for "unanimous jury determination of statutory aggravating circumstances." However, the specific eighth amendment challenge advanced on appeal was never raised below (R 28-29; 167-170). In his argument on the motion for use of special verdict form, defense counsel did specifically rely upon the dissenting opinions in Burch v. State, 522 So.2d 810 (Fla. 1988), but there was no challenge to the constitutionality of the statute made to the trial court. The only arguments presented below were that specific fact findings should be made by the jury as part of their advisory sentencing process, and that the jury's determination of aggravating factors should be unanimous (R 67-170). These arguments were rejected by this court and ultimately by the United States Supreme Court in

Hildwin v. Florida, 490 U.S. _____, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989).

In apparent recognition that the argument that he actually presented to the trial court in February, 1989, was specifically rejected by the Hildwin court in May, 1989, the appellant now improperly transforms his original argument into a new and improved version raised for the first time before this court. The appellant's clear procedural default in failing to contemporaneously raise before and have the trial court determine the issue should be dispositive. This claim should be specifically rejected for failure to preserve the issue below. Swafford v. State, 533 So.2d 270, 278 (Fla. 1988); Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984); see also, Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Inclusion of a plain statement in the opinion noting rejection of this claim due to the appellant's procedural default is necessary to avoid relitigation of this issue in later federal proceedings. See, Harris v. Reed, ____ U.S. ____, 109 S.Ct. 1038, 1043, ____ L.Ed.2d ____ (1989).

Alternatively, even assuming that the issue has been preserved for appellate review, the appellant presents no basis for invalidating Florida's death penalty staute on eighth amendment grounds where that statute has repeatedly survived constitutional challenge before this court and the United States Supreme Court. Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Dixon v. State, 283 So.2d 1

(Fla. 1973). The United States Supreme Court in Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), again specifically validated Florida's death penalty procedure including the jury override process and the standard of review applied by this court under Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The Spaziano court stated:

> We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case. Regardless of the jury's recommendation, the trial judge is required to conduct an independent review of the evidence and to make his own findings regarding aggravating and mitigating circumstances. If the judge imposes a sentence of death, he must set forth in writing the findings on which the sentence is based. Fla.Stat. §921.141(3) (1983). The Florida Supreme Court must review every capital sentence to insure that the penalty has not been imposed arbitrarily or capriciously. §921.141(4). As Justice STEVENS noted in **Barclay**, there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence, either in cases in which both the jury and the trial court have concluded that death is the appropriate penalty or in cases when the jury has recommended life and the trial court has overridden the jury's recommendation and sentenced the defendant to death. See **Barclay v. Florida**, 463 U.S., at 971-972, and n. 23, 103 S.Ct., at 3436, and n. 23. (opinion concurring in judgment).

The basic premise of appellant's argument is incorrect: this court does not conduct a different analysis depending upon

the jury's recommendation. In LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 175, 62 L.ED.2d 114 (1979), this court reviewed a case with a **unanimous recommendation of death**, and stated: "The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. Tedder v. State, 322 So.2d 908 (Fla. 1975)" The citation to Tedder demonstrates that the review process is the same regardless of the jury's recommendation. See also, Chambers v. State, 339 So.2d 204 (Floa. 1976)(England, J. concurring); Cooper v. State, 336 So.2d 1133 (Fla. 1976).

Even if appellant is correct that a different review is performed, his reliance upon the dissenting opinions in Burch is misplaced. The import of Justice Shaw's dissenting opinion is not that Florida's death penalty statute is unconstitutional because it does not require fact-findings in the advisory jury recommendation but rather that the court should recede from the standard of review adopted in Tedder v. State, supra, because it makes the jury recommendation "virtually determinative" and allows for "largely unfettered jury discretion" contrary to the intent of Florida's death penalty statute. Id. at 815. Established death penalty caselaw is that the trial judge makes findings of fact and is the ultimate sentencer under Florida's death penalty scheme. For that reason the dissenters in Burch noted that the trial judge's fact findings, which were supported

by competent substantial evidence of record, should not have been second-guessed by the majority of the court under the erroneously adopted Tedder standard. That minority opinion (shared by two justices) does not justify invalidation of Florida's death penalty statute based upon the appellant's contrived analysis.

The appellant overlooks the fact that the jury's recommendation is advisory only. The sentencing determination is made by the trial court after determination of the facts, considering the legal sentencing parameters establlished by this court. The judge incorportes into his analysis with appropriate weight the jury recommendation, whether it be for death or for life imprisonment. See, Grossman v. State, 525 So.2d 833, 839-840 (Fla. 1988). This court then supplies yet another level of review analyzing the appropriateness of the sentencing judge's determination in light of the factual evidence presented, the established law, and an independent proportionality analysis. This court's Tedder decision does nothing to invalidate an otherwise constitutional death penalty statute; to the contrary, the Tedder standard of review provides an additional protection to defendants above and beyond that required by our constitutionally approved statute, in part to prevent potential arbitrariness or capriciousness in the imposition of the death penalty by sentencing judges. This court and the United States Supreme Court have made clear that the various levels of review in our sentencing statute adequately serve to weed out arbitrariness and capriciousness in our death penalty system.

POINT THIRTEEN

APPELLANT CANNOT SEEK REVIEW OF EVERY UNFAVORABLE RULING UNDER THE RUBRIC OF "CUMULATIVE ERROR". NO ERROR IS PRESENTED BY ANY OF THE INDIVIDUAL POINTS RAISED HEREIN.

Under the guise of "cumulative error", appellant presents a "grab bag" of issues which are unworthy of individual consideration. Issues which are unconvincing standing alone are no more formidable in a group. No error has been presented.

Appellee discerns seven claims raised in this point which are not covered in other issues in the brief. First, appellant contends error occurred when Detective West was permitted to testify that in response to his question to appellant as to why he armed himself with a gun before approaching the victim's car, Robinson replied, "A gun is a sign of power and authority." There is no claim that this statement was involuntary. An admission against interest is admissible against a criminal defendant. Swafford v. State, 533 So.2d 270 (Fla. 1988)

He complains next that Fields' testimony from the trial was read into the record after the trial court found that his refusal to testify rendered him unavailable pursuant to Section 90.804(1)(b), Florida Statutes, (1987). Counsel for appellant below conceded that this testimony was admissible. (R 171-172) There is no abuse of judicial discretion demonstrated. Stano v. State, 473 So.2d 1282 (Fla. 1985).

During the reading of Fields' prior testimony, the defense objected to a particular question and answer which were not objected to when the testimony was given. This issue is

procedurally barred by failure to raise it at trial or on the first appeal.

Fourth, Robinson objects to the admission of certain physical evidence which was admitted during the trial, including a photograph, video of the crime scene, and purse strap from the victim's purse. It is proper to permit the resentencing jury to view evidence which was admitted trial. Teffeteller v. State, 495 So.2d 744 (Fla. 1986).

Appellant concedes that his next claim is controlled by this court's decision in Waterhouse v. State, 429 So.2d 301 (Fla. 1983) No error is presented.

The jury was instructed that appellant had previous convictions for attempted rape, robbery, murder and kidnapping, and instructed that these offenses involved violence. Robinson conceded below that this was correct. (R 156,162) This is proper. Johnson v. State, 442 So.2d 193 (Fla. 1983).

Last, appellant complains that he was not supplied with a coat and tie to wear during the proceedings. He does not contend that his attire suggested that he was incarcerated; he was not forced to attend his trial wearing jail garb. See, Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). The state provided him with a shirt and pants from a store in St. Augustine. (R 87) He presents no authority for the proposition that the state must provide formal attire to incarcerated defendants. He does not suggest that he was impeded in any way from obtaining a coat and tie on his own. No error is presented.

POINT FOURTEEN

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). This exact claim was raised verbatim in the first appeal, and this court found it to be meritless. Appellee suggests this holding is law of the case. 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 not presented to the trial court.[1] 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).

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[1] Although appellant cites to page 800, the record in this case is only 740 pages long. Counsel's citation refers to the last case in which he used this argument verbatim, Donald Gunsby v. State of Florida.

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 contends 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). This claim was not presented below. Appellant has failed to identify any limitation on mitigating evidence in his particular case. This argument was specifically rejected in Lemon v. State, 456 So.2d 8855 (Fla. 1984) 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 83, 698) This claim was impliedly rejected in Proffitt v. Florida, supra.

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).

Fifth, 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.

Next, 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 939 (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.

Robinson's eighth constitutional challenge relates to the fact that the advisory verdict need not be unanimous. This claim was presented to the trial court. (R 28) 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 ten 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).

Twelfth, 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 sentence of death imposed for the murder of Beverly St. George.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer brief has been furnished, by delivery, to Christopher Quarles counsel for appellant at 112-A Orange Avenue, Daytona Beach, FL 32114, this 26th day of December, 1989.

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