IN THE SUPREME COURT OF FLORIDA

WILLIAM D. CHRISTOPHER,

Appellant,

v. Case No. 74,451

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

As to Issue I - As this Honorable Court has previously found the statements to be voluntary, and this finding was not upset by the Eleventh Circuit Court of Appeals' finding that the statements were taken in violation of the defendant's *Miranda* rights, the state urges this Court to find that the trial court below correctly admitted the subsequent statement in accordance with the United State's Supreme Court holding in Oregon v. Elstad.

As to Issue II - Appellant's argument overlooks one basic principle; that hearsay evidence is inadmissible unless it falls under one of the statutory hearsay exceptions. Christopher's statements made to Norma Sands Vanloton were admissible by the state under §*90.803(18)*. A party may not offer his or her own statemntn as an admission; §*90.803(18)* only applies when statements are offered by an adverse party.

Appellant contends, however, that these statements should have been admitted out of fairness to the defendant under the rule of completion. Since the purpose of the "rule of completeness" is to ensure that a part of a statement is not taken out of context, only other parts of the statement which relate to the same subject and tend to explain the meaning of the portion already received are admissible under Section *90.108*. The law is clear that otherwise inadmissible statements are not rendered admissible where the admitted portions were not "necessary to clarify, or make not misleading that which is

introduced." Accordingly, the murder/suicide story was properly excluded by the trial court as it was not necessary to explain why Christopher claimed to punch Ahern in the nose or how he got the three hundred dollars.

As to Issue Issue III - It is the state's position that once the state had established that the witness had testified in a prior proceeding where she was subject to cross-examination, and that her statement was inconsistent, the state was entitled to introduce her prior sworn testimony as substantive evidence, without regard to the witnesses' adversity or establishing that the testimony is affirmatively harmful. Further, it is important to recognize that despite appellant's suggestion that the state was able to introduce the whole entire 1978 trial testimony of Norma Sands Vanloton, there were only three instances in which the state introduced portions of this prior testimony. The state asserts that even if it was error to allow the state to introduce this prior trial testimony, in light of the evidence that was admitted, the error was harmless.

As to Issue IV - Appellant contends in the instant case because the trial judge's written findings were not filed until two weeks after the oral pronouncement of death, that these findings were untimely in accordance with Grossman. The state contends, to the contrary, that the trial court's written order was timely filed and that the sentence of death should be affirmed. The trial court's imposition of death was based upon a jury recommendation of death and the written reasons were filed

within two weeks of the sentencing hearing and prior to filing of the notice of appeal. The record includes a contemporaneous well-thought-out order that sufficiently provides this Honorable Court with the opportunity for 'meaninful review.' Accordingly, the state urges this Court to find that the order was timely filed.

As to Issue V - The state contends that both of these murders were especially heinous, atrocious, or cruel, but notes however, that there are two death sentences involved and that each stands on its own merits.

Based upon the facts of this case and, the jury's recommendation of death, the trial court did not err in finding that the murders were heinous, atrocious, or cruel. Further, even if this Court should strike the heinous, atrocious, or cruel factor on one or both of the murders, the valid aggravating factor is sufficient to support the sentence of death in each case.

As to Issue VI - Appellant contends that the procedure followed in the instant case was woefully inadequate to insure the voluntariness of appellant's waiver of the presentation of mitigating evidence. Appellant, nevertheless, recognizes that in Hamblen v. State, 527 So.2d 800 (Fla. 1988), this Honorable Court held that the trial court did not err in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death sentence. Nevertheless, appellant's counsel suggests that this Honorable Court's decision

in Hamblen v. State mandates a thorough inquiry into the voluntariness of the defendant's waiver of his right to present mitigating evidence. In the instant case, counsel put on the record Mr. Christopher's concerns and desires and Mr. Christopher affirmatively agreed with the statements. (R 1357) No further inquiry was necessary.

Further, despite counsel's representation regarding his client's desires, counsel did present mitigating evidence and mitigating evidence was presented through the PSI. Accordingly, no error was committed and an adequate review before the imposition of the sentence was conducted.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ADMITTING STATEMENTS MADE BY THE DEFENDANT TO INVESTIGATOR YOUNG AT THE MEMPHIS AIRPORT.

Christopher alleges that the trial court erroneously admitted statements made by him to Investigator Young while they were at the airport at Memphis, Tennessee preparing to return to Florida. Christopher had previously been interrogated by Lieutenant Mills and Officer Young. Initially, Christopher denied killing Bertha Skillin and George Ahern. He claimed Ahern had killed Skillin and then had committed suicide. Subsequently, after two hours of questioning, Christopher confessed to both murders. These confessions were subsequently found inadmissible by the Eleventh Circuit Court of Appeals. Christopher v. State, 824 F.2d 836 (11th Cir. 1987).

During the instant trial, the state sought to introduce subsequent statements made by the defendant. Officer Young testified that when he and appellant were seated in the front of the Eastern ticket counter, that Christopher asked him what was to become of Norma, and Young replied that he thought the Tennessee court would return her back to her mother, Patricia Stocks. Christopher then stated to Young, "If you hadn't have caught me when you did, I would have killed one other person. And that was Pat Stock's boyfriend, Griff Scott. Because he had made passes at Norma too." (R 969 - 970) The original statements were made on September 22, 1977, and the statements at

the airport were made on September 24, 1977. (R 1314 - 1316, 1318 - 1319)

The United States Supreme Court in Oregon v. Elstad, 470 U.S. 298 (1985), held that a voluntary, unwarned statement does not necessarily render inadmissible a subsequent, warned statement. Under Elstad, a court must first determine whether the initial statements, obtained in technical violation of *Miranda*[1], were in fact involuntary. If it finds those statements involuntary, then the subsequent statements must be suppressed, unless the taint of the initial coercion is sufficiently attenuated. If, on the other hand, the trial court finds that the initial statement, while obtained in technical violation of *Miranda*, was in fact voluntary, then it should suppress the subsequent statements only if, after viewing the totality of the circumstances, it finds that they were in fact involuntary.

Appellant's argument to the contrary, this Court has already found that Christopher's initial confession was voluntary.

> "Appellant claims improper coercion during the course of the interrogation. A case in which improper coercion was found is Jarriel v. State, cited above [317 So.2d 141 (Fla. 4th DCA 1975), cert. denied, 328 So.2d 845 (Fla. 1976)]. In Jarriel the defendant was improperly urged by direct or implied promises to make a statement. The interrogating officer told defendant his wife would be arrested unless defendant made a statements. 317 So.2d at 141. No such

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

> urging or promising took place in the case sub judice. The confession was freely and voluntarily made, and was, therefore, properly admitted. Christopher v. State, 407 So.2d 198 at 200 - 201 (Fla. 1981). (emphasis supplied)

This finding remains unchanged. The Eleventh Circuit Court of Appeals in its opinion finding that Christopher *Miranda* rights were violated noted that:

> "Given that the confession was inadmissible because it was obtained in violation of Christopher's *Miranda* rights, we need not, and therefore do not, reach the voluntariness issue." Id. at 839 fn. 8.

Christopher contends, nevertheless, that his confession was involuntary and that Oregon v. Elstad only applies in cases where the statements are voluntary and unwarned. This argument has been rejected in Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), 479 U.S. 909 (1986):

> "The instant case differs from Elstad in that it involves a failure to involve a suspects request to 'cut off' questioning rather than a failure to give *Miranda* warnings. Nevertheless, the same reasoning necessarily applies. As explained in the preceding subsection, Martin's July 4 confession was voluntary. As in Elstad, the police here violated the technical requirements of *Miranda*, but did not violate the Fifth Amendment itself. The absence of 'actual coercion' in connection with the July 4 interrogation renders the 'fruit of the poisonous tree' doctrine inapplicable, and we hold that the July 4 *Miranda* violation does not automatically require the exclusion of the July 11 confession on this ground. Id. at 928

The Court further noted that:

> As with the 'fruit of the poisonous tree' doctrine, the Court's reasoning in Elstad disposes of the 'cat out of the bag' issue. Here, the police used neither 'physical violence' nor 'other deliberate means' to coerce Martin's confession. Rather, as in Elstad, the first confession was voluntary, although obtained through a technical violation of *Miranda*. We see no basis for treating a failure to honor a suspects right to 'cut off' questioning any differently from a failure to give *Miranda* warnings, and we hold the July 4 *Miranda* does not automatically require the exclusion of the July confession. Id. at 929.

Based on the foregoing, the state asserts that as in Martin, the confessions initially made by Christopher in the instant case were voluntary, although obtained through a technical violation of *Miranda*. Therefore, under the test set forth in Elstad, this Court's determination that the initial statement (while obtained in technical violation of *Miranda*) was in fact voluntary, allows for the admission of subsequent voluntary statements.

Appellant's only argument with regard to the voluntariness of the subsequent statements again rests upon the fact that his prior statement was obtained in violation of his *Miranda* rights. The Court in Elstad, rejected a similar argument.

> "Respondent, however, has argued that he was unable to give a fully informed waiver of his rights because he was unaware that his prior statement could not be used against him. Respondent suggests that Officer McCallister, to cure this deficiency, should have added additional warnings to those given him at the Sheriff's office. Such a requirement is neither practicable nor constitutionally necessary. In many cases a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession obtained.

* * * *

> This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decision vitiates their voluntariness."

470 U.S. 316

Thus, as this Honorable Court has previously found the statements to be voluntary, and this finding was not upset by the Eleventh Circuit Court of Appeals' finding that the statements were taken in violation of the defendant's *Miranda* rights, the state urges this Court to find that the trial court below correctly admitted the subsequent statement in accordance with the United State's Supreme Court holding in Oregon v. Elstad.

ISSUE II

WHETHER THE TRIAL COURT ERRONEOUSLY RESTRICTED DEFENSE'S CROSS EXAMINATION OF NORMA SANDS VANLOTON

Appellant's argument overlooks one basic principle; that hearsay evidence is inadmissible unless it falls under one of the statutory hearsay exceptions. *Section 90.802 Fla. Stat.* Christopher's statements made to Norma Sands Vanloton were admissible by the state under §*90.803(18)*, which provides in pertinent part:

> "Section 90.803 HEARSAY EXCEPTION AVAILABILITY OF DECLARANT IMMATERIAL
>
> The provision of S90.802 to the contrary notwithstanding the following are not inadmissible as evidence, even though the declarant is available as a witness: . . .
> (18) **Admissions.** A statement that is offered against a party and is:
>
> (a) his own statement in either an individual or a representative capacity [.]" (emphasis added)

A party may not offer his or her own statement as an admission; ¢*90.803(18)* only applies when statements are offered by an adverse party. These out-of-court statements and actions are admissible, not because they are against the interest of the party when they were made, but because they are statements made by an adversary and because the adverse party cannot complain about not cross-examining himself. Ehrhardt, Florida Evidence Section 803.18 (2nd Edition 1984).

Accordingly, the statements as introduced by the state were admissible under this exception to the hearsay rule. In contrast

however, these statements were not admissible in the defendant's case. The statements were clearly hearsay inasmuch as Christopher chose not to testify at his trial. *Section 90.801(1)(b), (c)* and *90.801(2), Florida Statutes*. The statements did not fit into any of the three exceptions, namely res gestae, statements against penal interest and admissions of a party opponent. The statements were made a substantial time following the commission of an offense without any indicia of spontaneity or excitement. The statements were exculpatory and self-serving rather than contrary to Christopher's interests. There was no corroboration or other basis for its truthfulness and reliability. Therefore its admission by the defendant would have been contrary to the rules of evidence. Fagan v. State, 425 So.2d 215 (Fla. 4th DCA 1983); see, also, Logan v. State, 511 So.2d 443 (Fla. 5th DCA 1987) (exculpatory statements made by the defendant to arresting officer were hearsay and were not admissible as they were self-serving and made under circumstances showing their lack of trustworthiness); Overton v. State, 429 So.2d 723 (Fla. 1st DCA 1983), review denied, 440 So.2d 352 (self-serving statements that constituted part of the res gestae should be excluded where the statements were self-serving and made under circumstances that indicate lack of trustworthiness); Lowery v. State, 402 So.2d 1287 (5th DCA 1981) (where self-serving declarations do not form a part of the res gestae, they should ordinarily be excluded from a criminal case); Watkins v. State, 342 So.2d 1057 (1st DCA 1977) (not error to refuse to permit defendant to testify as to

statements made by defendant to police officers at police station after alleged crime where such statements were not part of the res gestae and were self-serving.)

Appellant contends, however, that these statements should have been admitted out of fairness to the defendant under the rule of completion. Appellant relies on Eberhardt v. State, 550 So.2d 102 (Fla. 1st DCA 1989), to support this proposition. Eberhardt contended on appeal that the trial court reversibly erred in not allowing his counsel to cross examine a police officer regarding all the statements that Eberhardt made to him after his arrest. The appellate court found that once direct testimony of a conversation between the officer and a defendant had been admitted, the defense was entitled to cross examine the witness concerning the whole of the conversation. The court noted however, that this rule only allows admission of the balance of a conversation as well as other related conversation that are necessary for the jury to accurately perceive the whole context of what has transpired between the two. Eberhardt, at 105, citing to Eberhardt, Florida Evidence, §*108.1 (2nd Ed. 1984).*

It was not necessary in the instant case for the jury to hear one of the defendant's versions of the incident for them to understand what transpired between Christopher and Norma Sans Vanloton. During the instant trial, Norma merely testified to the events as they transpired before and after the murders of George Ahern and Bertha Skillin and the subsequent arrest of William Christopher. The only conversations that Norma testified

to were that the defendant had told her that he had gotten into a fight with Ahern and punched him in the nose and that he had ripped off a guy for three hundred dollars. (R 776 - 777) The self-serving unsupported fantasy of William Christopher about the murder/suicide was not rendered admissible by the admission of these statements. Since the purpose of the "rule of completeness" is to ensure that a part of a statement is not taken out of context, only other parts of the statement which relate to the same subject and tend to explain the meaning of the portion already received are admissible under Section *90.108*. The law is clear that otherwise inadmissible statements are not rendered admissible where the admitted portions were not "necessary to clarify, or make not misleading that which is introduced." Accordingly, the murder/suicide story was properly excluded by the trial court as it was not necessary to explain why Christopher claimed to punch Ahern in the nose or how he got the three hundred dollars.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO INTRODUCE PORTIONS OF NORMA SANDS VANLOTON'S PRIOR TRIAL TESTIMONY.

During the instant trial, the state called the defendant's daughter Norma Sands Vanloton to testify. Initially, Ms. Vanloton refused to testify stating, "I will not be a part of the inaccuracies, the misunderstandings and the circumstantial crucifixion of my father. I understand I am under subpoena, I have appeared as requested, but I cannot be involved in this crucifixion." She was held in contempt of court and jailed in the Collier County Jail. (R 713 - 719) When the court reconvened four days later, Ms. Vanloton agreed to testify. (R 730) During the course of direct examination the witness was asked by the prosecutor "Did you act as a father and daughter in the presence of George and Bertha?" After hearing her response, the prosecutor showed her her testimony from 1978 with regard to this same question. Upon objection by defense counsel, the state asserted that it was not asking the court to declare the witness adverse, it was just attempting to introduce the prior inconsistent statement taken under oath as substantive evidence. (R 751 - 752) The court, however, declared her an adverse witness finding that the witness was presented in good faith and that her testimony would be harmful to the state. (R 752) Appellant argues that the trial court incorrectly found the witness to be adverse, pointing to the fact that the state also agreed that the witness was an adverse. Accordingly, appellant argues that the testimony was improperly admitted.

It is the state's position that as the testimony was admissible under §*90.801(2)(A),* the trial court's determination that the testimony was admissible under §*90.608* was not prejudicial to the defendant and does not require reversal. It is well recognized that a correct ruling of the trial court will be sustained even if incorrect reasons are assigned to the ruling. Stuart v. State, 360 So.2d 406 (Fla. 1978); Trenary v. State, 423 So.2d 458 (Fla. 2d DCA 1982); Smith v. Phillips, 455 U.S. 209 (1982).

This relatively new rule of evidence (§90.801(2)) changes the traditional rule that prior statements of witnesses who testify during a trial are admissible to attack the credibility of a witness but are inadmissible as substantive evidence of the truth of the facts contained in the prior statements. Ehrhardt, Florida Evidence, §801.7 2nd Edition 1984. Under §*90,801(2)* "when a declarant testifies at the trial and is subject to cross examination, a prior inconsistent statement is admissible as substantive evidence of the facts contained in the statement if it was given under oath, subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition. The admissibility for a substantive purpose is in addition to its traditional use for impeaching the credibility of the declarant." Id.

"Although normally a witness may not be impeached by the party who calls him, that restriction is not applicable to a statement offered under §*90.801(2)(a)* because the purpose for

offering evidence is to prove the truth of the contents of the prior statement rather than to attack the credibility of the witness. Thus, it is proper for a party to call a witness who the party knows will testify inconsistently with a prior statement under oath, and after obtaining his inconsistent testimony, offer his prior statement under §*90.801(2)(a)*." See Ehrhardt §801.7.

In order to introduce prior statements, the state only needs to establish that the statement is inconsistent and that the statement was previously given at a trial or hearing where the declarant was subject to cross examination. Appellant concedes that this testimony was given during a prior hearing where the witness was subject to cross-examination. Appellant challenges, however the question of whether the testimony was inconsistent. Ehrhardt also addresses this question:

> "Whether a prior statement is inconsistent with the testimony of the witness is a preliminary question of fact for the trial judge. If a witness testifies during a trial that he cannot remember a particular fact, the issue arises as to whether that testimony is inconsistent with a prior statement asserting a fact to be true. The federal courts have focused on the intent of the advisory committee to protect against 'turncoat' witness who changes his story on the stand and deprives the party of calling him of evidence essential to his case.' If the trial court determines that the lack of memory is fained, it is generally treated as a denial of the prior statement which is inconsistent with the prior statement. The policy against the turncoat witness is being furthered. However, if the witness can truly remember when he testifies, the question remains open as to whether the prior

> statement may be admitted under §90.801(2)(a).
>
> Since 90.801(2)(a) statements are being offered to prove the truth of the matter asserted and the out-of-court statements submitted, rather than to attack the credibility of the witness, the limitations on impeaching a witness recognized in §90.608 are not applicable. Under the doctrine of limited admissibility recognized in §90.107, evidence may be admissible for one purpose even though it is inadmissible for another purpose. In other words, the rule against impeaching a party's own witness does not apply to prohibit a party from calling a witness and offering testimony under §90.801(2).

The trial court's finding of adversity is an implicit finding that the statement was inconsistent. Thus, it is the state's position that once the state had established that the witness had testified in a prior proceeding where she was subject to cross-examination and that her statement was inconsistent, the state was entitled to introduce her prior sworn testimony as substantive evidence, without regard to the witnesses' adversity or establishing that the testimony is affirmatively harmful.[2]

Further, it is important to recognize that despite appellant's suggestion that the state was able to introduce the whole entire 1978 trial testimony of Norma Sands Vanloton, there were only three instances in which the state introduced portions

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[2] Appellee recognizes that a contrary position is set forth by the Fourth District in Parnell v. State, 500 So.2d 558 (Fla. 4th DCA 1986), but suggests that the court in Parnell has substantially altered the section 90.801(2)(g) to reach this conclusion.

of this prior testimony. The first question was with regard to how the witness and the defendant acted in front of her parents which resulted in the initial objection. (R 750) The second was the witnesses' response to "Do you recall whether or not you were in love with the defendant?" Defense counsel objected to this question asserting that the state was not making a good faith effort to bring out essential items. (R 758) This objection was overruled. The third and final instance was when the witness failed to identify a pair of shoes. (R 792) Thus, in context the introduction of the prior testimony was very limited. There was no objection to this question. The state asserts that even if it was error to allow the state to introduce this prior trial testimony, in light of the evidence that was admitted, the error was harmless.

ISSUE IV

WHETHER THE TRIAL COURTS ORDER CONTAINING WRITTEN FINDINGS CONTAINING THE IMPOSITION OF DEATH WAS UNTIMELY FILED.

In each case in which the court imposes the death sentence, the determination of the court must be supported by specific written findings of fact. If the court does not make the findings the court shall impose a sentence of life imprisonment in accordance with §*775.08(2)*. *Section 921.141(3), Fla. Stat*. This Court visited this statutory requirement regarding written findings in support of the death sentence numerous times. Bouie v. State, 559 So.2d 1113 (Fla. 1990).

> "A trial judge's justifying a death sentence in writing provides 'the opportunity for meaningful review' in this Court. State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974); VanRoyal v. State, 497 So.2d 625 (Fla. 1986). Specific findings of fact based on the record must be made, VanRoyal, and the trial judge must 'independently waive aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed.' Patterson v. State, 513 So.2d 1257, 1261 (Fla. 1987) (emphasis omitted) Additionally, 'all written orders imposing a death sentence [must] be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement.' Grossman v. State, 525 So.2d 833, 841 (Fla. 1988), cert. denied, ___ U.S. ____, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989)."
>
> Id. at 1116

This Court further noted in Bouie, that trial courts have been given considerable leeway in the timely filing of written

findings which demonstrate the weighing of facts and the independent exercising of reason and judgement needed to support a death sentence. e.g. Stewart v. State, 549 So.2d 171 (Fla. 1989); Grossman; Patterson; Nibert v. State, 508 So.2d 1 (Fla. 1987); Muehleman v. State, 503 So.2d 310 (Fla.), cert. denied, 484 U.S. 882, 108 S.Ct. 39, 98 L.Ed.2d 170 (1987); Cave v. State, 445 So.2d 341 (Fla. 1984).

Appellant contends in the instant case because the trial judge's written findings were not filed until two weeks after the oral pronouncement of death, that these findings were untimely in accordance with Grossman. The state contends to the contrary that the trial court's written order was timely filed, and that the sentence of death should be affirmed. The trial court's imposition of death was based upon a jury recommendation of death and the written reasons were filed within two weeks of the sentencing hearing and prior to filing of the notice of appeal. The record includes a contemporaneous well-thought-out order that sufficiently provides this Honorable Court with the opportunity for 'meaningful review.' Accordingly, the state urges this Court to find that the order was timely filed and affirm the sentence.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY IMPOSED THE SENTENCE OF DEATH BASED UPON THE AGGRAVATING CIRCUMSTANCES.

Based upon a jury recommendation of nine to three, the court below imposed two death sentences upon the defendant William D. Christopher. The court found two aggravating circumstances which were applicable to both murders and no mitigating circumstances. (R 1235 -1237) The first aggravating circumstance was that the defendant was previously convicted of other felonies involving the use of violence to some person. The second aggravating circumstance was that the two capital felonies committed by the defendant William Christopher werer especially heinous atrocious, or cruel.

Appellant does not challenge the validity of the first aggravating circumstance, however, appellant does contend that neither of the murders was especially heinous, atrocious, or cruel. Appellant argues that both murders were the result of an instant gunshot wound to the head which does not support such a finding. The state contends that both of these murders were especially heinous, atrocious, or cruel, but notes however, that there are two death sentences involved and that each stands on its own merits. The state further recognizes that this Court's prior decision in Christopher v. State, 407 So.2d 198 (Fla. 1981) wherein this Court upheld the heinous, atrocious, or cruel factor for both murders, did consider information that was obtained from the now suppressed confession. Nevertheless, the state asserts

that the underlying facts that supported this Court's finding, remain the same.

The evidence adduced in the instant trial still supported this Court's finding that the murders were committed when Mrs. Skillin discovered that Norma was planning to leave Naples with the appellant and that she was killed to prevent the defendant from leaving the state with his daughter. Id. at 202. This Court's decision was valid at the time it was rendered and, contrary to appellant's contention, it is not an aberration of the law.

As for the sentence of death that was entered for the murder of George Ahern, the evidence adduced at trial showed that after the murder of Bertha Skillin, George Ahern was then accompanied to the bank by another man where he made a $300 withdrawal from his savings account. (R 724 - 729, 838 - 846, 848 - 852, 858) They then returned to Ahern's home, where Ahern was taken or chased into the bedroom and shot and killed. His body was discovered on the floor in the master bedroom and the body of Bertha Skillin was found in the bathroom off of the master bedroom. (R 530 - 533) There was also evidence that the body of Bertha Skillin had been dragged into the bathroom. (R 554 - 555, 575, 591 -592) The autopsy revealed that Ahern had a bruise on his chest, as well as a gunshot wound to the right arm and a fatal shot to the head. (R 651 - 655) Norma Sands Vanloton testified that the defendant picked her up from school shortly after the murders, and that he had $300 on him which he told her

he had received from some guy he had ripped off in a marijuana deal. (R 766 - 769) The defendant had also told her that he had punched George Ahern and that he had started bleeding all over the place. The defendant's shoes were covered with blood. (R 777) This evidence is sufficient to support a finding tht Ahern ws awere of his impending death.

Based upon the foregoing facts, and the jury's recommendation of death, the trial court did not err in finding that the murders were heinous, atrocious, or cruel. Further, even if this Court should strike the heinous atrocious or, cruel factor on one or both of the murders, the valid remaining aggravating factor is sufficient to support the sentence of death in the instant case. This Court held in State v. Dixon that when one or more aggravating circumstances are found, the death penalty is presumed proper unless the aggravating circumstance or circumstances are overridden by one or more of the mitigating circumstances. 283 So.2d at 9. In the instant case, no mitigating circumstances were found, therefore, even if this Honorable Court struck one of the aggravating factors, the sentence of death was appropriately imposed. See Christopher v. State, 407 So.2d 198, 203.

Evidence presented concerning the first aggravating factor showed that on Wednesday, May 17, 1972, at approximately 7:40 a.m., Patricia Lynn Norton, age 20, was forcibly raped by William D. Christopher at knife point, after he forced his way into her bedroom, hit her several times with his fist and forced her to

undress. At approximately 10:45 a.m., the victim was stabbed in the chest with a steak knife, while talking to her sister on the telephone. From the telephone conversation, Brenda Moll, sister of the victim, knew something was wrong, she heard the victim say, "Stop. Please don't." and the phone went dead. Brenda called her mother who called the police. Before leaving the scene Christopher telephoned his wife Gloria Christopher in Miam i, Florida, and told her he had "done something bad to Pattie." After the assault, Christopher took the keys to the Norton automobile and fled the scene, and abandoned the car later. Thereafter he surrendered to the police. Robert Norton, husband to the victim, had known Christopher for approximately seven years. The victim had known him for about two years. William and Gloria Christopher had spent two or three days as guests of the Nortons during the Christmas holidays in 1971. At the time of this crime, Christopher was again a guest of the Nortons. (R 1368 - 1369) In light of the heinous nature of this felony, a sentence of death was appropriate even if this Honorable Court shoudl strike the heinous, atrocious or cruel factor for either murder.

Appellant also claims that the trial court should not have given the heinous, atrocious, or cruel instructioni. Recently, in Stewart v. State, 558 So.2d 416 (Fla. 1990), this Court found that it was error for a trial court to refuse a requested instruction where the evidence showed impairment but not substantial impairment as a mitigating factor. Quoting Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986), this Court stated:

> "'The legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by bouncing opposing factors.' If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know."

Thus, if the trial court had refused to give the instruction where there was evidence to support it, he would have been usurping the jury's role in the decision making process.

It is unquestionable that there was sufficient evidence before the jury to support the giving of the instruction of heinous, atrocious and cruel.

To the extent that appellant is now arguing that the aggravating factor is unconstitutionally vague under Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), this point has not been preserved for appellate review. Appellant objected below on the basis that the factor was inapplicable, not that it was unconstitutionally vague. (R 931) Appellant may not change the basis for an objection at the appellate level. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Even if the merits of the argument could be reached it has been rejected. Smalley v. State, 546 So.2d 720 (Fla. 1989); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989).

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO WAIVE THE PRESENTATION OF MITIGATING EVIDENCE.

Appellant contends that the procedure followed in the instant case was woefully inadequate to insure the voluntariness of appellant's waiver of the presentation of mitigating evidence and that it was equally in a dequate to protect society's interest in seeing to it that the death penalty is applied properly. Appellant, nevertheless, recognizes that in Hamblen v. State, 527 So.2d 800 (Fla. 1988), this Honorable Court held that the trial court did not err in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death sentence. This Court noted that to permit counsel to take a position contrary to the defendant's wishes through the vehicle of guardian ad litem would violate the dictates of Faretta v. California, 422 U.S. 806 (1975).

> "This does not mean that courts of the state cannot administer the death penalty by default. The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of the death sentence. A defendant cannot be executed unless his guilt and the propriety of the sentence have been established according to the law. Hamblen at 804.

In the instant case, counsel presented the wishes of his client to the court and did not present any live testimony in accordance with those wishes. Nevertheless, counsel did present the affidavits of Christopher's family which were read into the

record. (R 1370 - 1372) In addition to these affidavits, counsel argued to the jury against the imposition of death. Further, as in Hamblen, the judge did not merely rubberstamp the state's position. This was Christopher's third trial in front of the same judge. This same judge had previously heard mitigating evidence presented on behalf of Christopher. Further, the trial judge also had the benefit of the presentence investigation which contained substantial evidence of nonstatutory mitigating factors such as the defendant's family background, his work history and his mental examinations.

Nevertheless, appellant's counsel suggests that this Honorable Court's decision in Hamblen v. State mandates a thorough inquiry into the voluntariness of the defendant's waiver of his right to present mitigating evidence. Counsel suggests that this inquiry should be similar to the inquiry required when there is a waiver of the right to counsel. Appellant contends that while he did not formally act as his own attorney, there is no question that he gave up an important constitutional rights against his attorney's judgement.

In Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), this Honorable Court rejected a claim that the trial court had erred by failing to conduct an inquiry and to determine whether the defendant had voluntarily, knowingly and intelligently relinquished his right to testify. Torres-Arboledo had characterized the right to testify as a "fundamental constitutional right" which he, as Christopher does in the

instant case, equated with such personal fundamental rights as the right to counsel, the right to trial by jury, the privilege to self-incrimination and the right to be present at all crucial stages of a criminal prosecution. Id. at 409. After careful consideration, this Honorable Court rejected the argument and held that although there is a constitutional right to testify in the due process clause, this right does not fall within the category of fundamental rights which must be waived on the record by the defendant himself. Further, this Honorable Court noted that even the accused's right to represent himself, is not so fundamental as to require the same procedural safeguards employed to ensure a waiver of a right to counsel is knowingly and intelligently made. Id. at 411. The Court also noted in Torres-Arboledo that:

> Although we expressly hold that a trial court does not have an affirmative duty to make the record inquiry concerning a defendant's waiver of the right to testify, we note that it would be advisable for the trial court, immediately prior to the close of the defense's case, to make a record inquiry as to the whether the defendant understands he has a right to testify and that it is his personal decision after consultation with counsel, not to take the stand. Such an inquiry will, in many cases avoid postconviction claims of ineffective assistance of counsel based on allegations that counsel failed to adequately explain the right or actively refused to allow the defendant to take the stand. Torres-Arboledo at 411 fn.2.

In the instant case, counsel put on the record Mr. Christopher's concerns and desires and Mr. Christopher

affirmatively agreed with the statements. (R 1357) No further inquiry was necessary.

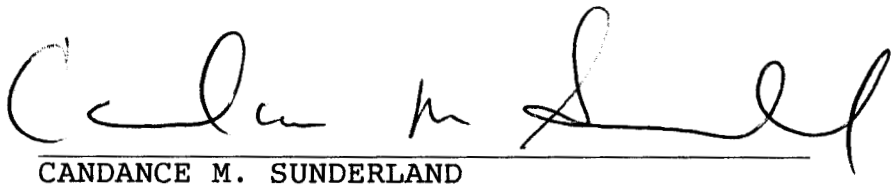
Further, as previously noted, despite counsel's representation regarding his client's desires, counsel did present mitigating evidence and mitigating evidence was presented through the PSI. Accordingly, no error was committed and an adequate review before the imposition of the sentence was conducted.

CONCLUSION

Based on the foregoing arguments and citations of authority appellee would pray that this Honorable Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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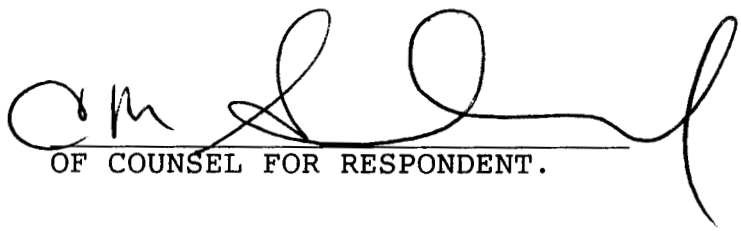
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 21 day of November, 1990.



OF COUNSEL FOR RESPONDENT.