IN THE SUPREME COURT OF FLORIDA

JEREMY LYNN SCOTT,

Appellant,

v.

Case No. 75,036

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

SUMMARY OF THE ARGUMENT

ISSUE I

Appellant asserts that he was denied a fair trial based upon numerous comments by the prosecutor during the course of the trial. The state contends that when these comments are considered in context that they were not improper and further, that it is beyond a reasonable doubt that none of the allegedly improper comments affected the jury's verdict.

ISSUE II

Mr. Scott is a cold blooded criminal who has shown society that he will not live by it's rules. The trial court correctly rejected the life recommendation based upon a valid finding the facts of this case suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. Accordingly, the state urges this court to uphold the sentence of the court below.

ISSUE III

Appellant contends that the trial court erroneously used the clear and convincing standard of evidence rather than the requisite beyond a reasonable doubt standard in finding the existence of five aggravating factors. It is the state's contention that a review of the sentencing order reflects that the trial court's use of the terms "clear and convincing" was with regard to the standard for a jury override.

ISSUE IV

The evidence reasonably establishes that the victim suffered a slow, lingering, cruel expiration. Accordingly, the trial court's findings should not be disturbed.

ISSUE V

This Court has consistently held that this factor is established where the evidence shows that the murder was undertaken after reflection and calculation. The facts in the instant case clearly support the finding that the murders were committed in an especially cold, calculated and premeditated manner as the evidence shows Scott deliberated the killing extensively before committing the murder and that he returned repeatedly to make sure the victim was dead.

ISSUE VI

The evidence shows that the sole motive for the murder was to preclude Moorehead from being able to identify Scott as the car thief. Accordingly, the factor of disrupt or hinder law enforcement was clearly supported by the evidence.

ISSUE VII

The trial court's order reveals that he accurately reviewed all of the mitigating evidence presented to the court.

ARGUMENT

ISSUE I

WHETHER THE PROSECUTOR VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY INDULGING IN INFLAMMATORY, ABUSIVE AND EMOTIONAL ARGUMENT, ATTACKING DEFENSE COUNSEL, MISLEADING THE JURY, AND SUGGESTING THE DEFENSE HAS THE BURDEN OF PROOF.

Appellant asserts that he was denied a fair trial based upon numerous comments by the prosecutor during the course of the trial. The state contends that when these comments are considered in context that they were not improper and further, that it is beyond a reasonable doubt that none of the allegedly improper comments affected the jury's verdict.

In general, wide latitude is permitted in arguing to the jury. Thomas v. State, 326 So.2d 413 (Fla. 1974); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 372 U.S. 904 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla. 1969), modified, 408 U.S. 935 (1972). A new trial should be granted only when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done". Darden v. State, 329 So.2d 287, 298 (Fla. 1976). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained

of remarks. As previously noted, when considered in context the challenged remarks in the instant case were entirely proper.

Initially, appellant contends that during the guilt phase closing argument the prosecutor staged an emotional outburst before the jury. Appellant then presents a substantially edited quote, out of context, from the closing argument to support his position. A review of the closing argument and the actual quote by the prosecutor shows that the prosecutor merely was responding to the defendant's closing argument. The prosecutor stated:

> "He wants you to weigh the credibility of all the witnesses and especially look at the accomplice instruction. You can read that. And I'm going to talk a lot about why Mr. Hall is a reliable witness. Keep in mind that in the Defense's opening statement, just like when he got up here to begin his closing, at the beginning of the trial he told you a whole bunch of things that were going to come out, and they didn't. He told you about drug use, he told you about just hundreds of things that were going to come out. He said when he got up on his openings, he said, I'm not going to use inflammatory language and I'm not going to be emotional. Then he got up and started punctuating his opening with homosexual practices, luring young men with drugs, calling him chicken, calling his client this dumb boy. That's emotion, ladies and gentlemen. That's all emotion. And none of that stuff was proven. He said he was going to prove that Jeremy only finished the eighth grade. Did you hear any evidence from that witness stand or see any document that said Jeremy Scott finished the first grade. Maybe he didn't. He said they were going to prove that this happened because Don was a homosexual. Think about these things.
>
> The Defense in every case argues the defendant's not guilty. That's his job. He's up here to try and put your attention on

> something besides the facts. So one of the things is, the victim was a homosexual, he caused it all, trying to get you to focus on the victim. He didn't cause himself to get his head crushed in. He said that there were going to be evidence that the victim was heavily into drug use. Only evidence in this is they sat down and smoked a joint and drank a couple of beers. There's no evidence of heavily into drug use. Even if he was - what if he was a heavy drug user? Does that mean anything as far as getting his head crushed in? I don't think so. He kept saying things like, in his opening, that Mr. Moorehead provided drugs and alcohol after he told you he wasn't going to be emotional and that I was. I am emotional. I don't like murderers. That's why I'm emotional --"
>
> (R 1489 - R 1490)

Defense counsel objected that it was improper assertion of personal feelings that the prosecutor was intentionally trying to inflame or prejudice the jury. The state responded that the defense opened the door by telling the jury that the prosecutor was an emotional person and that he was going to get up there and make some emotional arguments. (R 1491) The court sustained the objection, denied the motion for a mistrial and the motion to strike. The court further noted:

> "I think both of you used that phrase. You need to stay away from it. Both of you know better. I don't think either one of you are doing that intentionally, but you did do it, both of you. So I sustain your objection on that point." (R 1492)

The law is clear that the prosecutor, as an advocate, is entitled to make fair response to arguments of defense counsel. The latitude afforded counsel is especially broad when argument is in retaliation to prior improper comments made by opposing

counsel. In the instant case, the prosecutor's argument was merely a rebuttal to the arguments raised by defense counsel in closing argument. As such, they do not constitute reversible error. Cf. Williamson v. State, 511 So.2d 289 (Fla. 1987); Dufour v. State, 495 So.2d 154 (Fla. 1986); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Schwarck v. State, 568 So.2d 1326 (3d DCA 1990); United States v. Ard, 731 F.2d 718 (11th Cir. 1984).

During closing argument defense counsel repeatedly made personal remarks about the prosecutor and the prosecutor's style of arguing. (R 1454, 1456, 1457, 1460, 1461, 1462, 1471, 1472, 1474, 1483, 1484) Rather than being a personal attack on defense counsel, as suggested by appellant, the remarks in the instant case were invited by the comments of the defense counsel during closing argument and were meant to explain or clarify those comments. Accordingly, this argument by the prosecutor was entirely proper and did not constitute a basis for granting a motion for mistrial.

Appellant next contends that the prosecutor improperly vouched for the credibility of state witness Bryan Hall, when the prosecutor stated, "Why did Mr. Hall confess under oath to first degree murder? Because he is telling the truth." Appellant also challenges the prosecutor's argument to the jury that this crime was not reasonable, that it lacked a rational explanation, and the prosecutor's reference that he had never prosecuted anyone for homosexuality and that he didn't think it was illegal. It is the state's position that these claims are not properly preserved

for appellate review because appellant did not raise a contemporaneous objection to any of the challenged comments. A review of the record shows that no objection was raised to the foregoing comments until a recess was taken during the prosecutor's closing argument. At that point defense counsel objected to the prosecutor's reference in closing argument to Mr. Hall telling the truth and the prosecutor's personal opinion about judging a criminal by a reasonable man's standards. He also objected to the prosecutor's comment that homosexuality is not illegal. Defense counsel moved for a curative instruction or a mistrial. The motion was denied. It is the state's position that this objection was not sufficiently contemporaneous to preserve this issue for appeal.

In Clark v. State, 363 So.2d 331 (Fla. 1978), this Honorable Court held that when there is an improper comment, the defendant, if he is offended, has the obligation to object and request a mistrial. If the defendant fails to object or if, having objected, he does not ask for a mistrial, his silence will be considered an implied waiver. Thus, a contemporaneous objection is required to preserve error other than fundamental error for appellate review. Castor v. State, 365 So.2d 701 (Fla. 1978). The objection must be both timely and sufficiently specific to apprise the trial judge of the punitive error and to preserve the issue for intelligent review on appeal. Jackson v. State, 451 So.2d 458 (Fla. 1981). Counsel's failure to raise a timely objection to these comments constituted a waiver for appellate review.

Even if this issue was properly preserved for appellate review, appellant is not entitled to relief as the arguments were entirely proper comments on the evidence and fair rebuttal to the closing argument of defense counsel. Further, it is beyond a reasonable doubt that the comments by the prosecutor did not cause the jurors to return a more severe verdict than the evidence demanded.

During closing argument the defense counsel stated with reference to Mr. Hall:

> "When it comes to Bryan Hall, the special instruction that you are going to get about Bryan Hall is that you should use great caution in relying upon his testimony. Why is that? Well, Bryan Hall has also been charged with this crime, and the law recognized that a person who is charged with a crime when they come before the jury and testify that because of that unique circumstance, the jury should be very cautious just the way you might approach say a rattle snake, be very cautious if you are going to rely upon that witness to believe what he says, that this boy goes to the chair or prison for the rest of his life. (R 1467)

He further stated:

> What did Bryan Hall do? Well, he sat there in that chair with his head down, never looked you in the eye, not even once. And common sense tells you that if a man won't look you in the eye how do you know that they are going to tell you the truth. And the law will tell you that that's a factor that you can consider as to whether or not you believe Bryan Hall. How else did he act? Well, even though Mr. Aguero was leading him pretty much through his testimony, there were times when he hesitated, when he would breathe hard into the microphone, and take some time before he thought of what was the right answer to give. Do you remember that? Remember when Mr.

> Aguero said, what did Jeremy say you should do. And there was that hesitation and there was that breathing into the microphone and then there was he said kill him. How did he act when he was asked to identify Mr. Scott? He couldn't even look Mr. Scott in the eye and he barely picked up his finger. I suggest to you that the way Mr. Hall acted on the witness stand raises questions about the reliability and the believability of his testimony." (R 1469 - 70)

Defense counsel then went on to argue that everything that Bryan Hall said was self-serving and that everything he said about what happened was intended to take the blame away from Bryan Hall and put it on Jeremy Scott. Defense counsel then stated:

> " . . . So I suggest to you that Mr. Hall is not honest and straightforward in answering the questions. That the next factor that you could consider as to whether or not to believe Bryan Hall is he like any other witnesses in the case, has an interest in how the case is decided. And whether it be for spite or anger or a feeling that it is all his fault that he got in this trouble, those are reasons that you can consider as to whether or not you can rely on that testimony and believe it." (R 1470 - 1471)

During closing argument the prosecutor stated that he was going to respond to particular points by the defense. (R 1488) With regard to the defense counsel's attack on Mr. Hall, the prosecutor stated:

> He indicated that Mr. Hall gave a self-serving statement. Here's the crux of Mr. Hall. Mr. Hall got on that witness stand and confessed to first degree murder, first degree murder, and in two different ways. Both that he intended to kill him and he did it in the course of a robbery. He is not on trial right now. Mr. Scott is on trial. But

> he admitted it. Now, if he wanted to give a self-serving statement, then why on Earth did he get up there and take up the portion of Jeremy's statement where he said we were just out to teach a faggot a lesson and make it second degree murder or take up the part of Jeremy's statement that says we just wanted to beat his ass and make it third degree murder the car stealing. Why did Mr. Hall confess under oath to the first degree murder? Because he is telling the truth. There is absolutely nothing put on in evidence to make you disbelieve that man, not one thing." (R 1495)

With regard to Appellant's claim that the prosecutor's comment concerning the legality of homosexuality, it is the state's position that the argument was a proper response to defense counsel's closing argument. Defense counsel raised the issue concerning the legality of homosexuality. Thus, the response by the prosecutor was a fair comment on that argument. Further, despite appellant's argument that while homosexuality may not be prosecuted that sodomy itself is a crime, the issue was not sodomy but homosexuality. Finally, even if the comment was erroneous and the issue was properly preserved for appeal, it is clearly a matter that is within the common sense of the average juror that persons are not prosecuted for homosexuality in this state. Accordingly, error, if any, was clearly harmless.

He also contends that the prosecutor's argument improperly shifted the burden of proof. Again, the prosecutor's statements were not objected to until the recess. Therefore, this issue was not properly preserved for appeal. However, even if it had been properly preserved for appeal, the prosecutor's statements were

not improper. He at no time implied that the defendant had the burden of proof in the instant case, but was merely commenting on the evidence and on the arguments presented by defense counsel. Cf. State v. Lucas, 543 So.2d 760 (Fla. 2nd DCA 1989). The prosecutor told the jury repeatedly during closing argument that the state had the burden of proof. (R 1509, 1511, 1549) Further, the jury was clearly instructed by the trial court that the state had the burden of proving the defendant's guilt beyond a reasonable doubt. (R 1557 - 1561, 1563, 1565, 1567, 1570) Thus, even if the prosecutor's statement was erroneous, it was harmless beyond a reasonable doubt where the jury was clearly instructed to the contrary and where there is no evidence that the jury confused by the comments. Cf. Harich v. State, 437 So.2d 1082 (Fla. 1983) (where the body of the jury instruction was correct and where there was nothing in the record to indicate that the jury was confused, no reversible error occurred).

Next, appellant challenges the prosecutor's statement that the defendant was a hustler who was hustling queers. Appellant contends that there was no evidence to support the allegation and, thus, the comment was improper. Again, the prosecutor's comment was a proper comment on the evidence. Paul Smith testified that young guys go to Lake Morton to pick up older men or men with money. (R 1119 - 1120) He also testified that he had seen appellant there three or four times. (R 1120) The evidence further showed that after having befriended the victim in the instant case, that appellant and Bryan Hall had robbed and

murdered the victim. Under these circumstances, the prosecutor's comment that the defendant was a hustler was clearly supported by the evidence.

Finally, appellant challenges the prosecutor's statement that, "Now, if you are going to apply the same rules to each witness, apply those rules to Mr. Scott's taped statement." (R 1529) Defense counsel objected to the statement as an improper statement under the law. The objection was sustained and a motion for a curative instruction was denied. (R 1529) Appellant contends that the law does not impose the same standards upon the jury's consideration of a defendant's out-of-court confession or the admission to the police as upon the jury's consideration of witness testimony at trial. He alleges that this is true because before ever reaching the question of credibility, the jury must determine whether the defendant's statement to the police was voluntary. The jury was instructed with regard to the admission of the defendant's statement:

> "A statement claimed to have been made by the defendant outside of court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made.
>
> Therefore, you must determine from the evidence that the defendant's alleged statement was knowingly, voluntarily and freely made.
>
> In making this determination, you should consider the total circumstances including, but not limited to, whether when the defendant made the statement he had been threatened in order to get him to make it and

> whether anyone had promised him anything in order to get him to make it.
>
> If you conclude the defendant's out-of-court statement was not freely and voluntarily made, you should disregard it. (R 1571 - 1572)

However, once this initial threshold has been passed, the defendant's statements are to be considered just as any other witness and whether the defendant had repeatedly lied and told different versions of the murder in order to exculpate himself from the crime, is a relevant issue the jury. Thus, the prosecutor's comment was a correct statement of the law. Further, it is beyond a reasonable doubt that this comment by the prosecutor was harmless.

Appellant contends, in general, that none of these comments can be harmless because any one of them may have kept the jury from finding the defendant guilty of merely second degree murder and grand theft. The fact is that the evidence of this case is overwhelming. In addition to the physical evidence connecting the defendant to the crime and in addition to the defendant's own confession of guilt, there was also a full confession by a codefendant who was also being charged with the crime. Based on the foregoing, it is beyond a reasonable doubt that none of the comments by the prosecutor improperly affected the verdict in the instant case.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY REJECTED THE JURY'S RECOMMENDATION FOR A LIFE SENTENCE.

This Court in Tedder v. State, 322 So.2d 908 (Fla. 1974) and the multitude of cases following that decision, has set out a standard for jury override decisions in which the court may impose the death penalty. The standard is very clear. "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder, supra at page 910.. This Court has gone on to explain that "where the jury recommendation is not based on some valid mitigating factor discernible from the record, the Tedder standard for a jury override is met." Thomas v. State, 456 So.2d 454 (Fla. 1984).

Although a jury recommendation of life in a capital case is to be given great weight, the trial court must ultimately make the decision on which sentence is appropriate and which sentence is the correct legal sentence. Thomas, supra, at page 460. Whatever the reasons for the jury's vote, that it was in contradiction to the evidence in the penalty phase of the trial. "Where a sentence of death is otherwise appropriate and it appears that some matter not reasonably related to a valid ground of mitigation has swayed the jury to recommend life . . . it is proper for the judge to overrule the jury's recommendation." Francis v. State, 473 So.2d 672 and 676 (Fla. 1985).

This Court has held that where aggravating factors outweigh mitigating factors, death is presumed to be the appropriate penalty. In Sims v. State, 444 So.2d 922 (Fla. 1983), the jury recommended death, but in explaining why death was, in fact, appropriate the court reviewed the aggravating versus mitigating circumstances question. The defendant had presented witnesses to show his good character and difficult background circumstances. The state had presented evidence that the felony was committed in the course of robbery, that it was committed to avoid lawful arrest and that the defendant had previously been convicted of life-threatening crimes. This court held that "where there are some aggravating and no mitigating circumstance, death is presumed to be the appropriate punishment.

It was within the trial court's discretion to determine whether sufficient evidence exists of a particular mitigating circumstance, and, if so, the weight which should be given to it. White v. State, 446 So.2d 1031 and 1035 (Fla. 1984). The only statutory mitigating circumstance found by the court below was the defendant's age.

The only real evidence offered to support the nonstatutory mitigating factors in this case was that Mr. Scott had a rough childhood up to age five and that he has a sociopathic personality and therefore had no conscience. Thus, even if some slight weight was afforded to the defendant's nonstatutory mitigating evidence, it was substantially outweighed by the valid aggravating factors.

Mr. Scott is a cold blooded criminal who has shown society that he will not live by it's rules. The trial court correctly rejected the life recommendation based upon a valid finding that the facts of this case suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. Cf. Hayes v. State, 581 So.2d 121 (Fla. 1991) (Death sentence affirmed where developmentally disabled eighteen-year-old defendant, who was the product of a deprived environment, shot taxicab driver in the back of neck during a robbery). Accordingly, the state urges this court to uphold the sentence of the court below.

ISSUE III

WHETHER THE TRIAL COURT APPLIED A CLEAR AND CONVINCING EVIDENCE STANDARD IN FINDING AGGRAVATING CIRCUMSTANCES.

Appellant contends that the trial court erroneously used the clear and convincing standard of evidence rather than the requisite beyond a reasonable doubt standard in finding the existence of five aggravating factors. It is the state's contention that a review of the sentencing order reflects that the trial court's use of the terms "clear and convincing" was with regard to the standard for a jury override. In both the oral and the written pronouncement of sentence, the trial court stated:

> "The jury returned a recommendation to the court of a life sentence to be imposed upon you. The court is mindful and I have reviewed the Florida Supreme Court's guidance to trial courts in cases involving a sentence of death over a recommendation of life by a jury. That is the *Tedder* standard. A jury recommendation under our death penalty statute should be given great considered weight. I have given great and due weight to our jury's recommendation. In order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable persons could differ." (R 2007 - 2008, 2017)

Thereafter, the trial court enumerated its findings with regard to the aggravating circumstances. With regard to each of these aggravating circumstances the trial court referred to the clear and convincing standard. It is clear however, from the record that each of these aggravating circumstances was

established beyond a reasonable doubt, and that the trial court's reference to "clear and convincing" merely goes to the Tedder standard. This is supported by the trial court's second reference to the Tedder standard:

> "These five aggravating circumstances are all supported by the evidence and facts of the case. The evidence is so clear and convincing that virtually no reasonable person would differ." (R 2019)

In Henry v. State, 16 F.L.W. S593, 594 (Fla. August 29, 1991), this Honorable Court held:

> "In discussing the mitigators he found, the trial judge stated that they had been established 'beyond a reasonable doubt.' Henry now argues that this language shows that the trial judge applied too stringent a standard in considering the mitigating evidence. We disagree. Instead, the complained-of about language appears to reflect only the trial judge's articulation that more than enough evidence supported the mitigators he found. The judge correctly instructed the jury that mitigating circumstances, unlike aggravating circumstances, do not have to be established beyond a reasonable doubt. We will not assume, as Henry does, that the judge did not file the instructions he gave to the jury. Therefore, we find no error in the judge's consideration of the mitigating evidence."

In the instant case, the trial judge correctly instructed the jury that each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by the jury in arriving at their decision. (R 1911) As in Henry, this Honorable Court can assume that the trial judge followed his own instructions.

Further, it should be noted that this issue has not been preserved for appeal in light of defense counsel's failure to object to the standard used by the trial judge in entering this order. This order was orally pronounced during the sentencing hearing. At that point defense counsel objected to the court's finding of fact. Defense counsel, however, did not object to the findings based upon an erroneous standard of proof. This Court has consistently held that for an issue to be preserved for appellate review, an objection must be raised with specificity to the court below. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

ISSUE IV

WHETHER THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY FINDING THAT THE OFFENSE WAS HEINOUS, ATROCIOUS, OR CRUEL WHEN THE STATE FAILED TO PROVE THAT THE OFFENSE WAS UNNECESSARILY TORTUROUS TO THE VICTIM.

The trial court's order in the instant case stated:

> "The crime for which the defendant is to be sentenced was especially heinous, wicked, evil, atrocious, or cruel. This circumstance is established by clear and convincing evidence that the defendant knew that the victim, Donald Moorehead, was completely defenseless and posed no threat to him, that the victim lay helplessly asleep in a recliner chair and posed no harm to him, that the defendant used a full glass wine bottle to bash and crush the skull of the victim, Donald Moorehead." (sic) (R 2018)

Larry Bryan Hall testified that Moorehead was asleep in the chair while he and appellant stood behind him discussing who was going to hit him in the head. Finally, Hall took the bottle of grape juice and bludgeoned the victim with it three times to the head. The victim then slid to the floor and began making choking sounds. (R 1365 - 1370) As the victim lay on the ground choking, the defendant convinced Bryan Hall to hit the victim in the head again. Bryan Hall testified that the victim appeared to be seriously injured at that point. (R 1371) He also testified that the victim was making a lot of sounds, so Scott wanted him struck in order to make sure he was dead. (R 1371) At that point Larry Bryan Hall hit Moorehead one or two times. There was blood on the floor and on the chair. (R 1373) The victim was still making sounds but he never got up again. Larry Bryan Hall

then testified that because the victim was still making a lot of sounds Scott got to the point where 'he just couldn't take it any more' and he wrapped the telephone cord around the victim's neck and choked him with it. At that point the victim stopped making sounds. (R 1375) The evidence, thus, reasonably establishes that the victim suffered a slow, lingering, cruel expiration. Accordingly, the trial court's findings should not be disturbed. Squires v. State, 450 So.2d 208 (Fla. 1984); Combs v. State, 403 So.2d 418 (Fla. 1981); Johnson v. State, 465 So.2d 499 (Fla. 1985); Byrd v. State, 481 So.2d 468 (Fla. 1986).

Further, even if this Honorable Court should find that the heinous, atrocious or cruel factor was not established beyond a reasonable doubt, the trial court also found four other valid aggravating circumstances. Accordingly, even if this one factor was struck, there was sufficient evidence to support the imposition of the death penalty. Clark v. State, 443 So.2d 973 (Fla. 1983); Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933 (1981); Shriner v. State, 386 So.2d 525 (Fla. 1980), cert. denied, 449 U.S. 1103 (1981); Elledge v. State, 346 So.2d 998 (Fla. 1977).

Appellant also challenges the jury instruction with regard to heinous, atrocious and cruel alleging that it is unconstitutionally vague and overbroad. This Court has repeatedly rejected this claim. Atkins v. State, 541 So.2d 1165 (Fla. 1989); Freeman v. State, 563 So.2d 73 (Fla. 1990); Brown v. State, 565 So.2d 304 (Fla. 1990). Further, this specific claim is barred as it was not presented to the court below.

ISSUE V

WHETHER THE COURT ERRED BY FINDING THE OFFENSE COLD, CALCULATED, AND PREMEDITATED BECAUSE THE STATE FAILED TO PROVE HEIGHTENED PREMEDITATION, PRIOR CALCULATION, OR A PREARRANGED PLAN OR DESIGN.

This Court has consistently held that cold, calculated and premeditated is established where the evidence shows that the murder was undertaken after reflection and calculation. Harvey v. State, 529 So.2d 1083 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987). The facts in the instant case clearly support the finding that the murder was committed in an especially cold, calculated and premeditated manner. Larry Bryan Hall testified that they went to Moorehead's trailer because appellant told him that Moorehead owed him money. (R 1348, 1349) They sat around the trailer talking and drinking beer. (R 1349 - 1350) Sometime later, Donald Moorehead, the victim, fell asleep on the living room sofa. Hall later was awakened by the appellant at around 5:00 a.m.. Appellant was looking for Moorehead's pants. Moorehead was sleeping naked on the chair. Appellant found the pants on the table and looked through them without finding anything. (R 1356 - 1358) Appellant and Hall then looked through the trailer for money. Appellant said he knew Moorehead had withdrawn some money from the bank. (R 1359) They could not find any money, so they decided to take Moorehead's car. (R 1360 - 1361) Hall testified that appellant wanted to kill Moorehead to prevent from turning them in to the police. (R 1361 - 1362) Hall testified that they stood behind Moorehead for

several minutes while appellant tried to convince Hall to hit Moorehead in the head with a hammer. (R 1365 - 1370) Finally, appellant struck the victim Moorehead in the head several times with a juice bottle. As Moorehead lay on the ground making choking sounds, appellant convinced Hall to strike him again. When the victim still did not die, appellant then grabbed a telephone cord and choked the victim until he was convinced the victim was dead. (R 1373 - 1375) The two then proceeded to search the trailer for money.

While it is not clear that appellant planned to kill the victim prior to coming to the trailer, it is clear that the murder was undertaken only after the careful reflection and calculation which is contemplated by this statutory aggravating circumstance. This finding is also supported by evidence that when the victim continued to live that the defendant came back several times to make sure that he was dead. Based on the foregoing, the trial court correctly found that the evidence established this aggravating factor. See, also, Lamb v. State, 532 So.2d 1051 (Fla. 1988); Rutherford v. State, 545 So.2d 853 (Fla. 1989); Harvey v. State, supra.

Appellant also objects to the trial court's instructions on cold, calculated and premeditated. As noted previously, this claim has been consistently rejected by this Honorable Court. See Atkins v. State, supra. Further, this specific claim is barred as it was not presented to the court below.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY FINDING THAT THE OFFENSE WAS COMMITTED TO AVOID ARREST.

Appellant contends that the trial court improperly found as an aggravating circumstance that the murders were committed for the purpose of avoiding or preventing a lawful arrest. He argues, based upon this Court's decision in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), that the state did not clearly prove that the dominant or only motive for the murder was the elimination of a witness. It is the state's contention that this aggravating factor was established beyond a reasonable doubt and in accordance with the precedent established by this Honorable Court. Accordingly, the trial court correctly found the existence of the aggravating factor.

In Riley v. State, 366 So.2d 19, 22 (Fla. 1978), this Court held that proof of the requisite intent to avoid arrest and detection must be very strong where the victim was not a law enforcement officer in order to support a finding of this aggravating factor. In the instant case, the trial court found that the victim, Donald Moorehead, was asleep with no apparent ability to stop Hall and Scott but Scott made the conscious, intentional and deliberate decision to eliminate the victim Donald Moorehead so he could not later report the defendant's criminal activity to the police. (R 2019) This finding by the trial court was well supported by the evidence and should be afforded a presumption of correctness.

The record specifically shows that after they made the decision to take the car, Scott told Hall that they had to kill the victim Donald Moorehead. Larry Bryan Hall stated:

> "A. I think it was 'cause Jeremy had knew Don well, and that he knew that he wouldn't be able to get very far with Don waking up at any time. So he just made the decision that Don wouldn't -- something about Don knew his family or something and that --
>
> Q. Did he think that Don would turn him in?
>
> A. Yeah.
>
> Q. Did he tell you that? Did Jeremy tell you that he thought Don would turn you all in?
>
> A. That was the idea, that Don would turn him in if we got caught.
>
> Q. So what did Jeremy want to do about that to avoid Don turning him in?
>
> A. To kill him.
>
> Q. To kill him?
>
> A. (witness nodding head)

(R 13671 - 1362)

Larry Bryan Hall then testified as to how they stood behind the victim and deliberated on how to kill him.

Clearly, the evidence supported the trial court's finding that the crime was committed for the purpose of avoiding arrest. In Riley, supra, this Court found this factor to be established by evidence that the victim, who knew the defendant, was shot and killed during a robbery. The victim was bound and gagged after one of the perpetrators expressed a concern over possible

subsequent identification. Similarly, in Lopez v. State, 536 So.2d 226, 230 (Fla. 1988), the defendant therein stated within earshot of a state's witness that the victims had to be shot because the perpetrators could not afford to leave any witnesses behind.

Further, although existing in the instant case, it is not necessary that intent be proved beyond evidence of an express statement of the defendant or an accomplice indicating their motives in avoiding arrest. Routley v. State, 440 So.2d 1257 (Fla. 1983). Nor is it required that this be the only motive for the murder. In Bolender v. State, 422 So.2d 833 (Fla. 1982), this Court upheld the finding that murders were committed for the purpose of avoiding or preventing a lawful arrest where the victims were murdered partially to prevent retaliation but also to prevent arrest. In Routley v. State, supra, this Honorable Court distinguished Menendez v. State, 368 So.2d 1278 (Fla. 1979), by focusing on the fact that in Menendez it was not apparent as to what events proceeded the actual killing. In the instant case, there is substantial evidence as to what transpired prior to the murder. The state proved beyond a reasonable doubt that appellant needed money and that he formulated a plan to acquire same by robbing and killing the victim. The killing was done for the express purpose to avoid arrest. The state therefore submits proof of the requisite intent to avoid arrest and detection is very strong in this case. Accordingly, the trial court did not err in finding this aggravating factor.

ISSUE VII

WHETHER THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FAILING TO PROPERLY CONSIDER APPELLANT'S EVIDENCE OF MITIGATING CIRCUMSTANCES.

Appellant contends that the trial court's order with regard to the consideration of mitigating factors violates Eddings v. Oklahoma, 455 U.S. 104 (1982); Penry v. Lynaugh, 492 U.S. 302 (1989) and this Honorable Court's decision in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), because the trial court's order failed to reveal whether the trial court conducted a thoughtful analysis of the mitigating factors.

The trial court's order enumerates each of the statutory mitigating circumstances before the court. The only statutory mitigating circumstances the court found, however, was the defendant's age at the time of the crime. (R 2019 - 2020) With regard to the nonstatutory mitigating circumstances the trial court stated:

> "In considering the nonstatutory mitigating circumstances and all other circumstances in mitigation, the court has reviewed and considered them all, however, these do not outweigh the aggravating circumstances in this case." (R 2020)

The factors that appellant now suggests should have been expressly noted by the trial court were clearly presented to the trial court by appellant in both the penalty phase and in the motion in support of the life sentence. Based on the foregoing, it is clear that the trial court considered all of the facts now argued by appellant.

As this Court stated in Johnson v. Dugger, 520 So.2d 565, 566 (Fla. 1988):

> "When read in its entirety, the sentencing order, combined with the Court's instructions to the jury, indicates the trial court gave adequate consideration to the evidence presented."

Further, as this Court noted in Gilliam v. State, 16 F.L.W. S292 (May 2, 1991), prior to this Court's ruling in Campbell v. State, 571 So.2d 415 (Fla. 1990), the trial court was not required to expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it was supported by the evidence and whether, in the case of nonstatutory factors, it was truly mitigating in nature. As this Court noted in Gilliam, Campbell was not retroactive and accordingly does not apply to the facts of the instant case. Thus, while this Court in Rogers v. State, supra, suggested the appropriate course of action for a trial court to take, this procedure was not mandated until this Court's holding in Campbell. As Campbell is not retroactive, the trial court was not bound to expressly review each of the facts as now presented by appellant. Accordingly, the trial court's order in the instant case is sufficient.

Appellant contends, nevertheless, that this Court's holding in Gilliam is incorrect and that Campbell should apply to the defendant's case as it is well established that the appellant is entitled to the application of the law in effect at the time the appeal is decided. This position is without merit. As this Honorable Court held in Gilliam:

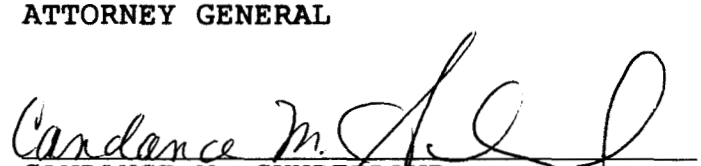
PAGE(S) MISSING

CONCLUSION

For the above stated facts, arguments and citations of authority, this Honorable Court should affirm the judgment and sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 9 day of December, 1991.

OF COUNSEL FOR APPELLEE.