IN THE SUPREME COURT OF FLORIDA

WILLIAM BRYAN CRUSE,

Appellant,

v. Case No. 74,656

STATE OF FLORIDA,

Appellee.



APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY

# BRIEF OF THE APPELLEE

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## STATEMENT OF THE CASE

Your appellee accepts the Statement of the Case as set forth in the brief of appellant at pages 1 - 8 as a substantially accurate reflection of those matters which occurred below. To the extent that appellant includes factual recitation of certain matters which transpired during the course of the proceedings below, your appellee will comment on same in the pertinent portions of the argument section below.

## STATEMENT OF THE FACTS

As this Court is well aware, the record on appeal in this case consists of fifty-four (54) volumes (plus one "supplemental" volume containing the transcript of an in-camera hearing) and exceeds some 8,900 pages in length. Therefore, in an effort to comply with the page limitations of the *Florida Rules of Appellate Procedure*, undersigned counsel hereby adopts, as a statement of the operative facts of this case, the facts found by the trial court contained within pages 2 - 6 of the judgment and sentence entered on July 28, 1989, and contained within the instant record commencing at R 8813. The following recitation can be found at R 8814 - 8818. The record references contained within the following factual recitation are supplied by your appellee and are those references to the evidence adduced at trial upon which the trial court may have based its factual conclusions:

. . . On March 21, 1987, after experiencing problems with neighborhood children, the defendant **WILLIAM BRYAN CRUSE, JR.** purchased a .223 caliber Ruger mini-14 semi-automatic assault rifle. This assault rifle was specially ordered through the Oaks Trading Post, a gun retailer in Melbourne, Florida (R 3117 - 18). This weapon is not a typical hunting rifle, (R 3148 - 49) nor is it the type of weapon purchased for home protection. The relatively small bullet fired from this assault rifle travels approximately 3,400 feet per second (R 3152). It is designed to inflict hideous destruction to the human body. As a bullet fired

from this rifle enters the human body, a temporary cavity is created as the energy of the round dissipates, sometimes pulverizing internal organs including those outside the direct path of the bullet. These cavities are sometimes as large as one foot in diameter (R 1587). Should a bullet strike a limb and pass through, the entry wound would not necessarily be remarkable, but the exit wound would be much larger than that created by a low velocity round (R 1590). The capacity of this assault rifle to destroy the human body is manifested by the defendant's carnage on April 23, 1987. The defendant was familiar with this assault rifle, yet it was purchased because the defendant was angry at neighborhood children.

Later, the defendant purchased six thirty-round clips after being told that forty-round clips would be likely to cause the assault rifle to malfunction (R 3157 - 58). He also purchased one hundred additional rounds of ammunition. Only five of these clips were purchased from the Oaks Trading Post, since that is all they had in stock (R 3158 - 59). It is not known where he obtained the sixth clip. Prior to April 23, he practiced firing the assault rifle.

On April 23, 1987, the defendant became angered, left his house with his Ruger mini-14 assault rifle, a 20-gauge shotgun and a .38 caliber revolver, and began driving towards the Palm Bay Center, a shopping area. After leaving his own driveway he stopped in front of the Rich family's house, across the street from the defendant's own home. He then began shooting at members

of the Rich family as they were in front of their house, wounding fourteen-year old John Rich IV (R 1714 - 50). He then continued to the Publix grocery store at the Palm Bay Center, a trip of many blocks. At approximately 6:15 p.m., he parked his automobile in front of Publix, exited with his assault rifle, ammunition pouch, and .38 revolver. Upon leaving his automobile the defendant commenced firing his assault rifle at Nabil Al-Hameli, Emad Al-Tawakuly and Faisel Al-Mutairi, hitting all three (R 1555 - 1564, 1889 - 1913). Before making sure that his first victims were dead, the defendant turned and repeatedly fired at Douglas Pollack as he ran along the walkway of the shopping center (R 1930 - 1938). He then shot Eric Messerbauer, who was in front of the K-Mart department store (R 1990 - 1997), and then he shot and killed Ruth Green as she pulled her car into the driveway in front of Publix (R 1941 - 1953, 1960 - 1979). The defendant then approached Nabil Al-Hameli and Emad Al-Tawakuly and shot them again, making sure they were dead (R 1900, 1946).

After killing Nabil Al-Hameli, Emad Al-Tawakuly and Ruth Green, the defendant heard sirens of emergency vehicles approaching the scene. He then left the Palm Bay Center and drove to the Sabal Palm Square shopping center. He drove to the driveway area just in front of the Winn-Dixie grocery store, where he exited his automobile with his assault rifle. The defendant was in the process of firing shots into the Winn-Dixie when Police Officer Ronald Grogan approached in his marked patrol car (R 1804 - 1807). The defendant turned toward the officer,

inserted a new clip into his semi-automatic assault rifle (R 2137, 2177) and fired eight shots into the patrol car (R 2123), killing Officer Grogan.

Police Officer Gerald Johnson then entered the Winn-Dixie parking lot just behind Officer Grogan. His patrol car was marked and he was in uniform. The defendant shot at Officer Johnson, wounding him in the leg (R 2124). He then stalked Officer Johnson into the parking lot, and upon finding him, fired several more shots into the policeman's body, killing him (R 2092). The defendant fired upon members of rescue team attempting to get Officer Grogan out of the defendant's line of fire. As rescue effort was underway, the defendant shouted, "Where is the cop? Get away from the cop! I want the cop to die." (R 2201) After Officers Grogan and Johnson were eliminated, the defendant entered the Winn-Dixie store with his rifle and ammunition.

As the defendant went through the Winn-Dixie grocery store, approximately fifteen to twenty people fled to the rear of the store and out the rear door. The defendant followed them. Once he was at the rear door of the Winn-Dixie store, the defendant began firing at people as they attempted to escape. He wounded many and killed Lester Watson by shooting him in the back (R 2386 - 2396). The defendant continued to fire on the men who made heroic efforts to rescue those trapped by the defendant's fire, wounding Najib Samad (R 2557 - 2588).

Throughout the episodes at both shopping centers, the defendant remained calm, going about his business of shooting people in an emotionless manner. The defendant would scan his field of fire, looking for targets (R 1965 - 1966), he would employ what is known as a 3-shot drill (R 2268 - 2270), and would move in and out from cover while firing. His shooting was not random. He would select human targets and then attempt to kill them (R 1833; 1839; 1963 - 1964; 2146; 2296). One witness described the defendant's actions by saying it looked as if he were shooting skeet (R 2397 - 2399; See also 1978 - 1979).

The defendant then took Robin Brown and Judy Larson hostage. He soon released Ms. Larson, but continued to hold Ms. Brown, sometimes holding a gun to her head (R 2589 - 2611). He tried unsuccessfully to shut off the lights inside the store in order to reduce his visibility. At one point he demanded that his automobile be driven to the back of the store, telling the police that they could kill him once he was outside Brevard County. Ms. Brown was eventually released sometime after 1:00 a.m. on April 24, 1989 (R 2612 - 2679). Tear gas was shot into the store, forcing the defendant out and into custody (R 2776 - 2782; 2793; 2801 - 2803). Before the defendant was captured he killed six people, and wounded ten others.

In his brief at pages 9 - 12, appellant sets forth some historical facts concerning his behavior prior to the commission of the homicides on April 23, 1987. This history was relied

upon, in part, by the mental health experts who testified at trial regarding the question of appellant's sanity. In an effort to economize your appellee will not reiterate those facts in this portion of this brief, but will rather synopsize the testimony of the mental health experts who testified. Disagreement with or clarification of these historical facts will be discussed in the remainder of this portion of the brief.

The first mental health expert called to testify by the defense was Dr. Walter Afield. Dr. Afield diagnosed the defendant as suffering from chronic paranoid schizophrenia and brain damage (R 3352). The defendant is preoccupied with homosexuality and suffers from bizarre delusions (e.g., everyone is watching the defendant's crotch or trying to get at his genitals) (R 3354 - 3355). Dr. Afield further testified that although the defendant has a history of drinking, he is not an alcoholic. Dr. Afield observed that alcohol is sometimes used by a patient as a tranquilizer to control some of the mental illness (R 3365 - 3366). Although there is evidence of brain damage in the left mid-posterior region which seems to be encephalomalacia (wasting away of a piece of the brain -- a hole or empty spot), the EEG did not reveal seizure problems or convulsions (R 3368 - 3370). In Dr. Afield's opinion, the defendant, by purchasing a firearm and ammunition within approximately ten weeks prior to the mass murders, was stocking up to protect himself from the "demons," the people out to get him (R 3372 - 3373). Dr. Afield concluded his direct testimony by opining that the defendant was

legally insane at the time of the incident (R 3380). On cross examination, Dr. Afield acknowledged that someone with the same delusional system as the defendant could be legally sane (R 3409 - 3410). In reaching his diagnosis, Dr. Afield had no statements from eyewitnesses of the incident (R 3433). Dr. Afield also acknowledged that he reviewed a report of Officer Bowden concerning the incident with the boys where the defendant grabbed his crotch. In that statement the defendant remembered everything he did and that the defendant stated, "I know I shouldn't have done it. It was wrong and I'm sorry." (R 3433 - 3444). Dr. Afield further testified that although the defendant knew he was holding Robin Brown as a hostage in the Winn-Dixie, the defendant did not know the consequences of his actions and did not know what he was doing was wrong (R 3448 - 3451). However, Dr. Afield also testified that in spite of his delusions, the defendant knew it would have been wrong if he shot people (R 3456). Dr. Afield also noted that the brain damage observed could be the result of normal aging (R 3457). Dr. Afield further testified that the defendant probably knew on April 23, 1987, that by shooting people he would seriously hurt or possibly kill them but he didn't understand that it was wrong to do so (R 3466). The defendant was quite angry with everyone he thought was in the conspiracy (i.e. all of the people he shot) (R 3467 - 3468). Although, as aforementioned, Dr. Afield had no eyewitness statements, he testified that in trying to reconstruct the defendant's mental state at the time of the incident it is

helpful to obtain as many facts as possible concerning the manner in which he did it, the defendant's behavior during the incident, etc. (R 3468 - 3469).

The next expert called by the defense was Dr. Alvin Wooten, a clinical psychologist. Dr. Wooten's preliminary findings indicated at least mild brain damage, cause unknown (but suspected to be chronic alcoholism) -- this was Dr. Wooten's major conclusion although he also diagnosed the defendant as paranoid. Dr. Wooten might not have been able to support a diagnosis of paranoid schizophrenia, although the two are close (R 3512). Dr. Wooten testified that the core of the defendant's delusion is that the defendant believes others think he is a homosexual (R 3516). This can be documented for at least fifteen years although it may have existed for approximately 30 years (R 3517). Notwithstanding the above testimony, Dr. Wooten concluded that on April 23, 1987, the defendant suffered from paranoid schizophrenia and brain damage (R 3545). At the time of the incident, the defendant was legally insane in that he did not know the difference between right and wrong and he did not appreciate the consequences of his actions (R 3545 - 3546). On cross examination, Dr. Wooten testified that in determining sanity, factual information (e.g. what the defendant admits to have been thinking at the time of the offense, what the defendant was doing at the time of the offense, how the defendant was interacting with other people during the time of the offense, and the defendant's ability to recognize certain things and respond

rationally) is important (R 3560). However, when Dr. Wooten rendered his opinion in September of 1987, he did not have this factual information. He did not have the videotape of the defendant's interview at the Palm Bay Police Department immediately after arrest, he did not have the statement of Robin Brown (the hostage), and he did not have statements of other witnesses (R 3561 - 3562). The defendant never told Dr. Wooten that any people were out to physically harm or kill the defendant, so, consequently, the defendant never said that he had to kill first to prevent harm to himself (R 3566). The defendant stated to Dr. Wooten that "They treated me like a patsy for two years, they played every trick on me, only one option left, fire power, wanted to demonstrate that I was the person to be reckoned with." (R 3570). The defendant advised Dr. Wooten that he got more and more upset as the day of the incident went on (R 3570 - 3571). The defendant said he had done something wrong but didn't know exactly what it was; the defendant also stated that he kept the young woman (Robin Brown, the hostage) with him so that the police probably would not shoot him. The defendant let the older woman (Judy Larson) go because she was scared and the defendant felt sorry for her (R 3573 - 3574). Dr. Wooten further testified that it is possible that the defendant may not want to remember the events of the incident or may describe events in a way different from how the occurred (R 3575). Dr. Wooten noted that the defendant's brain damage is not severe (R 3579). Dr. Wooten was also not aware that on the same day as the "crotch incident"

with the children on April 17, 1987, the defendant purchased ammunition and clips (R 3586). Dr. Wooten also did not recall Robin Brown's statement that the defendant said he had a run-in with the kids and that's the reason he got angry and purchased the ammunition and clips (R 3586). At other times prior to the incident in question, the defendant had driven to the shopping center with guns in his car although he did not shoot or display them. At those times, the defendant was legally sane (R 3594 - 3595). Dr. Wooten acknowledged that the videotape of the defendant shortly after arrest reveals that the defendant knew what was going on at the time, that to shoot a person would be wrong, and that shooting a person might result in harm or death (R 3605). At that time, however, the defendant was under the same delusional system as always (R 3605 - 3606).

The final mental health expert called by the defense in its case in chief was Dr. Jonas Rappeport, a psychiatrist who examined the defendant on March 22, 1988. Dr. Rappeport did review witness statements, other information, and familiarized himself with Florida law. He conducted a standard forensic psychiatric evaluation of the defendant (R 3635 - 3636). Dr. Rappeport concluded that the defendant's delusional system concerning being a homosexual or being forced to become a homosexual has existed for 15 - 25 years (R 3636). The defendant has brain damage, but not a tremendous amount (R 3647). Dr. Rappeport diagnosed the defendant as suffering from paranoid schizophrenia (R 3647). After review of medical records, the

examination of the defendant, speaking with jail personnel, going to the scene, reviewing witness statements, police reports and the videotape, Dr. Rappeport opined that the defendant was not legally sane at the time of the offense and that he had genuine amnesia concerning forgetting everything between putting the guns in his car and being in the Winn-Dixie with Robin Brown (R 3658 - 3669). Dr. Rappeport concluded that the defendant was in an acute psychotic break at the time of the offense, but he also opined that the defendant did not drink a lot that day (R 3672). On cross examination, Dr. Rappeport testified that something overwhelmed the defendant and caused the offense to happen -- this was a giant progression from what had occurred previously (i.e., dry firing the gun, "the crotch episode", etc.). The defendant felt threatened, cornered and overwhelmed with rage and anger because of the things he thought were happening to him (R 3748 - 3749). On redirect examination, Dr. Rappeport noted that the defendant was respectful of women, even reverent to them. Because women were shot by the defendant this is indicative that the defendant was totally unaware and didn't know the consequences of his actions (R 3776 - 3777). On re-cross examination, Dr. Rappeport testified that although the defendant expressed remorse that he had shot women, the doctor would expect the defendant to have bad feelings about men who he thought were trying to make him into a homosexual (but the fact that the defendant didn't express remorse in itself is not significant). (R 3783 - 3784). Dr. Rappeport further testified that it was

possible that the defendant left the Publix for a reason other than stated (i.e., that it was closed) -- it might be because he heard sirens and saw police cars coming his way and the defendant might have chosen not to be totally truthful concerning why he left the Publix (R 3789).

In the state's rebuttal case, two mental health experts were called to testify. The first was Dr. Robert G. Kirkland, a psychiatrist. Dr. Kirkland testified that the videotape was highly beneficial in rendering an opinion because those events occurred soon after the crime was committed (R 3926). The statements of Robin Brown were also helpful in determining whether the defendant knew right from wrong at the time of the offense, as were statements of witnesses at the scene (R 3927, 3933). Dr. Kirkland opined that when the defendant dry fired the rifle when he was having problems with neighbors it was because the defendant knew that to fire the rifle would be wrong (R 3937). The defendant also knew that when he shot a rifle into the air after he heard youngsters yelling at him and honking at him approximately 3 - 4 months prior to April 23, 1987, he was doing something mildly wrong (to prevent a major wrong, i.e., shoot a person) (R 3938 - 3939). With respect to the April 17, 1988 "crotch episode" (i.e., fifteen year and nine year old boys were in front of the defendant's house, the defendant made obscene gestures and repeated obscenities, the police came to the defendant's house the next day and the defendant acknowledged he was wrong and he was sorry), the defendant knew what he was

doing, understood the consequences, and knew it was wrong (R 3939 - 3940). Dr. Kirkland diagnosed the defendant as suffering for some time from a major mental disorder. Despite this disorder, the defendant retained the capacity to know what he was doing and to know whether or not those things are wrong (R 3941). The defendant knew what he was doing when he took Robin Brown as a hostage, knew the consequences of it and knew it was wrong (R 3942). The defendant, based on statements by Robin Brown, stated that he knew he was in trouble, that he needed a hostage to protect himself, that he was in danger of being killed, and that he knew he had done some very bad and wrong things (R 3942). Dr. Kirkland also opined that the defendant knew he was wrong to shoot people prior to the point he came into contact with Robin Brown (R 3942). It was also evident to Dr. Kirkland after viewing the videotape that the defendant knew it was wrong to shoot people (R 3944). Although the defendant suffered with a delusional system, he was still able to know on April 23, 1987, what he was doing, the consequences thereof, and that it would be wrong to shoot people (R 3946 - 3947). Dr. Kirkland concluded that the defendant was legally sane on April 23, 1987 (R 3948). Certain facts reviewed by Dr. Kirkland which occurred during the episode indicated that the defendant knew what he was doing during the shootings: carrying ammunition in a pouch, loading the rifle from time to time, the defendant asking about the cop and wanting to make sure the cop was dead, and that the defendant aimed at women but then diverted his aim towards men (R 3949 -

3950). Dr. Kirkland opined that alcohol consumption was not sufficient to negate the opinion that the defendant was legally sane (R 3959). Despite the defendant's anger or his delusions, the defendant knew what he was doing, knew the consequences and knew what he was doing was wrong. The delusions were not of the sort that would place the defendant's life in danger so that he would be acting in self-defense if the delusions were true (R 3966 - 3967).

The state also called Dr. James L. Cavanaugh, Jr., a psychiatrist, to testify in the case in rebuttal. Dr. Cavanaugh concluded that the defendant demonstrates now and then a mental illness or a mental defect, but at the time of the commission of the events he knew what he was doing, he knew the consequences of what he was doing, and he knew what he was doing was wrong (R 4107). In rendering this opinion, Dr. Cavanaugh considered what occurred during the weeks or months leading up to the events (R 4107). The videotape made shortly after arrest was good because the defendant clearly articulates what he intended to do when he went to the shopping center -- the defendant was going there to teach them a lesson (R 4115). Dr. Cavanaugh observed that anger motivated the defendant (R 4115). The defendant repetitively stated to Dr. Cavanaugh that the only justification for shooting another person is self-defense (R 4117). However, the defendant never believed, even in his delusional system, that he was physically threatened (R 4118 - 4119). It was clear to Dr. Cavanaugh that the defendant was not randomly shooting, but

rather was picking out targets and then firing (R 4121). The defendant focused particular attention on police officers, shooting to death two police officers and concentrating fire on them in the early to middle phase of the shooting episodes. Dr. Cavanaugh indicated that when the defendant saw or heard police officers coming he would leave the immediate area and retreat into another area, clearly showing that he was perceiving police (R 4121). Dr. Cavanaugh testified that the defendant knew the second officer (Johnson) was wounded and disabled and the defendant was overheard to say "Leave him alone. I want to get him." (R 4121 - 4122). The eyewitness accounts reviewed by Dr. Cavanaugh would show rationality, selection of targets, concentration on different types of targets, shooting, assessing damage, causing more damage or death to a given individual or individuals, followed by the hostage situation, further indicating that the defendant was aware that horrible events had proceeded the hostage situation, and that the motivation for taking a hostage was to hopefully secure his own safety. Dr. Cavanaugh concluded that this is irrefutable evidence to support the opinion that the defendant knew what he was doing, was aware of the consequences and knew what he did was wrong (R 4122). The defendant has a delusional disorder (a type of paranoid disorder) concerning false beliefs that people are either making him into a homosexual or are accusing him of being a homosexual, from which flows the perceived harassment -- this has been a fixed or unchanging illness since at least the mid-1970's (R 4122 - 4223).

In the penalty phase of the trial, the defendant presented evidence that he took good care of his property in Lexington, Kentucky (R 4583). Evidence also was adduced that the defendant was good to a neighbor in Lexington where he checked on her and did her yard work (R 4586). The defendant also presented evidence which showed that he was devoted to his mother (R 4592 - 4593; 4605 - 4606) and to his wife (R 4584 - 4585; 4588; 4593; 4598 - 4599; 4607).

The defendant also called as a witness in the penalty phase Dr. Robert M. Berland, a forensic psychologist. Dr. Berland testified that the defendant has a long standing psychotic disturbance primarily of an inherited origin, exacerbated by brain damage, although the source of that brain damage is not identifiable (R 4615). Dr. Berland opined that the organic brain damage might be related to age or alcohol abuse (R 4639 - 4641). Dr. Berland considered two principal diagnoses (paranoid schizophrenia and a bipolar disorder) and concluded that the defendant suffered from the bipolar disorder (formerly called manic depressive psychosis) (R 4643). Dr. Berland further testified that on April 23, 1987, the defendant was in an acute psychotic episode where he appeared to be as completely controlled by his delusions and hallucinations as someone is likely to be. Therefore, Dr. Berland concluded that the patient was insane at the time (R 4647). Dr. Berland believed that the defendant had regained some contact with reality when he

encountered the hostages Larson and Brown and at that time wasn't under the complete control of his delusions and hallucinations (R 4648). Dr. Berland opined that alcohol flamed the fires of psychosis and as the alcohol wore off the disturbance decreased in severity (R 4652 - 4653). Dr. Berland believed further that the defendant had delusions of physical danger to himself (R 4659 -4660). On cross examination, however, Dr. Berland acknowledged that no other mental health experts on the case (either for the defendant or for the state) talked about or found that the defendant was feeling that he was subject to physical attack (R 4738). In fact, this conclusion by Dr. Berland that the defendant had a fear for his life or physical well-being was not obtained until March 12, 1989, during the course of the trial of this cause (R 4730).

## SUMMARY OF THE ARGUMENT

As to Issue I: The trial court correctly denied the defendant's motion for production of favorable evidence where the defendant was seeking to discover the results of consultation between the state attorney and consulting mental health experts. These consultants were "agents" of the prosecution who helped to evaluate evidence in the preparation of trial. As such, these consultations were "work product" not subject to disclosure to the defense. In any event, it is clear that the consulting experts possessed no information different from any of the various mental health experts who did testify at trial for either the state or the defense. Therefore, there was no exculpatory, material evidence which needed to be disclosed. There is no question that the consulting experts were not possessed of information which, if known at the time of trial, would have created a reasonable probability that the result of the trial would have been different.

As to Issue II: The trial judge did not abuse his discretion by precluding impeachment of a state's expert witness where the impeachment concerned collateral and irrelevant matters. An attempt to impeach a mental health expert as to the results of his examination in a previous case (conducted more than a decade prior to the instant case) must fail as improper impeachment under §*90.608, Fla. Stat.*

As to Issue III: The trial judge correctly utilized a special jury instruction in the instant case pertaining to

delusions, a significant factor in the trial of the instant cause. The instruction utilized comports with Florida law on insanity and, indeed, had formerly been the standard jury instruction. Standard jury instructions may be amplified in the proper case, and the instant case is one in which the facts compelled the giving of an instruction on delusions.

As to Issue IV: The trial court did not abuse its discretion by disallowing the defendant to present surrebuttal evidence. Although surrebuttal is permitted where proper, in the instant case the testimony sought to be introduced was not true surrebuttal where the matters sought to be elicited had previously been adduced throughout the trial in the cases of both the state and the defense.

As to Issue V: The trial court did not err in refusing to permit opinion evidence of a police officer concerning the mental condition of the defendant during the days leading up to the shootings. The precedent of this Honorable Court dictates that such testimony must concern a time which is reasonably proximate to the events giving rise to the prosecution. It also was not error to refuse opinion evidence of a neighbor of appellant's mental condition where the proper predicate was not laid, to-wit, that observation of the defendant had occurred over a period of time. In any event, any error in the refusal to permit this lay opinion evidence was harmless beyond a reasonable doubt where there was no conflict in the testimony from either the defense or the state as to whether appellant suffered from a long-standing mental illness.

As to Issue VI: The trial court correctly overruled a defense objection during the guilt phase of trial to the state eliciting testimony regarding the defendant's lack of remorse over murdering his male victims. Appellant did not present his argument (that lack of remorse can not be used as an aggravating factor nor can it be used to enhance an existing aggravating factor) at trial and is, therefore procedurally barred from obtaining appellate review. Nevertheless, the state permissibly expanded upon matters which were opened by the defense.

As to Issue VII: The defendant was not deprived of a fair trial by virtue of purportedly irrelevant and prejudicial testimony. A reference to loss of a fetus was relevant to the consideration of great bodily harm to a victim, a possible element of aggravated battery (a lesser included offense which was instructed upon by the court). The mere reference to another case without more had little or no effect upon the jury. The elicitation of testimony comparing appellant with Rambo was invited by the defense and, in any event was not so prejudicial as to inflame the passions of the jury.

As to Issue VIII: Comments made by the prosecutor in the penalty phase of trial were not so egregious as to deny appellant his right to a fair penalty trial. The state did not place any non-statutory aggravating factors before the jury for their consideration, did not offer "victim impact" evidence and did not impermissibly argue matters pertaining to the "age" mitigating circumstance. Appellant's complaints under this point are

largely the result of his mischaracterization of comments made by the prosecutor.

As to Issue IX: Appellant's argument concerning the purported unconstitutionality of our cold, calculated and premeditated aggravating circumstance was not preserved for appellate review. In any event, this Honorable Court has consistently rejected the claim as asserted in appellant's brief.

As to Issue X: In the instant case the trial judge correctly found four aggravating circumstances to be established beyond a reasonable doubt, considered all relevant statutory and nonstatutory mitigating circumstances, and engaged in a deliberative weighing process when he validly imposed both death sentences on appellant.

As to Issue XI: Appellant correctly concedes that the matters raised under this point have all been rejected previously by this Honorable Court.

## ARGUMENT

### ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR PRODUCTION OF FAVORABLE EVIDENCE IN THE POSSESSION OF THE STATE.

As his first point on appeal, appellant contends that the trial court erred by denying the defendant's motion for production of favorable evidence in possession of the state. The appellant contends that the state was possessed of certain evidence which was not work product and he also baselessly alleges that the state was possessed of evidence which tended to exculpate the defendant of criminal responsibility. For the reasons asserted below, appellant's point has no merit and must fail.

The gist of appellant's complaint is that the state consulted two mental health experts and failed to disclose their names to the defense. Appellant appears to be arguing that it is unreasonable for an attorney to consult experts in a particular field where that field of endeavor will become a focus of a particular trial. It is for this reason that the prosecutors below asserted that consulting with mental health experts constituted "work product" of the state attorney which is not discoverable. In order to adequately prepare for cross examination of defense expert witnesses and in order to adequately prepare rebuttal mental health testimony, it is necessary for a prosecuting attorney to **consult** with appropriate

experts in the preparation of a case. In this respect, your appellee submits that the results of consultation with mental health experts falls within the parameters of *Florida Rule of Criminal Procedure 3.220(g)(1)* which provides as follows:

> **(g) Matters not Subject to Disclosure**
> (1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda, to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney, or members of his legal staff.

Thus, much as is the case with confidential experts on behalf of the defense with respect to matters of competency, it is submitted that mental health experts who consult with a state attorney in the preparation of trial are members of the "legal staff" within the parameters of *Rule 3.220(g)(1).* Mental health consultants are, in this context "agents" of the prosecution who help to evaluate evidence in preparation for trial. This type of material is work product which is not discoverable. State v. Gillespie, 227 So.2d 550, 556 - 557 (Fla. 2nd DCA 1969). In the instant case, appellant is concerned that the state did not divulge the names of Dr. Wilder or Dr. Miller prior to trial. These doctors were not listed on the reciprocal discovery form because they were not going to be witnesses at trial. In fact, neither Dr. Wilder nor Dr. Miller compiled a written report in

this case (IC 12).[1] Additionally, after preliminary consultation by Dr. Miller, the prosecutor felt uncomfortable with Dr. Miller's approach and his consultation was ended (IC 11, 13). With respect to Dr. Wilder, he never examined the defendant and his function was to serve in the role of a consultant (IC 8).[2] Based on the fact that doctors Wilder and Miller acted only as consultants to the state attorney in the preparation of the case, the fruits of these consultations were non-discoverable work product.

Even more importantly, nowhere in appellant's brief is it alleged that the state possessed exculpatory, material evidence which should have been disclosed to the defendant. Indeed, this is not possible where the consulting experts had no information different from any of the various mental health experts who did testify at trial. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), requires that the state disclose material, exculpatory information that it has in its possession. However, as set forth by the United States Supreme Court in United States

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[1] Reference to the transcript of the in camera hearing held on February 8, 1989 before the Honorable John Antoon, II, will be referred to by the symbol "IC" followed by the appropriate page number.

[2] There is no indication in the record that Dr. Miller ever examined the defendant as well. The record reveals that both doctors Wilder and Miller acted purely as consultants in the preparation of the case.

v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), " . . . the prosecutor will not have violated his constitutional duty of disclosure unless his own omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 427 U.S. at 108. The Court in Agurs further stated that:

> "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."

427 U.S. at 109 - 110. The proper standard of materiality of undisclosed evidence is that if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. 427 U.S. at 112. It is clear by reviewing the Statement of the Facts, supra, that the experts who testified at trial already were possessed of the information also known by the consulting experts. There has been no allegation, nor could there be, that the consulting experts concealed matters which, if known at the time of trial, would have created a reasonable probability that the result of the trial would have been different where a reasonable probability is meant to mean a probability sufficient to undermine confidence in the outcome of the case. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Arango v. State, 497 So.2d 1161 (Fla. 1986).

Moreover, disclosure requirements for the prosecution principally concern those matters not accessible to the defense in the course of reasonably diligent preparation. Perry v. State, 395 So.2d 170 (Fla. 1980); Halliwell v. Strickland, 747 F.2d 607 (11th Cir. 1984). In light of the foregoing principles of law concerning nondisclosure by the prosecution, an examination of the alleged Brady violations in the instant case compels the conclusion that the trial court correctly denied the appellant's motion for production of favorable evidence.

In his brief, appellant focuses upon certain characterizations by the prosecutor of the matters within the knowledge of the consulting experts rather than upon the nature of the evidence itself. The prosecutor's characterizations are irrelevant. What is important is whether or not there was, in fact, exculpatory evidence withheld by the prosecution. Appellant has failed to advise this Court as to what this exculpatory evidence consists of because, indeed, nothing was withheld from the defense which was not otherwise available either from their experts or from cross examination of the state's experts. Your appellee submits that in order to demonstrate reversible error on the basis of an alleged failure to disclose, appellant must somehow show that the consulting experts possessed information or opinions different from those already known. This he cannot do because that is simply not the case. The trial judge's resolution of this issue was correct as exemplified by his order concerning this matter (R 8564). Appellant's point must fail.

## ISSUE II

WHETHER THE TRIAL COURT ERRED BY PRECLUDING IMPEACHMENT OF A STATE'S EXPERT WITNESS AS TO COLLATERAL AND IRRELEVANT MATTERS.

In his second point, appellant contends that he should have been permitted to impeach the state's expert witness, Dr. Robert Kirkland, with evidence that he had rendered an incompetent mental evaluation of the defendant in State v. Sireci, 536 So.2d 231 (1988). In his brief, appellant contends that this cross examination was relevant to allow the jury to adequately weigh Dr. Kirkland's opinion, "especially in light of the testimony elicited by the state as to the witness' years of experience and the times that the doctor had been qualified as an expert" (appellant's brief at page 31). This, however, is not the issue. The trial court correctly ruled that, based on Dr. Kirkland's qualifications and the fact that he has been qualified as an expert for many years, Dr. Kirkland met the standard of *Florida Statute 90.702* and would be qualified as an expert in the instant case (R 3869). The real question presented to this Court is whether impeachment should have been allowed concerning an evaluation conducted by Dr. Kirkland in 1976.[3] Your appellee

[3] It should be noted that in Sireci, this Court acknowledged that there was evidence in that record to support the conclusion that Dr. Kirkland's original psychiatric examination was adequate. This Court did not wish to substitute its judgment for the trial court where there was also competent and substantial evidence to support the trial court's findings. State v. Sireci, 536 So.2d 231, 233 (Fla. 1988).

submits that the trial court did not abuse its discretion in refusing to permit this collateral impeachment.

The instant case presents a situation to this Court very similar to that presented in Rose v. State, 472 So.2d 1155 (Fla. 1985). In Rose, the Court held that an attack on a detective's professionalism was not a proper method of attacking credibility under §*90.608*. In accordance with this Honorable Court's decision in Rose, this trial court in the instant case undertook an analysis of §*90.608* with respect to the Court's discretion in permitting impeachment of witnesses (R 3896 - 3897). The trial court correctly ruled, as did this Court in Rose, that the type of impeachment desired by the defense was not within the parameters of §*90.608*. On this basis alone, the trial court did not abuse its discretion. In Rose, this Court observed that "the extent of cross-examination with respect to the appropriate subject of inquiry is within the sound discretion of the trial court," citing Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 728, 19 L.Ed.2d 956 (1968). This Court further observed that "this discretion is not subject to appellate review except in cases of clear abuse," citing Matera v. State, 218 So.2d 180 (Fla. 3d DCA), *cert. denied* 225 So.2d 529 (Fla.), *cert. denied,* 396 U.S. 955, 90 S.Ct. 424, 24 L.Ed.2d 420 (1969). As in Rose, the trial court did not abuse its discretion in the instant case.

Nor can appellant contend that his confrontational right to cross examination was improperly restricted by the trial court. The impeachment sought by the defendant with respect to Dr.

Kirkland was collateral to the issues raised in the instant case because it dealt with Dr. Kirkland having been allegedly incompetent due to his failure to properly test the defendant in a prior case. There has never been a genuine issue presented in this case regarding the testing procedures that were done by Dr. Kirkland, but even if there was such an issue, the defense was not foreclosed from inquiring into this area. The trial court specifically ruled that cross examination was permissible concerning these matters (R 3900).

For the foregoing reasons, appellant has failed to demonstrate that the trial court abused its discretion by denying impeachment of Dr. Kirkland in the manner suggested by the defense.

## ISSUE III

WHETHER THE TRIAL COURT ERRED BY UTILIZING A SPECIAL JURY INSTRUCTION DEALING WITH DELUSIONS.

As his third point on appeal, appellant contends that the trial judge erroneously gave a special jury instruction pertaining to delusions. As acknowledged by appellant in his brief at page 36, the instruction given was almost verbatim from what used to be a standard jury instruction. Moody v. State, 418 So.2d 989 (Fla. 1982); *Fla. Std. Jury Instr. (Crim.)* 2.11(b)-2(1980). Appellant contends that giving this instruction was misleading in that there may have been a tendency to focus on the special instruction before resolving the issue of insanity as defined by the standard jury instruction. This concern of appellant was alleviated by the trial judge where he instructed the jury that "a person may be legally sane in accordance with the instructions previously given . . . " (R 8675). This instruction clearly requires the jury to consider the question of right or wrong as set forth in our standard jury instructions concerning insanity. It is only then that the jury is to consider the additional question of the part the defendant's delusions played in the determination of whether or not he was insane at the time of the offense. There simply was no confusion here.

Merely because a former standard jury instruction has been omitted from the standard jury instructions in use at a particular time does not obviate the possibility that a special instruction might still be warranted under the circumstances of a

particular case. By way of illustration, this Honorable Court previously eliminated from the standard jury instructions an instruction on circumstantial evidence in light of the decision in Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954). However, this Court has also held that:

> . . . The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of the specific case. (emphasis added)

In the Matter of the USE BY the TRIAL COURTS OF the STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, 431 So.2d 594 (Fla. 1981). This theory is equally applicable to an instruction on insanity, specifically, an instruction on insane delusions. In Yohn v. State, 476 So.2d 123 (Fla. 1985), this Honorable Court observed:

> While the Standard Jury Instructions can be of great assistance to the Court, and to counsel, it would be impossible to draft one set of instructions which would cover every situation. The standard instructions are a guideline to be modified or amplified depending upon the facts of each case. (text at 127; emphasis added)

In the instant case, the trial court did not abuse its discretion in giving the special jury instruction. In fact, your appellee submits that the facts of the instant case warranted such an instruction.

In actuality, the special instruction given by the trial court is actually a second way that a defendant can be found insane. In other words, even if he is legally sane

under the provisions of our standard jury instruction, he still may be found insane if the delusions are such that could excuse the defendant from the commission of a crime. The special jury instruction given by the trial court is encompassed within the concept of McNaughten. In fact, this can be illustrated by reference to the historical underpinnings of this instruction:

> XVI. The eighteenth assignment of error alleges error in the following charge: "If a person under an insane delusion as to existing facts commits an offense in consequence thereof, his guilt or innocence depends on the nature of the delusion. If such person labors under partial delusions only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion, he supposes another man to be in the act of taking his life, and he kills that man, as he supposes, in self-defense, then he would be exempt from punishment. But if his delusion was that the deceased had inflicted a serious injury to his character or property, or to his happiness in any way, and he killed him in revenge for such supposed or real injury, he would be liable to punishment, if he had mind to enable him to distinguish right from wrong at the time the homicide occurred." The plaintiff in error had no proper ground for exception to this charge. The charge, without the qualification contained in the last clause, is almost in the identical language used by the judges in answer to the fourth question propounded to them in McNaughten's case, supra.

Davis v. State, 44 Fla. 32, 32 So. 822, 828 (1902). Inasmuch as the facts of the instant case focused upon the delusions of the defendant, the special jury instruction was more than proper.

The question of the existence of delusions is not present in every case, hence, there is no need for such an instruction to be encompassed within the standard jury instructions. However, in the proper case, as is the instant case, the giving of a delusion instruction is totally warranted. Appellant's point must fail.

## ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DISALLOWING THE DEFENDANT TO PRESENT SURREBUTTAL EVIDENCE.

Appellant next argues that the trial court erroneously disallowed the defendant to present surrebuttal evidence consisting of the testimony of another mental health expert. At the outset, it must be observed that appellant totally mischaracterizes the effect of the testimony of the state's expert witnesses. Appellant erroneously concludes that "the state's psychiatrists diagnosed the defendant as suffering merely from jail psychosis, rather than having some type of illness at the time of the offense." Nothing could be further from the truth. Both state mental experts who testified at trial diagnosed the defendant as suffering from a major mental disorder (see, e.g., R 3941 and R 4107). A long standing mental illness is not "merely jail psychosis." Appellant also states that the state mental health experts testified that the defendant's actions may have been the result of controlled anger and that there was no evidence of hallucinations prior to the event, but merely hallucinations while in jail (appellant's brief at page 38). This assertion is totally belied by Dr. Kirkland's testimony on cross examination that the defendant has suffered throughout his thirty years of mental illness from delusions and hallucinations (R 4018). Inasmuch as these assertions were the basis for the defendant's request that surrebuttal be permitted, it is clear that the trial court did not err in denying that request where appellant's assertions are false.

Appellant contends that the trial judge arbitrarily refused to permit surrebuttal in the instant case. This is a blatant mischaracterization of what occurred at trial. There is no doubt that surrebuttal testimony is admissible subject to the trial court's discretion. This concept has been embodied in Florida law for many years:

> . . . It is, however, within the discretion of the trial court to allow or refuse evidence in surrebuttal . . . , because there must be a limit fixed at some place where the recalling of witnesses will be stopped.

Davis v. Ivey, 93 Fla. 387, 112 So. 264 (1927). The situation presented in the instant case must be contrasted with what occurred in Reaves v. State, 531 So.2d 401 (Fla. 5th DCA 1988), wherein the trial court exercised *no* discretion but simply held that surrebuttal testimony is improper as a matter of law. The trial judge sub judice, spent much time and did independent research to determine whether the proposed surrebuttal was proper in the instant case (R 4371 - 4375). The trial judge concluded that, after hearing a proffer of the surrebuttal testimony, such testimony was not really rebuttal of the testimony presented by the state experts. Rather, the proffered testimony was of a kind which could have and should have been introduced during the defense's case in chief.

This Honorable Court has cited with favor the following test for review of a judge's discretionary power:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying

> that the discretion is abused only where no reasonable man would take the view adopted by the trial court.

Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980), citing Delno v. Market Street Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942). This Court further observed in Canakaris, that:

> The discretionary power that is exercised by a trial judge is not, however, without limitation . . . . The trial court's discretionary power is subject only to the test of reasonableness, but the test requires a determination of whether there is logic and *justification for the result.* The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. (text at 1203; emphasis in original)

It cannot be said that the trial court, when applying the test above described, abused its discretion by denying surrebuttal in the instant case. The defense was well aware that doctors Kirkland and Cavanaugh would be testifying on behalf of the state and, in fact, both doctors were deposed prior to trial. Thus, there can be no claim by the defense that they were surprised by the testimony of the state's experts thereby supporting a claim of a right to surrebuttal testimony. See, Gandy v. State, 440 So.2d 433 (Fla. 1st DCA 1983).

In conclusion, the trial court disallowed surrebuttal where the proffered testimony was not, in fact, true surrebuttal because the issue of hallucinations and delusions on the part of defendant were not new issues raised during the course of the state's case, but had been testified to in great detail by the defense experts as well. The trial court did not abuse its discretion by disallowing surrebuttal.

## ISSUE V

[WHETHER] THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE OPINION EVIDENCE OF A POLICE OFFICER CONCERNING THE MENTAL CONDITION OF THE DEFENDANT DURING THE DAYS LEADING UP TO THE SHOOTINGS. (As stated by Appellant)

Appellant next contends that the trial court erred by refusing to permit testimony of a police officer pertaining to his observations of the defendant vis a vis previous Baker Act situations. Appellant also mentions the failure of the trial court to permit testimony from a neighbor as to her opinion of the defendant's sanity. For the reasons expressed below, appellant's point must fail.

The focus of appellant's argument concerns the failure of the trial court to permit testimony by Officer Gregory Bowden as to his ultimate opinion of appellant's sanity as compared to other Baker Act situations encountered by the officer. It is significant to observe that the encounter between appellant and Officer Bowden occurred on April 17, 1987, nearly one full week prior to the shooting episodes at the Publix and Winn-Dixie. For this reason, the trial court correctly sustained the objections of the state to the proffered testimony of Officer Bowden. This Honorable Court in Garron v. State, 528 So.2d 353 (Fla. 1988), held that although a lay witness is permitted to testify concerning his or her personal observation as to a defendant's sanity, this observation and knowledge must have been gained in a time period *reasonably proximate* to the events giving rise to the prosecution. Officer Bowden's testimony concerned events which

occurred nearly one week prior to the murders. In Garron, this Court opined that "[a] nonexpert is not competent to give lay opinion testimony based on his personal observation that took place a day removed from the events giving rise to the prosecution." Id. at 357. This Court further observed that "[t]his is clearly the domain of experts in the field of psychiatry." Id. Your appellee submits that a week prior to the events it is not within such "close time proximity" to the shooting spree so as to render Officer Bowden's testimony competent.

With respect to the trial court's refusal to permit Mrs. Rich to testify that she told her children to stay away from the defendant because he was "wacky", appellant has failed to show reversible error. In Garron, supra, this Court in footnote three commented that witnesses who have known and observed the defendant over an extended period of time are competent to render their nonexpert opinion on a defendant's sanity. However, there was no attempt by the defense in direct examination to show the proper predicate, to-wit, that Mrs. Rich observed the defendant over an extended period of time. Even should this Honorable Court determine that it was error to prevent Mrs. Rich from testifying that the defendant was "wacky" on the same day that the murder spree occurred, such error is harmless beyond a reasonable doubt. First, it should be noted that Mrs. Rich did testify that she told the defendant that he "belongs in a rubber room" (R 3327). Secondly, with respect to both Mrs. Rich and

Officer Bowden, there is no reasonable possibility that any error in not permitting their opinion testimony affected the verdict in the instant case. See, State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). There was no question during the course of trial that the defendant suffered from a mental illness. It cannot be disputed that even the state's expert witnesses so testified. Thus, it is not possible for the defendant to show how the verdict may have been affected by the sustaining of state objections to the testimony of Mrs. Rich or Officer Bowden.[4] Your appellee submits therefore, that appellant's point must fail.[5]

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[4] Parenthetically, it should be noted that Officer Bowden testified that the defendant did not meet the Baker Act criteria (which means he was not a present danger to himself or others) (R 3245).

[5] In his brief, appellant contends that the lay insanity opinions were "imperative" to show the defendant's mental state prior to the crimes. He further states that there was an inference that the defendant was "faking his mental illness" after the murders (Brief of Appellant at pp. 45 - 46). These contentions are preposterous in light of all the expert testimony (including the state's experts) indicating the defendant was suffering from a long-standing mental illness.

## ISSUE VI

WHETHER THE TRIAL COURT ERRED IN OVERRULING A DEFENSE OBJECTION DURING THE GUILT PHASE OF TRIAL TO THE STATE ELICITING TESTIMONY CONCERNING THE DEFENDANT'S LACK OF REMORSE OVER HIS MALE VICTIMS.

As his sixth point on appeal, appellant contends that the trial court erroneously overruled the defense objection to certain testimony adduced by the state during re-cross examination of a defense witness, Dr. Jonas Rappeport. This objection, (R 3783), however, was not based upon the argument now presented in his brief, to-wit, that lack of remorse is not an aggravating factor nor can it be used to enhance an existing aggravating factor. Generally, in order for an issue to be preserved for further review by an appellate court, that issue must first be presented to the trial court and the specific legal argument or ground to be argued on appeal must be part of that presentation. Tillman v. State, 471 So.2d 32 (Fla. 1985), citing Steinhorst v. State, 412 So.2d 332 (Fla. 1982), and Black v. State, 367 So.2d 656 (Fla. 3d DCA 1979). The failure to present the specific objection in an argument during the guilt phase at trial as now presented on appeal precludes appellate review.

In any event, appellant's premise is simply wrong. The state was not introducing lack of remorse out of the blue, but rather was addressing certain matters which were initiated by the defense during redirect examination of Dr. Rappeport. On redirect examination, Dr. Rappeport testified that the defendant was very respectful of women, even reverent to them (R 3776).

Having opened the door, appellant cannot complain that the state attempted to expand upon an issue introduced by the defense. The state tied in the fact that defendant was respectful of women to the fact that he expressed remorse that he shot women (R 3783). Conversely, the fact that the defendant did not express remorse towards men simply reflects the notion that appellant knew what he was doing during his shooting spree of April 23, 1987. The elicitation of this type of testimony was relevant to the issues before the court and jury.

Moreover, it must be observed that the authority relied upon by appellant is simply inapplicable to the issue presented by appellant in his brief. Reliance upon Robinson v. State, 520 So.2d 1 (Fla. 1988), Pope v. State, 441 So.2d 1073 (Fla. 1983), and McCampbell v. State, 421 So.2d 1072 (Fla. 1982), is clearly misplaced. Those authorities stand for the proposition that lack of remorse may not be considered in the penalty phase of trial either as an aggravating circumstance or as enhancement of a proper aggravating circumstance. The purportedly objectional comments sub judice were made in the guilt phase of trial as permissible elements of cross-examination. There is no error here and appellant's point should be rejected by this Honorable Court.

## ISSUE VII

WHETHER THE TRIAL COURT ERRED BY PERMITTING THE PRESENTATION OF PURPORTEDLY PREJUDICIAL COMMENTS AND INADMISSIBLE EVIDENCE DURING THE GUILT PHASE OF TRIAL.

As his next point on appeal, appellant points to three minute portions of a voluminous record and opines that these references denied him a fair trial. Appellant further contends that the cumulative effect of these errors combined to result in the denial of a fair trial. Your appellee will address each of appellant's contentions in the order presented in his brief and, as will be demonstrated below, appellant's point is without merit.

Appellant's first example of a purportedly prejudicial comment concerns reference by the state in its opening argument and presentation of evidence in its case concerning the fact that one of the attempted murder victims also lost a fetus. In making his argument, appellant is laboring under a total misconception. In his brief at page 51 he states: "The state's theory was that it was admissible to show the injury to Amos which it contended would prove the offense was attempted murder as opposed to aggravated battery." This contention is wholly fallacious and, in fact, just the opposite is true. The state argued to the trial judge that that relevancy of the evidence is established by the fact that injury to a fetus is certainly great bodily harm to the mother. The prosecutor advised the court that he assumed the defense was going to ask for the lesser included offense of

aggravated battery, and the defense did nothing to dissuade that opinion (R 1517). Inasmuch as aggravated battery may be proved by showing great bodily harm, §*784.045(1)(a)(1).*, *Florida Statutes*, the relevancy of this evidence can plainly be seen. Appellant also appears to be concerned that reference to the losing of the fetus may be improper Williams rule evidence collateral to the issues being tried (Appellant's brief at page 51). This assertion is incorrect inasmuch as this incident was encompassed within the entire criminal episode and, hence, was not collateral to the charged crimes. Cf. Smith v. State, 365 So.2d 704 (Fla. 1978). This was not a collateral crime which occurred at another time in another place and which is attempted to be brought into the pending litigation to prove some other issue. Therefore, where defense counsel failed to bring to the court's attention any applicable law to rebut the state's assertion that this type of evidence was permissible to show great bodily harm, appellant cannot be heard to complain on appeal. Cf. Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979).

On cross examination of one of the defense expert witnesses, Dr. Jonas Rappeport, the prosecutor asked, "are you familiar with the William Perry [sic] case." (R 3764) Objection was made and sustained by the judge and the state was ordered not to mention any case names during the course of its questioning (R 3765 - 3766). It is preposterous to suggest that the mere questioning concerning a familiarity with a particular case can so inflame a jury as to deny the right to a fair trial. No further inquiry

was permitted by the court after the mention of the case name. The trial judge commented that "one [of] the advantages we have of this particular jury [is] they don't keep up with newspaper articles very much." (R 3766). Thus, the concern expressed by appellant that prejudice may have ensued by the mere mention of the Ferry case is belied by the record.[6] No reversible error is made to appear here.

The final purportedly improper comment or inadmissible evidence identified by appellant concerns a state witness' comparison of the defendant to Rambo. The question asked by the prosecutor was whether there was anything that indicated whether the defendant had control of his weapon. Based on her observations, the witness stated that her best comparison would be that of Rambo, that the defendant had control (R 2174). Initially, your appellee would submit that the character of Rambo is an heroic figure rather than a figure synonymous with evil or criminal activities. This was even acknowledged by one of the defense expert witnesses on cross examination. Dr. Afield testified that Rambo was a hero as portrayed in the movies. (R

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[6] It is interesting to observe that throughout the colloquy concerning this issue, the court reporter repeatedly referred to Ferry as "Perry". It cannot be discounted that the jury was unable to discern the correct name of the defendant in the Ferry case.

3460 - 3461)[7] On its face, therefore, the reference to Rambo is not so prejudicial as to deny the defendant a fair trial. More pointedly, it is interesting to note that at trial defense counsel criticized the state attorney for asking a question knowing that the witness would refer to Rambo. Yet, in the pretrial deposition of Carolyn Knam conducted by defense counsel, the question was asked as to how the defendant was holding the gun. The witness in deposition answered it to be a Rambo position (R 7377 - 7378). There was no further mention of this Rambo reference until it came up during testimony. In other words, defense counsel did not make a motion in limine or otherwise attempt to prevent an answer from a witness known by the defense prior to trial. Where defense counsel did not comment at the deposition or at trial until the reference came up, these tactics are akin to a "gotcha" maneuver which is criticized by many courts. See e.g., McKinnon v. State, 547 So.2d 1254, 1257 (Fla. 4th DCA 1989) (Garrett, J., concurring in part and dissenting in part); Brown v. State, 483 So.2d 743, 746, note 3 (Fla. 5th DCA 1986); Pollock v. Bryson, 450 So.2d 1183, 1186 (Fla. 2d DCA 1984); State v. Belien, 379 So.2d 446 (Fla. 3d

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[7] It is noteworthy to observe that, although appellant raises this "Rambo" reference as an issue, his own expert witness testified in a deposition that the defendant was a sixty-year-old Rambo gone wild (R 3460).

DCA 1980). Your appellee submits that defense counsel was as responsible for this "invited error" as was the prosecutor.

Your appellee submits, as argued above, that the now complained-of comments and evidence were not objectionable and, therefore, the "cumulative error" doctrine has no applicability in the instant case. There is no indication in the instant record that, because of the matters discussed by appellant under this claim, appellant was denied a fair trial. Appellant's point must fail.

## ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY REFUSING TO GRANT A MISTRIAL FOLLOWING PURPORTEDLY PREJUDICIAL COMMENTS BY THE PROSECUTOR DURING THE PENALTY PHASE OF TRIAL.

Appellant next contends that certain remarks made by the prosecutor during the penalty phase violated appellant's right to a fair penalty proceeding. The prosecutor's argument consists of nearly seventy pages in the record (R 4531 -4544; 4884 - 4941). Appellant points to several small passages in the prosecutor's argument and opines that such statements were so egregious as to deny appellant his right to a fair penalty trial. Your appellee contends otherwise and, as will be demonstrated below, appellant's point must fail.

It must be remembered that a wide latitude in the closing argument to the jury is permitted. See e.g., Thomas v. State, 326 So.2d 413 (Fla. 1975). The question to be determined is whether the prosecutor's comment was so prejudicial as to deny the defendant a fair trial. Darden v. State, 329 So.2d 287 (Fla. 1976). Only in the most egregious cases will a defect of constitutional proportion be found. Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). Specifically with respect to a penalty phase in a capital trial, this Honorable Court has held:

> . . . In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty phase trial.

Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985); See also, Jackson v. State, 522 So.2d 802, 809 (Fla. 1988). The comments of the prosecutor now complained-of by appellant are not egregious as to warrant a new penalty trial. In fact, your appellee submits that the comments of the prosecutor are not so objectionable.

Appellant argues that three of the prosecutor's statements were nothing more than improper argument of nonstatutory aggravating factors. At the outset, it is significant to observe that the prosecutor, in his opening statement of the penalty phase, advised the jury that they could consider **only** statutory aggravating circumstances (R 4535). With this in mind, your appellee submits that the prosecutor was not arguing that nonstatutory aggravating circumstances should be considered by the jury. As the first of these purported nonstatutory aggravating circumstances, appellant cites to argument by the prosecutor "concerning the loss of a woman's fetus" (Appellant's brief at page 57). This is an inaccurate statement of what occurred at trial. During closing argument in the penalty phase, the prosecutor stated:

> Mary Amos, pregnant four-year-old son, 16 month old child, laying back in the ditch. Great risk of death to many.
> Tracy Withrow, back in the field as the dust is flying around her head. (R 4933 - 4934)

Objection was then made by defense counsel that the prosecutor was only trying to inflame and prejudice the jury. However, no

reference was made to the fact that Mary Amos lost the fetus thereby negating appellant's argument that this statement was made merely for the purpose of inflaming the jury. Rather, the statement was made in the context of describing to the jury the great risk of death to many persons which existed at the time of appellant's shooting spree. The second purported non-statutory aggravating circumstance raised by appellant was the prosecutor's statement that "Ronald Grogan and Gerald Johnson were both law enforcement officers and they were engaged in the lawful performance of their duties at the time of death and of murder" (R 4541 - 4542). This, of course, is a statutory aggravating circumstance presently codified, but it was not at the time the defendant committed the murders. After lengthy legal argument and research by the court, it was determined that this particular aggravating circumstance should not be used in the instant trial. This does not mean, however, that the mention of this factor resulted in the denial of a fair trial. Rather, it must be remembered that the statutory aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (§*921.141(5)(e)*) was at issue in this case. Your appellee submits therefore, that the mere mention that two of the murder victims were police officers did not unnecessarily prejudice the defendant. In fact, your appellee submits that even if the new aggravating circumstance concerning the murder of a law enforcement officer was in effect, it might be contended that

finding both aggravating circumstances might be an inappropriate "doubling" and could only be considered as one aggravating circumstance. There was no improper prejudice to the defendant, especially in light of the trial court's curative instruction which clearly and unequivocally advised the jury that the killing of a law enforcement officer while engaged in the scope of his duty as a law enforcement officer is not a separate aggravating circumstance (R 4564 - 4565). The final alleged non-statutory aggravating factor cited by the appellant concerns the notion that the prosecutor contended that "a person's life is worth more than a life recommendation" (Appellant's brief at page 57). This is not exactly what occurred at trial. Rather, during the closing argument in the penalty phase, the prosecutor stated the following:

> . . . No, you said you would follow the law and to do otherwise would you cheapen the value of human life because we have had ---- (R 4940)

As can be seen from a clear reading of what the prosecutor said, this was merely argument to the jury to follow the instructions to be given by the court where this is a serious and sober matter. Your appellee submits that none of the examples of alleged non-statutory aggravating circumstances were considered as such at trial. Certainly, the jury was not instructed to consider these matters in aggravation nor did the judge rely on these matters when he imposed sentence. There was simply no indication that these matters had any effect upon the

recommendations of the jury or upon the sentence imposed by the court.

Appellant next contends that the prosecutor made improper "victim impact" argument in contravention of Booth v. Maryland, 482 U.S. 496 (1987). Apparently, appellant is acting under the same misapprehension on appeal as he did in the trial court. The statement of the prosecutor at issue was as follows:

> . . . Because the aggravating circumstance that the State intended to rely on deal with the crime that was committed, the nature of that crime, the effect on the victims of those crimes and the ---- (R 4531)

No mention was made of the impact upon the victims' families of the murders committed by the defendant. The prosecutor noted that he only commented on the victims in the context of the heinous, atrocious or cruel aggravating circumstance. The only mention of impact on the families was in the curative instruction given by the court at the insistence of defense counsel (R 4534 - 4535). There simply was no impermissible victim impact evidence adduced at this trial.

Finally, appellant contends that the prosecutor made improper argument concerning the "age" mitigating circumstance. Appellant characterizes the prosecutor's argument as advising the jury that they could not consider advanced age as being a mitigating factor because only youthful age is a mitigator (Appellant's brief at page 57). This is not what the prosecutor argued. The prosecutor never stated that the mitigating factor of age applies only where the defendant is of a young age. Rather, the prosecutor argued, in part:

> Age. There was mention that he is getting so old, I think he might be sixty-one, fifty-nine that senility was creeping in. He doesn't have any disability, physical. His I.Q. was above average. He knows it is wrong to kill. He just doesn't care. The age is a mitigating factor usually when you are dealing with teenagers who really ---- (R 4902)

The trial judge immediately recognized what the prosecutor said and it was not the interpretation as asserted by defense counsel. The prosecutor never said that the age mitigating factor only applies to teenagers, but rather, it was properly asserted that it usually involves teenagers. The trial court correctly ruled that this was argument and not a misstatement of the law. This ruling was correct. There was no prohibition against arguing age as a mitigating factor and, in fact, the defense did so (R 4966). Nor does it appear that the jury was deceived or confused as to the applicability of age as a possible mitigating factor in the instant case and they were instructed accordingly (R 4987 - 4988).

There is no indication in the instant record that, because of the prosecutorial comments addressed in this point, appellant was denied a fair penalty phase trial. None of the matters addressed herein were so egregious as to warrant a new penalty phase. Appellant's point must fail.

## ISSUE IX

SECTION 921.141(5)(i), FLORIDA STATUTES (1987) IS UNCONSTITUTIONALLY VAGUE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION AND THE COURT ERRED IN INSTRUCTING THE JURY THAT, IN DETERMINING WHAT SANCTION TO RECOMMEND, IT COULD CONSIDER WHETHER THE MURDER WAS COMMITTED IN A COLD, CALCULATED, OR PREMEDITATED MANNER, AND FURTHER ERRED IN FINDING THE UNCONSTITUTIONAL FACTOR THEREBY RENDERING THE DEATH SENTENCE UNRELIABLE. (As stated by Appellant).

As his ninth point on appeal, appellant contends that the cold, calculated, and premeditated aggravating factor is unconstitutionally vague and, therefore, the trial court erred by instructing the jury concerning that aggravating factor and further by finding the factor to be applicable to the instant case. For the several reasons expressed below, appellant's point must fail.

It is axiomatic, almost beyond the need for citation, that matters which are not brought to the attention of the trial court are procedurally barred on direct appeal. See, e.g., Ventura v. State, 560 So.2d 217 (Fla. 1990). This claim was not presented to the trial court below. Although appellant filed several motions to declare *Florida Statute 921.141* unconstitutional (R 8505 - 8511), none of those motions challenged the applicability of the cold, calculated aggravating factor as is now presented on appeal. Additionally, during the charge conference concerning the instructions to be given the jury in the penalty phase, this argument was not presented to the court. Defense counsel relied

upon Banda v. State, 536 So.2d 221 (Fla. 1988), for the proposition that the cold, calculated, and premeditated aggravating circumstance should not have been instructed upon where the facts of the instant case allegedly did not support the aggravating factor. Defense counsel argued that the evidence dictated that there was a pretense of moral justification for appellant's acts and, therefore, the trial court should not instruct the jury on §*921.141(5)(i), Florida Statutes*[8] (R 4699 - 4701). Therefore, where no claim was presented to the trial court as is presently asserted on appeal, this claim is procedurally barred and should not be reviewed by this Honorable Court.

In any event, even if this claim was properly before this Honorable Court, this claim would have no merit. In Jones v. Dugger, 533 So.2d 290, 292 - 293 (Fla. 1988), this Court held that where a killing is not found to be heinous, atrocious, and cruel, the decision in Maynard v. Cartwright, 486 U.S. 356 (1988), is inapplicable.[9] Even more recently, this Honorable Court has rejected a claim similar to that now raised herein:

> [8] Based on *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), Brown also argues that the standard

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[8] This contention of defense counsel is belied by the record and will be discussed under Issue X, infra.

[9] Appellant premises his argument upon the decision in Maynard v. Cartwright. See Appellant's brief at page 61.

> instruction on the cold, calculated, and premeditated aggravating circumstance is unconstitutional. In *Maynard*, the court held the Oklahoma instruction on heinous, atrocious, and cruel unconstitutionally vague because it did not adequately define that aggravating factor for the sentencer (in Oklahoma, the jury). We have previously found *Maynard* inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor. *Smalley v. State*, 546 So.2d 720 (Fla. 1989). We find Brown's attempt to transfer *Maynard* to this state and to a different aggravating factor misplaced. (citations omitted) . . .

Brown v. State, 565 So.2d 304 (Fla. 1990). See also, Occhicone v. State, 15 F.L.W. 531 (Fla. October 11, 1990).

Inasmuch as this issue was not preserved for appellate review where the specific legal argument or ground upon which it is based was not presented to the trial court, Bertolotti v. Dugger, 514 So.2d 1095, 1096 (Fla. 1987), and inasmuch as even if preserved this claim would have no merit, appellant's ninth point must fail.

## ISSUE X

WHETHER THE TRIAL COURT PROPERLY IMPOSED TWO SENTENCES OF DEATH UPON APPELLANT BASED UPON THE WEIGHING OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES PRESENT IN THIS CASE.

Appellant commences his point ten by contending that "[t]he trial court found improper aggravating circumstances, failed to consider (or gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors" (Appellant's brief at page 62). Your appellee, however, asserts that the trial court correctly found four aggravating circumstances to be established beyond a reasonable doubt, considered all relevant statutory and nonstatutory mitigating circumstances, and engaged in a deliberative weighing process to validly impose the two death sentences on appellant. For the reasons expressed below, appellant's tenth point must fail.

A. The Trial Court Properly Found Four Aggravating Circumstances to Exist with Respect to Each of the Two Murders.

In the instant case, the trial court found four aggravating circumstances to be established beyond a reasonable doubt. Two of those factors are not contested upon appeal, to-wit: previous conviction of another capital felony or of a felony involving the use or threat of violence [§*921.141(5)(b), Florida Statutes*] and the defendant knowingly created a great risk of death to many persons [§*921.141(5)(c), Florida Statutes*]. In his brief, appellant does contest the finding by the trial court of two other aggravating

circumstances, cold, calculated, and premeditated and avoiding or preventing a lawful arrest. The trial court's finding of these aggravating circumstances was proper.

I. Cold, Calculated, and Premeditated Manner Without any Pretense of Moral or Legal Justification.

Appellant contends that the trial court "heavily relied upon" this Court's decision in Herring v. State, 446 So.2d 1049 (Fla. 1984), as the standard for measuring whether this aggravating circumstance applies. Appellant ignores the fact that the trial court also relied upon this Court's decision in Rogers v. State, 511 So.2d 526 (Fla. 1987), with regards to the "calculation" aspect of this aggravating factor (R 8824). Contrary to appellant's assertions, therefore, the trial court applied the proper standards in assessing the applicability of the cold, calculated, and premeditated aggravating factor. Also, as will be discussed below, the trial court also considered whether the defendant possessed a "pretense" of moral or legal justification (R 8824), another element to consider when determining the applicability of this aggravating factor. Thus, where it is clear from the record that the trial judge applied the proper standards, it is necessary to review the facts which support the finding of the cold, calculated aggravating factor.

In his brief, appellant offers his conclusions as to what the evidence showed pertaining to the beforehand planning and calculation of the defendant in purchasing the rifle, the ammunition and the clips. He relies upon the fact that the

defense experts testified that appellant was arming himself merely for protection.[10] Appellant ignores, however, the fact that the rifle and some ammunition were purchased after he had been experiencing problems with neighborhood children. Appellant also chooses to ignore the fact that he returned to the Oaks Trading Post the same day as the "crotch incident" with the children on April 17, 1987, approximately one week prior to the murders.[11] When purchasing the hundred rounds of ammunition on April 17, 1987, the defendant also purchased five 30-round clips after he was told that 40-round clips would likely cause the rifle to malfunction. The procurement by the defendant of the rifle and large quantities of ammunition and clips compels but one conclusion, that is, the defendant was going to get his

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[10] Significantly, only one of the six expert witnesses who testified at trial opined that the defendant had delusions of physical danger to himself. This testimony was adduced from Dr. Berland, a defense expert who testified at penalty phase, who acknowledged that his conclusion that the defendant had a fear for his life or physical well-being was not obtained until March 12, 1989, during the course of trial (R 4730). Dr. Berland also testified, however, that no other mental health experts on the case (either for the defendant or for the state) talked about or found that the defendant believed he was subject to physical attack (R 4738).

[11] It is interesting to observe that at least one of the defense mental health experts did not realize that the defendant purchased ammunition and clips on the same day as the "crotch incident" (R 3586).

revenge.[12]

Advance procurement of the weapon, the ammunition, and the clips is not the only indication of the cold, calculated, and premeditated nature of the homicides. It must be remembered that death penalties were imposed for the murders of the two police officers. These murders occurred subsequent to the three murders already committed at the Palm Bay Center. Indeed, as the trial judge astutely observed, "By the time the defendant arrived at Sabal Palms Square, his premeditation was heightened to the extreme" (R 8857, 8859). When he arrived at the Sabal Palms Shopping Center, the defendant commenced shooting into the Winn-Dixie. However, when Officer Grogan approached in his vehicle, the defendant turned towards the officer, inserted a fresh 30-round clip into his assault rifle and aimed at the vehicle killing Officer Grogan. In fact, throughout the entire episodes,

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[12] In his brief, appellant makes reference to a statement of the defendant that people would know "he was someone to be reckoned with" (Appellant's brief at page 64) by driving around in his car so people could see his guns. This is not what occurred. On cross examination, Dr. Alvin Wooten, a defense expert witness, testified that the defendant made a tentative statement that he had probably gone to the shopping centers to try and convince people to leave him alone. However, the defendant did not say that he planned to do this by driving around the shopping center with his guns on display (R 3569). The specific statement made by the defendant to Dr. Wooten was, "They treated me like a patsy for two years, they played every trick on me, only one option left, fire power, wanted to demonstrate that I was a person to be reckoned with" (R 3570). This admission of the defendant is certainly capable of meaning that the defendant had enough and was going to lash out at his tormentors. Indeed, this interpretation is consistent with the advanced procurement of the rifle and ammunition at times when appellant was angry or upset.

the evidence indicated that appellant had a special interest towards law enforcement officers and focused his attention upon them. What cannot be ignored is the intent expressed by appellant at the scene when he stated, "Where is the cop, get away from the cop, I want the cop to die" (R 2201). With respect to the death sentence imposed for the murder of Officer Johnson, the evidence was clear that defendant shot at the officer and wounded him in the leg. Appellant then stalked Officer Johnson, found him in the parking lot, and once again evinced his intent to kill by firing several more shots into the officer's body.

A case which demonstrates that the trial judge in the instant case correctly found the cold, calculated aggravating circumstance to apply is this Honorable Court's decision in Swafford v. State, 533 So.2d 270 (Fla. 1988). This Court discussed the applicability of this aggravating circumstance:

> Swafford also claims that the trial court erred in finding the murder to have been committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." §*921.141(5)(i), Fla. Stat. (1985)*. The evidence showed, however, that Swafford shot the victim nine times including two shots to the head at close range and that he had to stop and reload his gun to finish carrying out the shootings. This aggravating factor can be found when the evidence shows such reloading, *Phillips v. State*, 476 So.2d 194, 197 (Fla. 1985), because reloading demonstrates more time for reflection and therefore "heightened premeditation." *See Herring v. State*, 446 So.2d 1049, 1057 (Fla.), *cert. denied.* 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984). The cold, calculated, premeditated murder, committed without pretense of legal or moral justification, can also be indicated by

> circumstances showing such facts as advanced procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. *See, e.g., Burr v. State*, 466 So.2d 1051, 1054 (Fla. 1985), *cert. denied*, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985); *Eutzy v. State*, 458 So.2d 755, 757 (Fla. 1984), *cert. denied*, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). The evidence is sufficient to sustain the finding here.[13] (text at 277)

All of the factors discussed in Swafford, i.e., multiple shots and reloading of a gun, advance procurement of a weapon, lack of resistance or provocation and the appearance of a killing carried out as a matter of course, are all present in the instant case and noted by the trial judge in his order. There is no reasonable doubt that the defendant committed the homicides in a cold, calculated, and premeditated manner. This conclusion is buttressed by the decision in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), wherein this Court opined:

> . . . Heightened premeditation necessary for the circumstance does not have to be directed toward the specific victim. Rather, as the statute indicates, if the murder was committed in a manner that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable. (text at 1183; emphasis in original)

Your appellee further submits that the second part of the test, to-wit, that the murder was committed without the pretense

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[13] That Swafford retains viability is evidenced by this Court's discussion of Swafford in its revised Campbell opinion. Campbell v. State, Case No. 72,622 (Fla. June 14, 1990) (corrected opinion filed on December 13, 1990).

of any moral or legal justification, has also been shown beyond a reasonable doubt. Appellant premises his argument on the purported motion that he "honestly believed that the members of the community were out to do him and his wife serious bodily harm" (Appellant's brief at p. 65). This contention is belied by the great weight of evidence presented at trial -- five of the six mental health experts who testified did not find that the defendant believed he or his wife was subject to physical attack (See f.n. 10, supra.).

Appellant cites to Thompson v. State, 15 F.L.W. S347 (Fla. June 14, 1990), for the proposition that appellant committed the murders in a deranged fit of rage. In Thompson, this Court noted that rage is inconsistent with the premeditated intent to kill someone, unless there is other evidence to prove heightened premeditation beyond a reasonable doubt. As outlined above, there was more than enough evidence to show the heightened premeditation. The "rage" experienced by the defendant in the instant case was not the result of provocation or was not the type of rage discussed in Thompson equated to a sudden fit of temper. Rather, the evidence showed only that the defendant's anger was the result of his delusional system. He was upset with people because they were calling him a homosexual or were attempting to turn him into a homosexual. However, even if people were acting in the manner believed by the defendant, there is no justification, either moral or legal, for lashing out and committing murder. The cold, calculated, and premeditated

aggravating circumstance was proved to the exclusion of any reasonable doubt.

2. For the Purpose of Avoiding or Preventing a Lawful Arrest.

Appellant contends that the trial court improperly found the avoiding or preventing a lawful arrest aggravating circumstance because it was not shown beyond a reasonable doubt that appellant's motive in killing the officers was in fact to avoid lawful arrest (Appellant's brief at page 67). Appellant cites several cases but concedes that those cases do not involve police officer victims. This Court has always insisted that when this aggravating circumstance is sought to be proved with respect to the killing of a non-police officer, the evidence must show that the dominant or only motive of the defendant was to avoid arrest. However, it does not appear that this strict standard is applicable when police officers are murdered. In Riley v. State, 366 So.2d 19 (Fla. 1978), the appellant therein urged this Court to "limit this factor to cases where a police officer or other apprehending official was killed" (Id. at 22). In Bates v. State, 465 So.2d 490 (Fla. 1985), this Court made a distinction between police officers and non-police officers when discussing the applicability of the avoid arrest aggravating factor. The fact that Officers Grogan and Johnson were law enforcement officers may well be determinative of the validity of finding this aggravating circumstance.

Even if more is required, the facts of the instant case show beyond a reasonable doubt that this aggravating circumstance was properly found. Appellant attempts in his brief to avoid responsibility for planning, considering, and designing his actions by relying on his mental illness (Appellant's brief at page 67). Appellant's actions at the scene belie his position. In his brief, appellant states that he "at the very least in a deranged fit of rage, went on a rampage, shooting everything that moved. He did not shoot solely at police officers (which if he had, may have indicated a plan to avoid arrest)" (Appellant's brief at pages 67 - 68). Appellant's conclusion that if he shot at the police officers it may have indicated a plan to avoid arrest is exactly what happened in the instant case. The evidence reveals that the defendant focused his attention on the officers, stalked Officer Johnson to finish him off, and yelled at those attempting to move Officer Grogan to get away and let him die. The defendant succeeded in his attempt to avoid arrest by killing the police officers and by subsequently holding a hostage and demanding a means of escape. This aggravating circumstance has been proved beyond and to the exclusion of every reasonable doubt.

B. Mitigating Factors.

Appellant contends that the trial court erroneously failed to give certain mitigating factors great weight. As will be discussed below, the trial court's treatment of the mitigating factors proposed by the defendant was proper.

1. The Capacity of the Defendant to Appreciate the Criminality of his Conduct or to Conform His Conduct to the Requirements of the Law were Substantially Impaired.

Appellant erroneously contends that the trial court based its decision not to find this mitigating circumstance solely because the defendant was found to be sane by the trial judge (Appellant's Brief at page 70). This is simply not true. A review of the court's order reveals that several reasons were given for not finding this circumstance (R 8850 - 8851). It should be noted, however, that the fact that a defendant knows right from wrong on the day of a murder is a factor which can be considered in determining whether this mitigating circumstance can be rejected. See Provenzano v. State, 497 So.2d 1177 (Fla. 1986). The rejection of this mitigating circumstance was supported by the evidence at trial.

In his brief, appellant once again relies on his mental illness as the end-all reason why this mitigating circumstance should have been found. He relies upon this Court's decision in Ferry v. State, 507 So.2d 1373 (Fla. 1987), wherein the trial court did find both extreme or emotional disturbance and that Ferry's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. However, from the opinion we do not know what Ferry's mental condition was other than that he was a paranoid schizophrenic. In other words, Ferry might have had an extremely low I.Q. or some other indication that he was unable to

appreciate the criminality of his conduct or conform his conduct to the law. In the instant case, however, evidence was adduced which supports rejection of this mitigating circumstance. Appellant had been a librarian and had obtained a Master's Degree. The evidence presented by all the mental health experts revealed that Cruse's I.Q. was no worse than average. The mental health experts presented by the state unequivocally testified that the defendant understood the consequences of what he did and, as the trial court found, these opinions were supported by the defendant's planning and preparation and conduct at the scene of the crimes. As also observed by the trial court, the defendant's own statements to the mental health professionals and to the police via the videotaped interview revealed that he, indeed, understood the consequences of what he did. It is significant to note that one week before the shooting spree, the defendant in a statement to a police officer acknowledged that when he grabbed his crotch in the incident with the boys he knew that he shouldn't have done it, that it was wrong, and that he was sorry. After the shootings, the defendant acknowledged that he knew shooting people was wrong. The fact that the defendant is intelligent and was able to articulate his thoughts helps to establish that the defendant was capable of understanding the criminality of his conduct, and this will not reduce his culpability. Rogers v. State, 511 So.2d 526, 534 - 535 (Fla. 1987).

Your appellee submits that having a mental illness does not always result in the finding of the mitigating circumstance at issue here. Rather, in some cases, as in the present case, the evidence indicates that this mitigating circumstance should be rejected.

2. The Age of the Defendant at the Time of the Crime.

Appellant contends that the trial court erred by refusing to find age as a mitigating factor. At the time of the offense, the defendant was fifty-nine (59) years of age but, as the trial court found, there is nothing in the record which suggests that the defendant was senile or that any factor concerning his age ameliorates the defendant's guilt (R 8851 - 8852). Appellant contends that the court ignored evidence that the defendant's mental infirmities were directly related to advanced age (Appellant's brief at page 72). This contention is totally belied by the record where all mental health professionals who examined the defendant opined that appellant's mental infirmities were of long-standing nature. The fact that appellant's brain damage might become worse as he got older is not different from any person of appellant's age. As the trial court correctly found, the defendant did not establish the cause of his organic brain damage and he failed to show that its degree of severity was significant (R 8852). This finding was supported by the record wherein even the experts called by the defense characterized appellant's brain damage as "mild" and the test results revealed that there were no seizure problems or

convulsions. In other words, there simply was nothing concerning appellant's age which mitigated his crimes.

3. The Non-Statutory Factors.

Appellant relies on Campbell v. State, 15 F.L.W. S342 (Fla. June 14, 1989), a decision which postdates the trial court's entry of his written order in the instant case.[14] When deciding Campbell, surely this Court did not mean to create a draconian dilemma for prosecutors throughout the State of Florida. By way of illustration, reference can be made to one of the proposed nonstatutory mitigating circumstances offered by appellant in the instant case, to-wit, that the defendant was a loving husband who assumed all household duties and completely cared for his wife, who suffered from Parkinson's disease, for over twelve years. It is certainly possible for this type of evidence to be rebutted by the state. However, such rebuttal could only come in the form of testimony from family members or close friends to show that the defendant, at times, did not act in the manner suggested by the defense. This would require sensitive cross examination which, for tactical reasons, a prosecutor might not wish to pursue. However, the failure to attempt to rebut this type of evidence must, according to Campbell, result in the finding that a mitigating circumstance has been established. In a case such as the one at bar, a prosecutor would not want to risk alienation of

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[14] As aforementioned in this brief, this Honorable Court entered a corrected opinion in Campbell on December 13, 1990.

the jury by undertaking rebuttal of this type of evidence where the proposed nonstatutory mitigating evidence is infinitesimally insignificant when compared with the gravity of the crimes committed.

Also, this Court's laudable goal is to seek uniformly and clarity in capital sentencing, your appellee submits that Campbell goes too far by requiring trial judges to weigh nonstatutory mitigating factors, even where those factors may carry infinitesimal weight or do not ameliorate the enormity of a defendant's guilt. Cf. Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984). There is no authority, statutory or presidential, which mandates a finding in mitigation. Indeed, prior decisions of this Court dictate the opposite, to wit., there is no requirement that the trial court find anything in mitigation. See, Porter v. State, 429 So.2d 293, 296 (Fla. 1983)., Nothing in the Constitution precludes a sentencer from assigning no weight to a mitigating factor which has been fully considered. Previously, this Honorable Court has left the matter of finding or not finding a mitigating circumstance to the sound discretion of the trial court as long as all of the evidence was considered (and in the instant case there can be no reasonable assertion that the trial judge failed to consider all nonstatutory mitigating evidence). See, e.g., Hill v. State, 549 So.2d 964, 971 (Fla. 1989); Lopez v. State, 536 So.2d 226, 231 (Fla. 1988); Bryan v. State, 533 So.2d 744, 749 (Fla. 1988); Kight v. State, 512 So.2d 922, 933 (Fla. 1987); Daugherty v. State, 419 So.2d 1067, 1071

(Fla. 1982). Campbell does not expressly recede from these precedents, and no good cause for such action is made to appear.

In any event, the trial court's 49 page order in the instant case should survive scrutiny with respect to the imposition of the two death sentences. In his brief, appellant complains that the trial court did not find the evidence of remorse to be mitigating. In his order, the trial court observed that there was evidence that the defendant expressed some sorrow and remorse. However, as the evidence at trial indicated, this remorse was for the female victims and no remorse was ever expressed for the male victims. Thus, the trial court's conclusion that the evidence presented wasn't mitigating is supported by the record.

Appellant also complains that the trial court failed to find appellant's use of alcohol as a mitigating circumstance. However, the evidence adduced at trial, even from the defense expert witnesses, did not reveal that alcohol was a factor in the incident. Quite the opposite is true. Defense expert Dr. Afield testified that although the defendant has a history of drinking, the defendant is not an alcoholic (R 3365). Another defense expert, Dr. Wooten, testified that the defendant had at least mild brain damage and suspected the cause to be chronic alcoholism (R 3512). Dr. Kirkland, a state expert witness, opined that the defendant's alcohol consumption was not sufficient to negate the opinion that the defendant was legally sane (R 3959). Thus, there is simply no evidence to support the

existence of the proposed mitigating circumstance of chronic alcohol abuse.

Appellant also contends in his brief that "other factors which are entitled to substantial weight and mitigation include that the defendant was a loving husband who cared for his invalid wife and had cared for his ailing mother, and who had, prior to his mental deterioration, shown kindness and acts of charity for his neighbors" (Appellant's brief at page 73). However, nonstatutory mitigating factors are not "entitled" to substantial weight, but rather, "the relative weight given to each mitigating factor is within the province of the sentencing court." Campbell, supra, slip opinion at page 9.

Your appellee submits that in reviewing the trial court's written sentencing order it is clear that the trial court considered all evidence and conducted an appropriate balance. See, Downs v. State, 15 F.L.W. S478 (Fla. September 20, 1990).

C. Conclusion

Your appellee submits that the two death sentences imposed upon appellant were done so in a proper and deliberative manner by the trial court. To contend that the death sentences are disproportionate to appellant's crime is to ignore the fact that there were substantial aggravating circumstances present and the court thoughtfully weighed the severity of appellant's mental illness with those aggravating factors. The death sentences imposed in this case were more than proper.

## ISSUE XI

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

As his final point on appeal, appellant "shotguns" various claims which appellant concedes have been rejected previously (Appellant's brief at page 75). This type of argument has been presented to this Court before and has been consistently rejected by this Court. See, e.g., Mendyk v. State, 545 So.2d 846 (Fla. 1989); Stano v. State, 460 So.2d 890 (Fla. 1984). Most of the alleged constitutional infirmities raised on appeal were not raised at the trial court level and are therefore procedurally barred. See, e.g., Ventura v. State, 560 So.2d 217 (Fla. 1990). Those constitutional issues which were raised in motions to declare §*921.141* unconstitutional (R 8505 - 8511) have en repeatedly rejected. See, e.g., Proffit v. Florida, 428 U.S. 242 (1976); Lightbourne v. State, 438 So.2d 380 (Fla. 1983); State v. Dixon, 283 So.2d 1 (Fla. 1973). This Honorable Court's recent opinions indicate that this Court continues to reject the constitutionality arguments. See, e.g., Carter v. State, 14 F.L.W. 525 (Fla. October 19, 1989). Appellant's point eleven should also be rejected.

## CONCLUSION

Based on the foregoing reasons, arguments and authorities, the judgment and two sentences of death imposed by the trial court should be affirmed by this Honorable Court.

Respectfully submitted,

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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 James R. Wulchack Assistant Public Defender, 112-A Orange Avenue, Daytona, Florida, this 21st day of December, 1990.

Robert J. Krauss
OF COUNSEL FOR APPELLEE.