IN THE SUPREME COURT OF FLORIDA

GEORGE MICHAEL HODGES,

Appellant,

v.

Case No. 74,671

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

ISSUE I.

The trial court did not err in admitting testimony regarding the existence of the charges pending against the defendant. The evidence did not constitute hearsay as it was not offered to prove that the defendant committed the crime of indecent exposure. The hearsay evidence admitted during the penalty phase was also properly admitted as such evidence is admissible in penalty phase proceedings where, as here, the defendant is given the opportunity to rebut the evidence.

ISSUE II.

The testimony of defense witness Detective Boydston was properly admitted during the state's cross-examination to rebut or explain evidence presented on direct examination by the defendant. Further, appellant's failure to raise the objection now presented precludes appellate review.

ISSUE 111.

Appellee contends that there was no reasonable grounds to believe the defendant was incompetent during the penalty phase and that his actions subsequent to the jury retiring for deliberations in the penalty phase did not require the trial court to suspend the proceedings until the defendant had been taken to the hospital, treated and then examined when the jury was already out for deliberations. Further, as there is no evidence to suggest that the defendant was incompetent during the penalty phase, the state urges this Court to find Hodges suffered

no prejudice by the trial court's failure to halt the proceedings to hold a competency hearing.

ISSUE IV.

Appellant complains that during the penalty phase the trial court permitted the introduction of victim impact evidence as condemned by Booth v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987) and South Carolina v. Gathers, 490 **U.S.** ____, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). He claims the principles of Booth and Gathers were repeatedly violated during the penalty phase of his trial. It is the states contention that the evidence appellant now complains of is not the type of evidence condemned by Booth and Gathers and that appellant's failure to object to the challenged testimony on this basis precludes appellate review of this claim.

ISSUE V.

This court has repeatedly rejected challenges to the validity of the cold, calculated, and premeditated instruction.

ISSUE VI.

There was substantial competent evidence to support the imposition of both aggravating factors.

ISSUE VII.

Both aggravating factors were supported by independant facts. Cold, calculated, and premeditated encompassed the facts establishing 'how' the crime was committed; whereas, hindering law enforcement was based on the facts showing 'why' the crime was committed.

ISSUE VIII.

Even if appellant had properly argued the mitigating factors now suggested to this Honorable Court to the trial court, the evidence is not of sufficient import as to mandate the finding of nonstatutory mitigating evidence. Nor does the evidence outweigh the two valid aggravating factors.

ISSUE IX.

Obviously the state does not agree with appellant's argument that the state failed to prove beyond a reasonable doubt that either of the aggravating circumstances relied upon by the trial court. See Issue VI. Therefore, the state urges this Court to find that in light of these two valid aggravating circumstances and the finding of no mitigating factors, the sentence of death imposed in the instant case was proportionate to other similarly situated defendants.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS EXAMINE HIS ACCUSER BY ADMITTING EVIDENCE OF BETTY RICK'S STATEMENTS.

Appellant generally asserts that the trial court violated his right to confront and cross-examine witnesses against him when it permitted the State to present hearsay evidence of Betty Rick's statements to the police and her sister during the guilt and penalty phase of the trial. As the standards for determining admissibility of evidence are different for guilt and penalty phases, the state will address each phase individually.

During the guilt phase of the trial Detective Rick Orzechowski and Detective Craig Horn testified that they interviewed the victim Betty Ricks in November of 1986. At that time she signed a request for prosecution against the defendant for indecent exposure. (R 296 - 297, 305) Detective Orzechowski further testified that he interviewed the defendant concerning these charges. (R 298) Both of the witnesses testified that the victim was adamant about pressing charges.

This evidence was the subject of the defendant's Motion in Limine heard on July 6, 1989. (R 752 - 780) Counsel objected to this evidence and evidence of the victim's other statements as impermissible Williams rule and as inadmissible hearsay. The court denied the motion to exclude the officer's testimony that Betty Ricks was adamant about pressing charges and that she was pressing charges for indecent exposure. (R 940 - 942)

Appellant's contention that this evidence constituted impermissible hearsay misconstrues the evidence presented and the hearsay rule. Hearsay is a statement other than one made by a declarant while testifying offered to prove the truth of the matter asserted in the statement. *Section 90.801(1)(c) Florida Statutes.* Where an out-of-court statement is not offered to prove the truth of the matter asserted, it is not hearsay. This evidence was not admitted to prove the charge of indecent exposure. Thus, the test for admission of this evidence is merely one of relevancy. This evidence was admissible because it was relevant to the existence of a possible motive. See, Jackson v. State, 522 So.2d 802 (Fla. 1988) (Evidence of other crimes is admissible if it casts light upon the character of the act under investigation by showing motive); Grossman v. State, 525 So.2d 833 (Fla. 1988) (Fact that appellant was on probation for previous crimes and the theft of a gun violated his probation was relevant to motive).

In Koon v. State, 513 So.2d 1253 (Fla.), *cert. denied,* 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1987), this Court held in reference to an out-of-court statement:

> It is admissible where it is not offered to prove the truth of the matter asserted, but rather to show that having heard the statement, a defendant could have formed the motive for eliminating one of the two prosecuting witnesses.

In the instant case the evidence showed that the victim Betty Ricks pressed charges against the defendant for indecent exposure and that the defendant was subsequently informed of

those charges. It was not necessary to prove that the defendant actually exposed himself to Betty Ricks and, thus, that evidence was not presented for the truth of the matter asserted. It was only relevant that the charges had been pressed and that the defendant knew of those charges, thereby providing him with the motive to kill Betty Ricks.

The officers' testimony that the victim was adamant about pressing charges was admissible under the state of mind exception to the hearsay rule. The state of mind exception allows the introduction of the declarant's intent to do a future act, if the occurrence or performance of that act is at issue. Morris v. State, 456 So.2d 471, 475 (Fla. 3d DCA). The victim's intent to prosecute was relevant to prove the defendant's motive.

As for the statements introduced during the penalty phase of the trial, the law in the State of Florida is very clear that hearsay evidence is admissible in penalty phase proceedings. *Section 921.141(1), Fla. Stat. (1987)* provides that:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received regardless of admissibility under the exclusionary rules of evidence, provided the defendant is afforded a fair opportunity to rebut any hearsay statements. (emphasis added).

See, also, Lucas v. State, 15 F.L.W. S473, 474 (Fla. September 20, 1990) (Not erroneous to allow the state during

penalty phase to elicit on redirect hearsay testimony that the victim told witness of threats made toward her by Lucas).

During the penalty phase of the trial Detective Orzechowski testified that Betty Ricks told him that the defendant kept trying to get her to drop the charges and that it was scaring her. (R 683) Detective Horn testified that Betty Ricks told him the defendant came in a few times to try to get her to drop the indecent exposure charge. (R 685) Betty Rick's sister, Deborah Ricks, testified that she usually spoke to her sister every morning at about 6:30. One morning Betty called Deborah and said that the guy who flashed her came to the Beverage Barn and asked Betty to drop the charges. Betty said that Hodges told her he had a family and a job and a reputation to protect. Betty said that she told that he should have thought of that before he did it. (R 690)

These statements were relevant to establish the aggravating factor that the homicide was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of the law under the provisions of ¢921.141(5)(g), *Florida* ***Statutes.*** The evidence established that the defendant, having been charged with the crime of indecent exposure, repeatedly came by the victim's work to plead with her to drop the charges. The evidence further established that the victim was adamant that she would not drop the charges and that she intended to go through with the prosecution. This evidence supports the court's finding that having failed to convince the witness to drop the charges and

facing certain prosecution appellant chose to eliminate the charges against him by permanently silencing Betty Ricks.

Nevertheless, appellant claims that even though hearsay evidence may be admissible in the penalty phase, this evidence should have been excluded because it's admission constituted a denial his right to confront his accusers. Admittedly, Betty Ricks was not available for cross examination because she had been murdered by the defendant. Nevertheless, each of the officers were available for cross examination by the defendant as well as the victim's sister Deborah Ricks. The defendant could also have rebutted this testimony by producing evidence that his employers, his family or his friends knew about the impending prosecution.

Additionally, even if hearsay evidence was not admissible in the penalty phase, the statements would have been admissible under ¢90.803(3)(a) which provides for the admission of hearsay statements to show the existing mental and emotional or physical condition of the claimant. Betty Rick's state of mind was relevant to show that despite pressure by the defendant that she intended to pursue the prosecution for the indecent exposure charge. The existence of the conflict was at issue in the instant case as it supports one of the aggravating factors. And, as the court found, the sheer number of people who knew of the defendant's repeated requests, as well as the absence of any motive for the victim to have fabricated the story, gave the evidence sufficient indicia of reliability. Therefore, the

evidence was relevant and admissible. See Koon v. State, supra; Peede v. State, 474 So.2d 808 (Fla.), cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1987; and, Jenkins v. State, 422 So.2d 1007 (Fla. 1st DCA 1982).

Further, as this Court noted in Tompkins v. State, 502 So.2d 415 (Fla. 1986), the admission of such testimony in either phase is subject to the harmless error rule. The evidence of Hodges' guilt and moral culpability was overwhelming even absent the challenged testimony. The defendant's truck was seen at the murder scene at the time of the murder. Witnesses disputed his alibi defense. And the defendant himself confessed to the killing to two different people.

Further, even without the evidence of the threats presented in penalty phase, the evidence of the existence of the charge against the defendant by the victim, the defendant's statements to Jessie Watson, the call to the prosecutor's office and Mrs. Hodges' ignorance of the pending charge were sufficient to support the aggravating circumstance that the murder was committed to disrupt or hinder law enforcement. Similarly, the evidence supporting cold, calculated, and premeditated is sufficient without the challenged evidence. Accordingly, error if any was harmless as to both the imposition of the judgment and the sentence.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ELICIT THE POLICE OFFICER'S TESTIMONY THAT NEITHER HE NOR THE PROSECUTOR BELIEVED A KEY STATE WITNESS' PRIOR INCONSISTENT STATEMENT WHICH EXCULPATED APPELLANT.

Defense witness Detective Boydston testified that when he and the prosecutor first interviewed Jessie Watson they made it clear to Watson that they did not believe him. Appellant argues that this testimony was not relevant because it was not probative of appellant's guilt or innocence and that the detectives' testimony improperly bolstered Watson's trial testimony. The argument presented herein, that the testimony improperly bolstered Watson's testimony, was not presented to the trial court. The only objection made to this evidence at trial was relevancy. (R 535) For an issue to be cognizable on appeal, it must be raised with specificity to the court below. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Castor v. State, 365 So.2d 701 (Fla. 1978). Accordingly, appellant is procedurally barred from now asserting this claim.

Further, even if the objection was sufficient, the detective's testimony was proper in that Detective Boydston was not attempting to bolster Watson's credibility, but rather was merely explaining the actions of the Tampa Police Department and the Hillsborough County State Attorney's Office. It is proper for a police officer to explain the course of action taken so as

not to leave the jury in a vacuum as long as the testimony does not include impermissible hearsay statements. State v. Baird, 572 So.2d 904 (Fla. 1990) Hernandez v. State, 547 So.2d 138 (Fla. 1st DCA 1989); Johnson v. State, 456 So.2d 529 (Fla. 4th DCA 1984). This is especially true when the investigation was the subject of the defendant's examination of the witness. Baird, at 908.

This Court has repeatedly held that when direct examination opens a subject, the cross examination may go into any phase, and may not be restricted to mere parts oK to specific facts developed by the direct examination. Lucas v. State, 15 F.L.W. 5473, 474 (Fla. September 20, 1990). Cross examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief. Zerquera v. State, 549 So.2d 189 (Fla. 1989); Coxwell v. State, 361 So.2d 148 (Fla. 1978); Blaire v. State, 406 So.2d 1103 (Fla. 1981); Ross v. State, 386 So.2d 1191 (Fla. 1980). The testimony by Detective Boydston on cross examination merely explained in further detail what had happened during the questioning of Jessie Watson which was the subject of the direct examination. The evidence was relevant and admissible to rebut or explain the assertion by defense counsel that Jessie Watson was pressured into changing his story. Accordingly, the trial court properly overruled the objection to the relevancy.

Finally, even if the testimony was erroneously admitted, the error is harmless in light of the overwhelming evidence of guilt.

ISSUE III

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS TO BE MENTALLY COMPETENT TO STAND TRIAL AND TO BE PRESENT WHEN IT PROCEEDED WITH THE PENALTY PHASE OF TRIAL FOLLOWING APPELLANT'S SUICIDE ATTEMPT WITHOUT FIRST CONDUCTING A COMPETENCY HEARING.

The day after the jury rendered its verdict of guilty in the instant case, the penalty phase was conducted. (R 650, 660) The state presented three witnesses, Detective Rick Orzechowski, Detective Craig Horn, and the victim's sister Deborah Ricks. (R 683, 685, 687) The defense presented the defendant's mother and brother-in-law in mitigation. (R 693, 697) After the presentation of all of the defense witnesses, counsel for the defendant put on the record that the defendant had originally stated that he wanted to testify, but then had determined that he didn't care if he testified or put an any second phase defense. (R 700) Hodges was then instructed by the court that he had the right to testify and was questioned concerning his decision not to testify in the second phase. (R 701 - 702) The jury was then brought back in for closing argument and jury instructions. The jury recessed at 11:50 a.m.. (R 730) At 12:05 p.m., the jury submitted a question concerning aggravating and mitigating instructions. At the same time the court was informed that the defendant had attempted suicide in his holding cell and the paramedics had been called. (R 731) After the defendant was taken to the hospital a discussion was had concerning the jury question, Counsel for the defendant did not waive the

defendant's presence during this discussion or the rereading of the instructions to the jury. The court reread the original instructions concerning aggravating and mitigating circumstances. Defense counsel did not object to the content of the instructions. (R 734 - 739)

At 1:05 p.m. the jury came back with a recommendation of 10 - 2 for death. (R 742) The suicide note left by the defendant was made a part of the record. (R 750, 886 - 887) It read:

> To John N. Conrad and Daniel L. Perry:
>
> Dear Sirs, Please don't think me a fool and I want to thank you both for all you did for me during the trail [sic], thank you both very much. Mr. Conrad I'd like for you to make contact for with [sic] my Mother and let her know that the Lord has answered my prayer and took me home.
>
> I just couldn't take another day in court and listen to anymore lies said about me. Jessie's lies [sic] was the last straw, if you know what I mean.
>
> I told you that I didn't kill Betty Ricks, I told you the truth. I am not going to say who killed her, because they are the one [sic] who has to live with it.
>
> Tell Mr. Benito that he has made an Innocent Man take his own life. I don't holed [sic] against him. It was just a job he had to do. But in the near days ahead be a little more careful on a man, when his main witness is lying to him on the stand the way that Jessie Watson did. The jury should have known that Jessie was lying. His letters to me told the truth. May God forgive Jessie and Mr. Benito for what they've caused.
>
> Mr. Conrad.

> Thank the two deputies that were in court. They treated me like a real person. Thank them for me.
> Mr. Perry.
>
> I'm sorry I didn't give you a chance to help me in court on the second phase of the trail. I'm sure you would have got me just a life sentence. But I could not even serve another day in jail for a crime that I didn't do.
>
> If there is any way to make the State of Florida pay for my burrieal [sic] it would be a help to my parents. They are not rich. Thank you.
>
> Respectfully, George Michael Hodges, July 13, 1989.
>
> P.S. The state owes it to me. They made me do it to myself. This is one murder that I am guilty of and it is of myself.
>
> Mr. Conrad, you are a good lawyer. Thank you for trying to help me just don't let them tell any more lies about me in court now that I'm dead. It's kind of funny in a way. Because I beat Mr. Benito this way I win. **(R 886 - 887)**

Now on appeal, appellant alleges that the trial court erred in reinstructing the jury, allowing them to proceed with deliberations and accepting their verdict in the defendant's absence.

It is well settled that the voluntary absence of a defendant after the trial has begun in his presence does not nullify what has been done and does not prevent completion of the trial, but rather operates as a waiver of his right to be present. Peede v. State, 474 So.2d 808, 812 (Fla. 1985) *cert. denied,* **479 U.S. 1101 (1986).** Noting that one of the basic rights guaranteed by the confrontation clause of the Sixth Amendment is the right to be

present in courtroom in every stage of the trial, the United States Supreme Court in Illinois v. Allen, 397 U.S. 337 (1970), held that this right is not absolute. This Court in Peede, supra, held that a waiver is valid in capital as well as non-capital cases. The defendant's actions by attempting suicide constituted a voluntary waiver of his right to be present during the rendering of the jury recommendation. See *Rule 3.180(b), **Florida Rules of Criminal Procedure.***

Appellant contends however, that the action was not a voluntary waiver of his right to be present, but rather was a result of his incompetence to stand trial and that the trial court erred in proceeding without him. He also contends he is entitled to a new penalty phase because he may have been incompetent during the entire penalty phase.

This Honorable Court in Pridgen v. State, 531 So.2d 951 (Fla. 1988), remanded for resentencing where the record reflected "reasonable grounds to believe" that Pridgen was not mentally competent to continue to stand trial during the penalty phase of the proceeding. Pridgen's counsel had approached the trial judge prior to the penalty phase proceeding about his concerns regarding Pridgen's competency to stand trial. A medical expert testified that Pridgen was probably incompetent to stand trial though he could not say that to a medical certainty. Nevertheless, the trial judge, who also appeared to have qualms about Pridgen's mental condition, denied defense counsel's request that the penalty proceeding be continued so that Pridgen

could receive further psychiatric evaluation of his competency to stand trial and allowed the penalty phase to proceed. Based upon these facts, this Honorable Court concluded that if Pridgen was incompetent during the penalty phase of the trial, that a practical decision made by him to offer no defense to the state's recommendation of death could not stand. Therefore, this Court held that the judge erred in declining to stay the sentencing portion of the trial for the purpose of having Pridgen re-examined by experts and for refusing to hold a new hearing on Pridgen's competency to continue to stand trial. Id. at 955.

Similarly, in Nowitzke v. State, 15 F.L.W. S645 (Fla. December 6, 1990), this Honorable Court, citing Pridqen v. State, supra, held that the obligation to order a competency examination and conduct a hearing when a trial court has reasonable grounds to believe that the defendant is not mentally competent to proceed is a continuing one. This Court agreed with Nowitzke's claim that the trial court erred in refusing to order a second competency hearing immediately prior to trial, where the record showed that on the Friday before the trial was to begin Nowitzke rejected a plea offer stating that he believed he would be released on July 4, 1989, because it was Independence Day and because of the number of letters in his three names. Nowitzke stated that he obtained this information from a judge in his dreams. He laughed at the possibility of the death sentence, telling his lawyers that the trial was a necessary "step" he must go through; but since he would be spiritually released on July 4,

1989, he could not be executed. Nowitzke's attorney conveyed this information to the judge and moved for a competency hearing. The trial judge summarily denied the motion on the basis of the competency evaluation made three months earlier when Nowitzke had been returned from trial from the North Florida Treatment Center.

The instant case clearly is distinguishable from Nowitzke and Pridgen. Beyond the attempted suicide after the jury had retired for deliberations from the penalty phase, there was absolutely no evidence that Hodge's competency was an issue. In Trawick v. State, 473 So.2d 1235 (Fla. 1985), this Court stated "appellant's despondency and ambivalence about his plea did not constitute reasonable grounds to believe that he might be incompetent." Id. at 1238. This Court also noted in Trawick that while a suicide attempt is a substantial indication of possible mental instability, such an attempt does not legally create a reasonable doubt about the defendant's competence to stand trial and that a number of courts addressing this question have held that it does not. Id. at 1238. Again, in Card v. State, 497 So.2d 1169 (Fla. 1986), this Court addressed the contention that the trial court erred in failing to conduct a pretrial competency hearing and contrasted Card with Hill v. State, 473 So.2d 1253 (Fla. 1985), in which this Court held a trial court must conduct a pretrial hearing on the issue of whether a defendant is competent to stand trial when reasonable grounds exist as to support a finding of incompetence. This

Court in Card, stated:

> "The contrast between the instant case and Hill is readily apparent. In Hill we held that a pretrial competency hearing was mandated because among other things, Hill had a history of grandmile epileptic seizures, mental retardation with communication problems, acquiescence and acceptance of guilt regardless of actual fact, and an I.Q. as low as 66, reflecting borderline intelligence. The pattern of bizarre conduct and behavior problems presented to the court in the instant case does not compare to the factual predicate presented in Hill. Id. at 1175.

The facts in the instant case do not even rise to the level of the facts found insufficient in Trawick or Card. Again there was absolutely no evidence Hodges' competency was at issue until after the jury had retired to deliberate in the penalty phase. Further, the evidence showed that when the defendant was examined for competency prior to sentencing, he was found competent. Despite appellant's reliance on Dr. Merin's statement that it appeared that appellant's attempted suicide was a result of his conversation with his parents proceeding the penalty phase, this evidence alone does not suggest any incompetence during the penalty phase.

The record shows the only disagreement between appellant and his lawyers regarding the presentation of the penalty phase was on appellant's decision to testify. (R 700) The record further shows, that the decision not to testify was in accordance with the advice given to him by his counsel. (R 701) Any suggestion that appellant's suicide note is sufficient evidence that counsel

was restrained from presenting a defense during the penalty phase is clearly unsupported by the record. At no time did counsel for the defendant suggest to the court that he was precluded from the presentation of evidence during the penalty phase. Appellant's motion for a new trial with regard to this issue merely stated:

> (11) That the court erred in proceeding with the penalty phase of the case including the court's consideration of the jury's question during the penalty phase deliberation, after the defendant had attempted suicide and was transported to the hospital. (R 888)

Similarly, in appellant's argument on the motion for new trial, counsel argued that Dr. Merin's testimony supported a conclusion that the defendant might not have been aware of what was going on during the penalty phase, but at no time did he suggest to the court that he was precluded from presenting any testimony or adequately representing the defendant because of the possibility Hodge's was suffering from psychogenetic amnesia. (R 787 - 788)

It is understandable that the defendant was depressed after having received a guilty verdict on first degree murder and having to face up to the consequences of his actions.[1] The suicide note shows the defendant had an understanding of the charges and an awareness of his actions.

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[1] The motive for the murder itself was the defendant's refusal to face the consequences of his criminal actions.

Accordingly, appellee urges this Honorable Court to find that there was no reasonable grounds to believe the defendant was incompetent during the penalty phase and that his actions subsequent to the jury retiring for deliberations in the penalty phase did not require the trial court to suspend the proceedings until the defendant had been taken to the hospital, treated and then examined when the jury was already out for deliberations. Further, as there is no evidence to suggest that the defendant was incompetent during the penalty phase, the state urges this Court to find Hodges suffered no prejudice by the trial court's failure to halt the proceedings to hold a competency hearing.

ISSUE IV

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S EIGHTH AMENDMENT RIGHT TO A FAIR PENALTY PHASE TRIAL AND **SENTENCING HEARING** BY ALLOWING EVIDENCE, AND EMOTIONAL DISPLAY AND PROSECUTORIAL REMARKS.

Appellant first complains that during the penalty phase the trial court permitted the introduction of victim impact evidence as condemned by Booth v. Maryland, **482** U.S. 496, **96** L.Ed.2d **440, 107** S.Ct. **2529 (1987)** and South Carolina v. Gathers, **490** U.S. ____, **109** S.Ct. **2207, 104** L.Ed.2d 876 **(1989).** He claims the principles of Booth and Gathers were repeatedly violated during the penalty phase of his trial. It is the states contention that the **evidence** appellant now complains of is not the type of evidence condemned by Booth and Gathers and that appellant's failure to object to the challenged testimony on this basis precludes appellate review of this claim.

The first evidence appellant challenges is the testimony that Betty Ricks' told the investigating detectives and her sister appellant repeatedly came by the Beverage Barn to pressure her to drop the charges against him for indecent exposure. At trial appellant objected to the admission of this evidence as hearsay which would violate the right to confrontation, and that it was irrelevant, unreliable and would violate the Eighth and Fourteenth Amendments. (R 665 - 667, 674 - 677) The court overruled defense counsel's objections finding that the evidence while hearsay was sufficiently reliable to be admitted during the penalty phase. (R 678) The objection was not predicated on

Booth grounds. The failure to raise a Booth objection precludes consideration ab inito now. *See* Grossman v. State, 525 So.2d 833 (Fla. 1988); Parker v. Dugger, 550 So.2d 459 (Fla. 198); Porter v. Dugger, 559 So.2d 1201 (Fla. 1990). Appellant may not change the basis of his trial objection in the appellate court and objections must be raised with specificity to the court below. Grossman, supra; Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Glendenninq v. State, 536 So.2d 212 (Fla. 1988); Tillman v. State, 471 So.2d 32 (Fla. 1985). Even if the objection had been properly observed, the evidence as presented was relevant to the issues at hand and was not the type of evidence condemned under Booth.

Secondly, appellant objects to the testimony of Deborah Ricks, the victim's sister. During her testimony concerning the threats the defendant had made against Betty Ricks, Deborah Ricks broke down crying. Defense counsel asked to approach the bench and asked the court to admonish the witness or admonish the jury about crying or showing any emotion during the testimony relating to "the state's case, presentation of aggravating circumstances, anything relating to the victim, the impact it would have on the family," as he claimed it was totally inadmissible in a capital penalty phase. Defense counsel further noted that if she was going to continue to cry and be upset the prejudicial nature outweighed the probative value as her testimony was cumulative to the detectives'. (R 688) There was no objection to her testimony based upon Booth and in fact the bench conference did

not contain an objection to the testimony but rather asked the court to admonish the witness not to continue to cry. If defense counsel had felt the testimony violated Booth or constituted error in any way, it was incumbent upon him to present an objection to the trial court and move for a mistrial or a curative instruction. Defense counsel in the instant case did neither. Thus, any allegation of error predicted on Booth has been waived.

In addition to the Booth argument now presented, appellant also argues that this testimony was violative of cases such as Rodriquez v. State, 433 So.2d 1273, 1276 (Fla. 3d DCA 1983). In Rodriquez, the court found that the victim's wife's testimony deprived the defendant of a fair trial, stating:

> "Turning to the final challenge, we agree that Mrs. Izquierdo's emotional outbursts, while understandable, were extremely prejudicial and created an atmosphere in which appellant could not receive a fair trial. Mrs. Izquierdo shouted at epithets and interspersed her testimony with impassioned statements evidencing her hostility toward Rodriguez. Her conduct necessary engendered sympathy for her plight and antagonism for Rodriguez, depriving him of a fair trial." Id. at 1276.

Deborah Ricks' testimony did not make any reference to the defendant's personality or to the cold-blooded murder. Further, after appellant asked her not to cry, Deborah Ricks' testimony continued without any further challenge. Accordingly, her testimony was neither prejudicial to the defendant in depriving him of a fair trial, nor did it constitute victim impact evidence

violative of Booth. Thus, assuming there had been a proper objection presented to the trial court, the record shows that no error was committed.

Lastly, appellant challenges the closing argument by the prosecutor in which he stated:

> "What about life imprisonment? What can a person do in jail for life? You can cry. You can read, you can watch T.V., you can listen to the radio. You can talk to people. In short, you are alive. People want to live. You are living. All right? If Betty Ricks had had a choice between spending life in prison or lying on that pavement in her own blood, what choice would Betty Ricks have made? But, you see, Betty Ricks didn't have that choice. Now why? Because George Michael Hodges decided for himself, for himself, that Betty Ricks should die. And for making that decision, for making that decision, he, too, deserves to die." (R 717)

First, it should be noted that no objection was made to the closing argument as presented. Accordingly, this issue was not preserved for appeal. Jackson v. State, 522 So.2d 802 (Fla. 1988). Further, as this Honorable Court held in Jackson, and subsequently in Hudson v. State, 538 So.2d 829, 832 n. 6 (Fla. 1989), that even if an objection had been raised to the comments, the challenged argument was not so outrageous as to taint the validity of the jury's recommendation. Quoting Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985), this Court noted:

> "In the penalty phase of a murder trial, resulting in a recommendation of which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding far a new penalty-phase trial." Jackson, at 809.

Further, it should be noted that the argument as presented during the instant trial did not *go* to the loss of the victim, but rather to the premeditation of the defendant. Premeditation was an issue during the penalty phase.

Lastly, appellant challenges the prosecutor's comment to the trial judge that the victim's family was present and that they wanted to speak to the court but that he had advised them that this was a violation of the line of cases from the Supreme Court regarding victim impact statements. He told the court that the Tuckers' loved their daughter and that they wanted justice done in his deliberations. (R968)[2] Appellant contends that this statement in itself was a violation of Booth, but again no objection was presented to the court below on this (or any) basis. Thus, like the other Booth claims now raised by appellant, this issue is procedurally barred. See, Grossman, supra.

Appellant argues, however, that no objection was necessary because the prosecutor himself had brought the impropriety of the statements to the trial court's attention. This does not relieve defense counsel of the obligation to present error to the trial court for review.

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[2] Defense counsel had previously stated during closing argument that he was sure the Ricks loved their daughter, (R 723

Further, there is absolutely no evidence that the trial court considered the statement. Accordingly, absent showing of prejudice and proper objection, this issue also does not constitute reversible error.

As none of the arguments presented herein were properly objected to at trial and as none of these claims violate the dictates of Booth, your appellee urges this Honorable Court to find error if any was harmless. Grossman, at 842-846.

ISSUE V

WHETHER THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY GIVING THE JURY THE STANDARD INSTRUCTION ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WITHOUT INFORMING THE JURY OF THIS COURT'S LIMITING INSTRUCTION OF THAT CIRCUMSTANCE.

Appellant claims that the standard jury instruction on the cold, calculated, and premeditated aggravating circumstance violates the Eighth Amendment to the United States Constitution. In Brown v. State, 565 So.2d 304, 308 (Fla. 1990), and Jones v. Dugger, 533 So.2d 290, 292 - 293 (Fla. 1988), the arguments as presented by appellant were considered and rejected by this Court. Accordingly, no error was committed.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY FINDING THAT THE OFFENSE WAS COMMITTED TO DISRUPT OR HINDER LAW ENFORCEMENT AND WAS COLD, CALCULATED, AND PREMEDITATED BECAUSE THE STATE'S EVIDENCE FAILED TO PROVE EITHER CIRCUMSTANCE BEYOND A REASONABLE DOUBT.

The trial court found two aggravating circumstances: (1) The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws and, (2) The crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R 906, 907) Appellant argues that neither aggravating circumstance was proven by the state beyond a reasonable doubt. Your appellee contends, however, that the evidence presented during the guilt and penalty phase, as relied on by the trial court in its order, clearly supports both aggravating circumstances beyond a reasonable doubt.

With regard to the first aggravating circumstance, the trial court found:

> "The evidence shows that the defendant, GEORGE MICHAEL HODGES, had been accused by the victim, BETTY RICKS, of an act of indecent exposure sometime prior to January 8, 1987, that the victim was persisting in the prosecution of formal criminal charges against the defendant for said exposure act, and that the defendant had approached the victim on occasion, prior to the murder of the victim, attempting to talk the victim out of continuing with the prosecution against him. It is apparent that the defendant had told the victim that he was very concerned about his family, his reputation and his job

> security if the victim was to persist in his prosecution.
>
> The court finds that the sole purpose for the killing of BETTY RICKS was to disrupt of hinder the lawful prosecution of GEORGE MICHAEL HODGES for the indecent exposure charge filed by the victim." (R 906 - 907)

In addition, the evidence showed the defendant's family was not aware of the impending charges. The evidence further shows that the murder was committed on the day the defendant was to go to arbitration at the State Attorney's Office concerning the indecent exposure charges and that shortly after the commission of the murder, the defendant called the State Attorney's Office and told them that arbitration would not be necessary. The aggravating factor to hinder or disrupt law enforcement was created for just such a case.

In Roon v. State, this Honorable Court upheld the trial court's finding that the murder was committed to hinder or disrupt a lawful government function where the evidence showed that a federal magistrate stated in his presence that a complaint against him would have been dismissed if there were one less accusatory witness and that it was evident that Koon was angry with the witness for planning to testify against him. Koon v. State, 513 So.2d 1253, 1256 (Fla. 1987). In the instant case, the defendant's sole motive for the murder was to eliminate Betty Ricks as a complaining witness and to remove any potential that his family or his employer would become aware of his indecent exposure charge or the previous charges against him.As the trial

court found, the evidence clearly supported this aggravating circumstance beyond a reasonable doubt. See, also, Grossman v. State, 525 So.2d 833 (Fla. 1988); Francis v. State, 473 So.2d 672 (Fla. 1985).

To support the second aggravating circumstance, the trial court stated:

> "The evidence presented by the state convinces the court that the defendant, GEORGE MICHAEL HODGES, having been accused by the victim of indecent exposure, sought to have the victim drop those charges against him and that upon the refusal to do so, the defendant stalked the victim in the early morning hours of January 8, 1987, ambushed her as she approached her place of employment and then with the calculation of a professional killer, the defendant walked up to her and with virtually no emotion, shot her down in cold blood.
>
> The killing of BETTY RICKS by GEORGE MICHAEL HODGES did not occur in a moment of domestic anger as is so often the case. Nor was it done in a moment of passion of desperation or under the pressure of any exigent circumstances. The killing of BETTY RICKS was simply an execution performed by the defendant in a cold, calculated and premeditated manner in order to prevent his prosecution from a simple misdemeanor charge.
>
> The killing of BETTY RICKS was simply all out of proportion to the acts by her that the defendant sought to prevent. Such a killing, for such an insignificant purpose, and done with emotionless dispatch, sets this murder aside from the norm. (R 907)

In addition to the above evidence, the defendant's stepson, Jessie Watson, also testified that the defendant told him that he walked up behind the girl and said, "Sorry about this" and shot her four or five times. This statement, when coupled with the

evidence that after concocting an alibi, the defendant procured a gun, waited for the arrival of Betty Ricks, killed her and departed within a matter *of* moments supports the trial court's finding that this was not a normal first degree murder but rather was cold, calculated and committed with heightened premeditation. (R 429) See Koon v. State, 513 So.2d 1253 (Fla. 1987).

ISSUE VII

WHETHER THE TRIAL COURT FOUND TWO SEPARATE AGGRAVATING CIRCUMSTANCES BASED UPON THE SAME ESSENTIAL FEATURES OF THE OFFENSE.

Appellant argues that the trial court's finding of both aggravating circumstances, to disrupt or hinder law enforcement and cold, calculated and premeditated were based upon the same essential feature of the offense -- that appellant killed Betty Ricks to prevent her from prosecuting him for indecent exposure. (R 906 - 907) This argument is without basis.

The trial court's order clearly sets out those facts which supported a finding for each circumstance. The evidence of cold, calculated and premeditated encompasses the defendant's waiting at the Beverage Barn with a shotgun for the victim to arrive and then coldly walking up to her saying, "sorry about this," and putting four or five bullets into her head. Whereas, the evidence to support disrupt or hinder law enforcement consisted of evidence that the defendant executed the victim in order to prevent the prosecution of the indecent exposure case. As neither circumstance was based upon the same essential feature of the offense both factors were properly found and should be upheld by this Court. Koon v. State, 513 So.2d 1253, 1256 - 1257 **(Fla. 1987).**

ISSUE VIII

WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER APPELLANT'S EVIDENCE OF MITIGATING CIRCUMSTANCES.

Appellant's argument herein is twofold. (1) that the trial court's evaluation of the mitigating circumstance failed to satisfy this Court's requirements as set forth in Campbell v. State, 16 F.L.W. S2 (Fla. December 3, 1990) and Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988) and (2) that the court's order seems to have restricted itself to the consideration of statutory mitigating circumstances.

During the penalty phase of the trial, defense counsel presented two witnesses. The defendant's mother, Lulu Hodges and the defendant's brother-in-law, Harold Stewart. The defendant's mother testified that the defendant was the youngest of five children and that at some point George's older brother drowned, She testified that the brother's drowning changed George completely because they were real close. (R 693 - 694) She stated that George was unable to establish any long-term friendships because they moved around a lot when he was growing up. His activities were confined mostly to the family unit. (R 694) She also testified that George was a good father, that he loved his children and that he had gotten his G.E.D.. (R 695) The defendant's brother-in-law Harold Stewart testified that he worked with George and that George was a good worker. (R 697) He also noted that the defendant was a good father, that he loved his stepchildren and children.

Defense counsel argued to the jury during closing arguments in the penalty phase that this crime was mitigated by the fact that although the Ricks loved their daughter, the Hodges also loved their son. He also argued that they moved around a lot and that Hodges was not able to establish any close attachments to anyone other than his family and an older brother who drowned and that affected him deeply. (R 723) He also argued that the defendant must have been a fairly good husband and that his children loved him. (R 724)

In Lucas v. State, Case No. 70,653 (Fla. September 20, 1990), this Honorable Court stated:

> "We have previously held that the trial court need not expressly 'address each nonstatutory mitigating factor in rejecting them, Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984), and '[t]hat the court's findings of fact do not specifically address appellant's evidence and arguments does not mean they were not considered.' Brown v. State, 473 So.2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 (1985). More recently, however, to assist trial courts in setting out their findings, we have formulated guidelines for findings in regard to mitigating evidence in **Rodgers** v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), and Campbell v. State, No. 72,622 (Fla. June 14, 1990). We have even noted broad categories of nonstatutory mitigating evidence which may be valid. Campbell, slip opinion at 9 n. 6. However, '[m]itigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt.' Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985). We, as a reviewing court, not a fact finding court, cannot make hard and fast rules about what must be found in mitigation in any particular case. Hudson v. State, 538 So.2d 829 (Fla.), cert. denied,

> **110** S.Ct. 212 **(1989);** Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. **1000 (1981).** Because each case is unique, determining what evidence might mitigate each individual's defendant sentence must remain within the trial court's discretion."

This Court further noted that because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating evidence it is attempting to establish. Citing to Holmes v. State, **374** So.2d 944, 950 (Fla. 1979), cert, denied, **446** U.S. **913** (1980), this **Court** further stated:

> "There is no prescribed form for the order containing the findings of mitigating and aggravating circumstances. The primary purpose of requiring these findings to be in writing is to provide an opportunity for meaningful review by this Court *so* that it may be determined that the trial judge viewed the issue of life or death within the framework of the rules provided by statute. It must appear that the sentence imposed was a result of a reasoned judgment."

The nonstatutory mitigating circumstances suggested by appellant herein were not presented as such to the trial court. Therefore, appellant cannot challenge the trial court's failure to delineate this evidence as set forth by appellant. Nevertheless, the record is clear that the trial court did consider each of these facts in his order. Nevertheless, the trial judge found that the aggravating circumstances far outweighed any mitigating circumstances and that the killing of **Betty Ricks** by George Michael Hodges required the ultimate sanction. (R 907 **- 908)**

Further, even if the court had erroneously failed to consider a mitigating factor, a review of the nonstatutory mitigating factors argued by appellant herein reveals that none of the evidence as presented outweighs the substantial aggravating factors. The factors now suggested by appellant are:

(1) Traumatic Childhood Experiences -- Appellant's mother testified that he had a close knit family and that even though they moved around, the appellant was close to his family. The only childhood tragedy spoken of was the drowning of a brother. The brother's death does not constitute the type of dramatic childhood experiences usually considered as mitigating evidence. Eddings v. Oklahoma, 455 U.S. at 115; Campbell v. State, 16 F.L.W. at S2 n. 4; Stevens v. State, 552 So.2d 1082, 1085 - 1086 (Fla. 1989).

(2) Deprived Educational Backqsound -- The appellant's mother testified that the defendant chose not to finish high school because his family moved to another state, but he later obtained his G.E.D.. Again, this is not the type of deprived educational background that supports a finding of mitigation.

(3) Close Family Relationships -- The trial court considered the evidence presented to it that the defendant was close to his family and also considered the loyalty of his wife and stepson. The weight given to this evidence by the trial judge is consistent with this Court's opinion in Campbell, supra,

fn. 4(2). The evidence of the defendant's relationships was not so overwhelming as to outweigh the two substantial aggravating factors.

(4) Employment History -- Again, in Campbell v. State, note 4(2) this Honorable Court held that contribution to community or society as evidenced by an exemplary work, military, family, or other record constitutes mitigating evidence. The evidence in the instant case that the defendant was a good worker who never had any problems on the job does not constitute an exemplary work record. Accordingly, evidence that the appellant was a good worker alone is insufficient to support the finding of this mitigating factor.

Thus, even if appellant had properly argued the mitigating factors now suggested to this Honorable Court to the trial court, the evidence is not of sufficient import as to mandate the finding of nonstatutory mitigating evidence. Nor does the evidence outweigh the two valid aggravating factors. Campbell v. State, supra, and Nibert v. State, 16 F.L.W. S4 (Fla. December 13, 1990); Lucas v. State, supra.

Appellant also argues that the trial court's order seems to restrict itself to statutory mitigating factors. This argument is based on the following statement in the trial court's order: "However, in balancing all aspects of the defendant's character, which is the only statutorily enumerated mitigating circumstance the Court has found in this case[.]" (R 908) A review of the entire order makes it clear, however, that the court thoroughly

reviewed all of the nonstatutory evidence that was presented to it and that this reference was to the jury instruction on nonstatutory mitigating evidence.

Accordingly, the sentence of death was properly imposed.

ISSUE IX

WHETHER THE DEATH SENTENCE WAS PROPORTIONATE TO THE PERSONAL CULPABILITY OF APPELLANT AND THE CIRCUMSTANCES OF THE OFFENSE.

Obviously the state does not agree with appellant's argument that the state failed to prove beyond a reasonable doubt that either of the aggravating circumstances relied upon by the trial court. See Issue VI. Therefore, the state urges this Court to find that in light of these two valid aggravating circumstances and the finding of no mitigating factors, the sentence of death imposed in the instant case was proportionate to other similarly situated defendants. Cf. Koon v. State, 513 So.2d 1253 (Fla. 1987); Jackson v. State, 522 So.2d 802 (Fla. 1988); Lara v. State, 464 So.2d 1173 (Fla. 1985). This was a cold blooded murder that was committed solely to prevent the prosecution of the defendant for indecent exposure. Unlike those cases relied upon by appellant, this sentence was not a jury override nor was this murder committed during the height of passion or during an attempted robbery but rather was a result of a well thought out process which very nearly resulted in the defendant's freedom from prosecution for both the indecent exposure and the murder.[3] The sentence of death imposed in the instant case is proportionate to the sentences imposed in similar cases.

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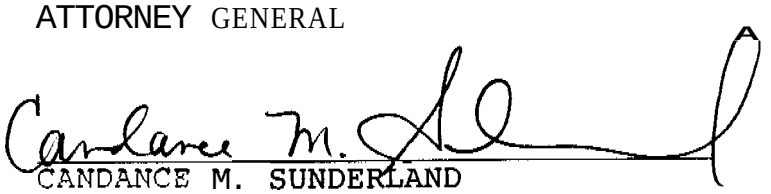
[3] The record shows that Jessie Watson did not come forward with the truth until six months after the defendant confessed to him that he had killed Betty Ricks. (R 204)

CONCLUSION

For the foregoing reasons, the state urges this Court to affirm the judgment and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregaing has been furnished by U.S. Regular Mail to Paul C. Helm, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 5 day of April, 1991.

OF COUNSEL FOR APPELLEE.