IN THE SUPREME COURT OF FLORIDA

BRUCE DOUGLAS PACE,

Appellant,

v. CASE NO. 75,056

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 239161

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

(a) Procedural History

The Appellant's statement is accepted.

(b) Statement of the Facts

Bruce Pace, the Appellant, was broke and fed up with his situation. (R 682). On November 3, 1988, Bruce told his cousin Angela that tomorrow he was going to do something he "hated to do" to get money. (R 682). Bruce was supposed to paint a house on November 4, 1988, but he did not show up. (R 683).

On November 4, 1988, Floyd Covington vanished while driving his cab. His daughter, Barbara Mack, had spoken to Floyd on the radio and was waiting for him at his office. (R 578-579). Mr. Covington never arrived. (R 583). Barbara spoke to Floyd sometime between 10:00 a.m. and 10:30 a.m. (R 578).

Mr. Phillip Brand was traveling from Navarre, Florida, to Milton, Florida, when he saw a white taxi (a station wagon) drive off of the highway and into the woods. (R 661). The cab had no overhead light (R 667), and had just one person inside. (R 662). Several days later, he saw a newspaper report and called the police to report what he saw. (R 664). Mr. Brand correctly "located" Mr. Covington's taxi.

Orestine Franklin, the Appellant's aunt, saw Mr. Pace in the victim's taxi on the morning of November 4, as well. (R 669).

On November 5, 1988, Mike Green picked up the Appellant as he was walking towards May Green's house. (R 699). When Mike said he was going to do some shooting in May's back yard, Pace

volunteered the use of his gun. (R 699). Pace's gun, it so happens, was hidden outside, in some bushes, next to an abandoned house a block away from May's place. (R 699-701). Pace stayed at May's home all day without mentioning Mr. Covington, phantom stranglers, blood soaked cabs or anything else. (R 703). The Appellant appeared to be fine. (R 703).

When May Green noticed blood stains on Pace's pants, Pace told May it was squirrel blood. (R 710). Pace told Ms. Green he had left two beers on her porch the (Friday) night before. (R 721). Pace left his gun at Ms. Green's and she later gave it to the police. (R 714).

Harvey Rich, Pace's stepfather, became concerned when his son did not show up for several days and became concerned even more when Mr. Covington vanished. (R 847-851). Mr. Rich called the sheriff on November 8, only to find that Pace had come home. (R 851).

Pace told his father that he (Pace) had to leave because he "thought" something had happened to Mr. Floyd. (R 852). Mr. Floyd Covington, the victim, was still missing but his cab had been found the night before. (R 727). Pace went on to tell his father that the had been with Covington on the morning of November 4, 1988. (R 852). Pace was locked out of the house so he entered his room through a window. (R 854). He was attacked by a phantom assailant who choked him into unconsciousness. (R 852-854). Pace woke up in the woods with his brother's gun alongside him and Covington's bloody taxi nearby. (R 852-854). Pace was near May Green's place so he went there. (R 855).

Mr. and Mrs. Rich found some red shotgun shells in their front yard so they gave them to the police. (R 857-860, 877-878). Mr. Rich told May Green to give the shotgun Pace left at her house to the police.

Meanwhile, Captain Hardy (as noted above), found Covington's taxi in a wooded area near Bagdad. (R 609). The taxi had been left at the end of a dirt road, or path, the end of which (nearest the road) had been covered by brush as if to hide the trail. (R 609). The taxi, as described by Pace to his father, was full of blood but no body was present. (R 609).

John Shirak, acting on a tip that a cab had been seen entering the highway from a wooded area near the Yellow River, found Floyd Covington's body. (R 602). The body was located on November 10, 1988. (R 605). A car had driven near where the body was dumped. (R 651-652). Floyd's empty wallet was nearby. (R 734).

Dr. David Nicholson testified that Floyd Covington was killed with two close-range shotgun blasts. (R 628). The shots were fired from three feet away or less. (R 628). Death was rapid but not instantaneous. (R 633).[1]

The Appellant's fingerprint was found on the exterior of the cab. (R 766-767). Clothing seized from the Appellant was found to have blood stains of the same ABO type as the victim. (R 799). Although the Appellant also had type "O" blood, the Appellant had no wounds and, more important, the blood stains on

---

[1] Blood spatter evidence showed that the victim was shot from the passenger side as he sat behind the wheel. (R 814-817). The victim was dragged over to the passenger side. (R 820).

his clothes had seeped from the outside in, not the inside out. (R 790). The blood was human, not animal, blood. (R 788).

The red shotgun shells were found to have been fired from Pace's gun. (R 899).

The victim's body was found 7.7 miles from the Rich home, an eleven minute drive (R 889); the cab was found 12.1 miles (and a 15 minute drive) from the body, but only 1 mile from May Green's place. (R 899). The shotgun was hidden a block from May Green's home. (R 889).

The State's theory was that Bruce Pace needed money and decided to murder Floyd Covington to get it. (Covington received his pension checks on the third of the month, R 583). Pace had Covington drive him to the Rich house, where Pace shot Covington. Pace drove the body into the woods and dumped it. Pace then ditched the cab and hid the gun. Despite seeing several people on Saturday, Pace never mentioned his phantom robber story until his mother told him the police were looking for him. Pace lied about the blood on his clothes, as well. The physical evidence and eyewitness testimony all corroborated this theory. The Appellant put on no evidence during the guilt phase.

Seven issues are offered on appeal. Specific facts relevant to each are summarized as follows:

Facts: Point I

The Appellant objected to the admission of Mr. Rich's testimony about Pace's "phantom robber" story. (R 825, et seq.) Appellant said that the story was exculpatory hearsay, but the court found the story incriminating (R 835), due to its inherent admissions and its unbelievable plot.

Facts: Point II

Mr. Pace attempted to "cross" examine Mr. Rich about the existence of a possible third shell he might have found in his yard. (R 866). This was beyond the scope of direct so the State objected. (R 866). The objection was only sustained when the court determined that only two shells were being offered into evidence. (R 867). No "third shell" surfaced during this trial.

Facts: Point III

The motive for this murder was robbery. The State, to prove Appellant's motive and intent, elicited testimony from Angela Pace that on November 3, 1988, the Appellant said he would do something to get money "tomorrow". (R 682). "Tomorrow" was the day Pace murdered and robbed Covington. Defense objections to this evidence were overruled.

Facts: Point IV

The shotgun which Pace took from the bloody cab to May Green's house was the same weapon that fired the unusual red shells found in Mr. Rich's yard. The ballistics expert could not state that these shells were the source of wadding and pellets in Covington's body but the waddings were of the same type as used in the red (Federal Brand) shells. (R 844-897, 900-901).

A few references were made to the existence of a third possible "Federal" shell but the defense put on no witnesses to say who found it, turned it in, or fired it. (See R 866, 881, 901-902).

Facts: Point V

The State relies upon its opening factual statement. No defense or "reasonable hypothesis of innocence" was ever put forward by Pace.

Facts: Point VI

During the penalty phase the Appellant offered the following as "mitigation":

Paul Campbell said that Pace behaved himself in jail prior to trial. (R 1040-1041).

Hurley Manning said Pace was a former football player whom he had not seen for ten years. (R 1046). As far as he could tell, Pace had a good family. (R 1046).

Robert Settles testified that Pace was a good worker when he wanted to be, but he was unreliable. (R 1052). If Pace needed money, Settles would have given Pace an honest job. (R 1056). As it was, he had had little contact with Pace since 1979. (R 1055).

Eleanor Rich said Pace came from a large, supportive family and had plenty of opportunity to succeed. (R 1062). Pace was her nephew. (R 1058). Her niece was a lawyer (reflecting the opportunities available to Pace). (R 1062).

Lillian Rich pled for mercy for her son. (R 1072).

Mr. Pace did not show proof of mental illness, abuse, poverty, neglect or lack of opportunity. His "mitigation" showed athletic promise, a good family, job opportunity(ies) and no excuse for his crime.

The court considered this in properly sentencing Pace to death. (R 1356-1360). This "evidence" did not outweigh the three valid statutory aggravating factors which were present:

> (1) Pace was convicted of a prior strong-arm robbery in which he clubbed a helpless store clerk with a metal pipe. (R 1321, 1356-1360).
>
> (2) Pace was on parole during this murder. (R 1356-1360).
>
> (3) This murder was committed during a robbery. (R 1356-1360).

Facts: Point VII

No additional factual development is necessary.

SUMMARY OF ARGUMENT

The Appellant's seven point appeal relies heavily on a very egregious view of the facts and limited consideration of the controlling caselaw.

The trial court committed no errors during the guilt phase when it admitted relevant, probative evidence of Pace's guilt.

The court did not err in sentencing Pace in accordance with the weight of the evidence.

Pace is not entitled to relief.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ADMITTING MR. PACE'S STATEMENT INTO EVIDENCE

Mr. Pace, aware that the police were looking for him, told his stepfather he was going to have to "leave" because of Mr. Covington. Mr. Pace then went on to relate an incredible "phantom mugger" tale. According to Mr. Pace, this person was hiding in the Rich's home, choked him into unconsciousness, somehow put him inside Covington's taxi, murdered and robbed Covington, dumped Covington's body then ditched the cab after dragging Pace into the woods. Pace was not killed.

This story was obviously false given Mr. Pace's own conduct on the weekend of November 4th. Pace says he saw the bloodstained taxi, yet he told May Green the blood on his clothes was squirrel blood. Mr. Covington was someone Pace had known and worked for, yet Pace never mentioned the abduction, bloody taxi or missing victim during the entire Friday and Saturday after he allegedly "came to". His fictional account of the crime was patently and obviously false.

Mr. Pace contends that his story, because it is "exculpatory", should not have been admitted at trial because it was hearsay. Mr. Pace's objection, of course, was based upon his awareness that his story (to his father) was untrue and therefore, incriminating. Citing **Moore v. State**, 530 So.2d 61 (Fla. 1st DCA 1988), however, Pace contends that the trial court erred.

The trial court did not err. The decision in **Moore v. State, supra,** was clarified on rehearing to recognize that a "false exculpatory statement" is admissible in the State's case in chief to prove the defendant's consciousness of guilt and efforts to avoid detection and arrest. **Moore** states, however, that the defendant's comments must be demonstrably false.

In our case, the falsity of Pace's story to his father was demonstrated by his actions on November 4th and 5th, 1988. Pace never mentioned the disappearance of Mr. Covington to anyone, nor did he discuss his abduction or the abandoned, bloody taxi. Surely these things were not such common events or sights in Pace's life that they simply "slipped his mind". The defendant, by describing the blood on his clothes as squirrel blood to May Green, obviously was lying to different people at different times. Mr. Pace's claim that his story was not demonstrably false is simply not tenable on this record.[2]

Meanwhile, Pace's story served to demonstrate awareness that Covington was killed, awareness that the taxi and the body were disposed of in different places, presence with the victim on November 4, 1988, and use (or at least the presence) of his shotgun.

Again, this Court has recognized that a defendant's false exculpatory statement is admissible as direct evidence of guilt even where the defendant does not take the witness stand. **Smith**

---

[2] The physical evidence corroborated Pace's presence at the crime scene and the use of his shotgun. No evidence, however, supported his "phantom robber" story. This "phantom robber" story, of course, has been used before. See **Herring v. State,** 446 So.2d 1049 (Fla. 1984).

v. State, 424 So.2d 726 (Fla. 1982); **Spinkellink v. State**, 313 So.2d 666 (Fla. 1975). As direct evidence of guilt, this evidence is not merely "impeachment". **Brown v. State**, 391 So.2d 729 (Fla. 3rd DCA 1980), **see also United States v. Holbert**, 578 F.2d 128 (5th Cir. 1978).

Clearly, the trial court did not err.

POINT II

THE TRIAL COURT DID NOT UNFAIRLY "LIMIT" CROSS EXAMINATION

Three times defense counsel attempted, on cross, to elicit testimony admitting the existence of an alleged "third shotgun shell". State objections were sustained during the cross examination of Pace's mother and father. During the cross of the ballistics expert, reference was made to a "third" shell but counsel did not clarify whether this third shell was found at the Rich's home or whether it came from somewhere else (or even was the shell used in test firing the shotgun).

The State did not question Mr. or Mrs. Rich on any "third" shell and no such shell was offered as evidence by either party. If the FDLE had a third shell, Pace did not subpoena it. If Pace's own parents found an exculpatory[3] third shell, they never testified to doing so.

Based upon the State's questions and the introduction of only two shells into evidence, the trial judge correctly limited cross examination of Mr. and Mrs. Rich to the scope of direct.

---

[3] We do not accept the notion that a third shell would necessarily be exculpatory. While Mr. Covington was only shot twice, the "fact" that another red shell was found does not disprove anything.

Mr. Pace alleges that **Zequera v. State**, 549 So.2d 189 (Fla. 1989), supports his position. It does not. In **Zequera**, the ownership and possession of certain .22 caliber bullets (that were **in evidence**) was a central issue. Zequera said the bullets belonged to a Mr. Puttkamer, who testified at trial. The defense was not allowed to ask Puttkamer whether this evidence was seized from his personal property. In granting relief, this Court noted that cross examination cannot be restricted to the point that the examiner cannot explore "an event or transaction only a portion of which has been testified to on direct". **Zequera, supra**, at 549.

Mr. Pace's problem is that the "third shell", unlike the .22 shells in **Zequera**, was **not** in evidence. Also, this alleged "third shell" was **not** given to the police with the other two shells as a part of that event or transaction. Mrs. Rich picked up and delivered **two** shells, not three. Mr. Rich merely **saw** two shells and neither picked them up or turned them in. If a third shell was ever given to anyone by the witnesses, it was not during this transaction and thus was outside the scope of direct.

Coxwell v. State, 361 So.2d 148 (Fla. 1978), is totally irrelevant. There, a prosecution witness testified to planning the victim's murder with the defendant but the defendant, on cross, was not allowed to ask if the plan was carried out.

Coco v. State, 62 So.2d 892 (Fla. 1953), is the case quoted in **Zerquera** and is thus subject to the same distinction.

The trial court had the discretionary power to limit the scope of cross examination to the scope of direct examination

pursuant to §90.612, Florida Statutes. There is no right to unlimited cross examination. **Delaware v. Van Arsdall**, 475 U.S. 673 (1986); **Delaware v. Fensterer**, 474 U.S. 15 (1985). Included in this power is the power to preclude defense abuse of cross examination as a vehicle for introducing its evidence without either calling witnesses or adopting the witness as its own. **Steinhorst v. State**, 412 So.2d 332 (Fla. 1982); **Coco v. State, supra.**

Steinhorst recognizes that the two purposes of cross examination are to (1) weaken, test or show the impossibility of the witness' testimony, or (2) to impeach the credibility of the witness. Mr. Pace's questions did not address either objective.

Mr. Pace's actual complaint is not the "limitation" of cross as much as it is the inability of defense counsel to use cross examination as a vehicle for introducing evidence in violation of **Steinhorst**. The fact remains, if there was a third shell, its absence from the exhibits is the result of defense strategy, not judicial error.

Mr. Pace called no witnesses and obviously wanted the benefit of "first and last" argument. Thus, even though the witnesses in question were his own parents and were not hostile, Pace did not adopt the witnesses as his own nor did he recall them on the defense side of the trial. **Jones v. State**, 440 So.2d 570 (Fla. 1983); **Steinhorst, supra; Henry v. State**, 15 F.L.W. 2099 (Fla. 4th DCA 1990). This tactical decision clearly supports a defense of "harmless error" even if it could be said the trial judge erred, **Jones, supra; Henry, supra; see also**

Correll v. Dugger, 15 F.L.W. S147 (Fla. 1990), since it is presumed that this so-called evidence - if it existed - was not so important as to cause defense counsel to give up opening and closing final argument.

The "third shell" testimony was outside the scope of direct and did not disprove or impeach the testimony of Pace's parents. This shell was not relevant to any unspoken theory of defense either. Thus, the limitation on cross was correct and any "error" was clearly harmless.

POINT III

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS HEARSAY CLAIM

Mr. Pace alleges that his November 3, 1988, comments to Angela Pace were inadmissible because they constituted something less than a specific threat against the victim at bar or any "class" of victims under **Sikes v. State**, 252 So.2d 258 (Fla. 2nd DCA 1971).

Mr. Pace's statements were not offered as a specific threat against Mr. Covington. They were offered as a specific statement of Pace's existing mental state or condition and as proof of motive under §90.803(3), (18), Florida Statutes. As such, they were admissible. **Jackson v. State**, 530 So.2d 269 (Fla. 1988); **Kennedy v. State**, 385 So.2d 1020 (Fla. 1980).

When Pace said he was "broke" and "tired of" being broke, he manifested his mental state. When Pace said he was going to remedy the condition "tomorrow" by doing something he "hated to do", he manifested intent to take some action.

Under Appellant's theory, a statement of mental condition or intent is only admissible if it contains a precise identification of the intended victim or class of victims. Nothing in §§803 reflects this requirement. We submit that Mr. Pace is attempting to equate "mental condition" and "intent" with a "specific threat". This, clearly, is not the law. Otherwise, an avowed intent, say "to steal tomorrow" would be inadmissible because the accused failed to specify whether he was going to rob a bank, a convenience store or an old lady. This additional detail does not add to the issue of "intent" to commit a crime.

Mr. Pace has another problem. As noted in **Swafford v. State**, 533 So.2d 270 (Fla. 1988), Pace entered this litigation as a party opponent **as well as** the declarant. His position is different from that of other declarants because (1) he had, by his plea, asserted a position and (2) by virtue of his privilege not to testify, he was unavailable as a witness. Thus, as a party opponent his admissions (the need for money and intent to act "tomorrow") were admissible under §90.803(18). **Swafford, supra; Johnson v. State**, 438 So.2d 774 (Fla. 1983); **Rose v. State**, 425 So.2d 521 (Fla. 1982).[4]

In **Johnson**, a finding of "cold, calculated and premeditated" murder during the penalty phase was proven by Johnson's (non-

---

[4] We also note that the "rationale" for the exclusion of hearsay evidence is the protection of the party (against whom it is offered) from the impact of statements he cannot verify or cross examine. Obviously, when the declarant is the party himself, he has no such problem. §90.801, Florida Statutes.

victim-specific) comment that he did not mind shooting people to get money.

In **Rose v. State**, 425 So.2d 521, 522 (Fla. 1982), the relevant evidence against the defendant included his comment, prior to the murder, that he was capable of hurting the victim's mother and that she (the mother) did not know what he was capable of doing. Rose murdered eight year old Lisa rather than her mother.

Therefore, even though **Sikes** would apply if Pace's statement was merely offered as a "threat", it is clear that **Sikes** will not prohibit the introduction of all evidence of mental state, condition, motive or intent.

Again, Pace is not entitled to relief.

POINT IV

THE TRIAL COURT DID NOT ERR IN ADMITTING THE SHOTGUN SHELLS INTO EVIDENCE

While the two shotgun shells found at the Rich home could not be positively identified as the source of the wadding and pellets found in the victim, we would note:

(1) The shells were of a kind not normally used for target shooting by Pace.

(2) The shells were at the scene of the murder.

(3) The shells were found **after** the murder.

(4) The shells had been fired by Pace's gun.

(5) The victim's death was caused by this **kind** (brand and size) of shotgun shell.

This physical evidence was not "remote" to the crime or to the defendant. We reject out of hand Pace's references to the

shotgun as a gun "he once possessed", implying that he did not possess the gun during the murder. Pace possessed the gun **before, during** and **after** the murder, according to witnesses such as Mike and May Green and Mr. Pace himself. He lost "possession" only because May Green gave his gun to the police.

The shotgun shells were indisputably admissible as evidence. The only real issue was their evidentiary weight, not their admission. **Nickles v. State**, 37 So. 312 (Fla. 1904); **Hall v. State**, 381 So.2d 683 (Fla. 1979); **Irizarry v. State**, 496 So.2d 822 (Fla. 1986), **see also Wilson v. State**, 113 S.E.2d 447 (Ga. 1960); **Perkins v. State**, 203 S.E.2d 854 (Ga. 1974); **Flores v. Texas**, 372 S.W.2d 687 (Tex. 1963).

The presence of these shells, newly found, in Pace's front yard just after the murder, coupled with the fact that they were fired from Pace's gun and that the wadding in Covington's body came from that brand of shotgun shell, provided the necessary basis for admitting this evidence.

POINT V

THE TRIAL COURT DID NOT ERR IN DENYING PACE'S MOTION FOR JUDGMENT OF ACQUITTAL

The Appellant's brief gratuitously minimizes the State's evidence as falling into five limited categories. In fact, the State's case is (or was) as follows:

On November 3, 1988, Pace was heard to say he needed money and, "tomorrow", was going to have to do something he "hated" to get it. The next day, Pace was seen riding towards the Rich's house in a taxi being driven by Floyd Covington. Sometime around

10:30 a.m., Covington, who had once employed Pace and who had just received his pension for the month, was murdered. Shells of the kind used to murder Covington were found in the yard at the Rich's home. The shells were fired by Pace's shotgun. Pace himself was seen in blood spattered clothes by May and Mike Green. Pace said the blood was squirrel blood. Pace also hid his shotgun in some bushes by an empty house but retrieved it so he and Mike could do some shooting (November 5). Pace, when told the police were looking for him, proceeded to concoct a "phantom robber" story which put him in the cab, with the victim, with his gun, during the killing. It also belied his "squirrel blood" story.

The physical evidence showed that although Pace and Covington had the same blood type (O), only Covington was known to have any bleeding wounds. Also, Pace's blood stained clothes were stained from the outside in, meaning that the source of the blood was Covington's bloody cab, not Pace's body. A fingerprint belonging to Pace was found on the cab.

Although it was circumstantial, the case was almost overwhelming.

Now Mr. Pace alleges that a motion for judgment of acquittal should have been granted at trial and that, on appeal, this Court should reweigh the evidence to see if it excludes all reasonable hypotheses of innocence.

Missing from Mr. Pace's brief is acknowledgment of this Court's many holdings that the issue of whether "all reasonable hypotheses of innocence" have been excluded is a **jury** question,

not subject to appellate review if the verdict attained enjoys record support. **Rose v. State**, 425 So.2d 521 (Fla. 1982); **Welty v. State**, 402 So.2d 1159 (Fla. 1981); **Clark v. State**, 379 So.2d 97 (Fla. 1979); **Heiney v. State**, 447 So.2d 210 (Fla. 1984); **Williams v. State**, 488 So.2d 521 (Fla. 1986); **State v. Law**, ____ So.2d ____, 15 F.L.W. S241 (Fla. 1990); **Duckett v. State**, ____ So.2d ____, 15 F.L.W. S439 (Fla. 1990).

In **Law**, this Honorable Court addressed the subject of "what" a trial judge should do in ruling on a motion for acquittal in a circumstantial case. This Court said:

> It is the trial judge's proper task to **review** the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the State. **Spinkellink v. State**, 313 So.2d 666, 670 (Fla. 1975), **cert. denied**, 428 U.S. 911 (1976). The State is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. **See Toole v. State**, 472 So.2d 1174, 1176 (Fla. 1985). Once that threshold burden is met, it becomes the jury's burden to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

Supra, at 241.

If we apply this standard to the evidence then Pace's appellate argument fails.

The "phantom robber" story was, to put it charitably, facetious. The notion that a phantom robber choked Pace, dragged him out a window to Covington's cab, drove him around but never killed him, killed and robbed Covington, hid Covington's body but

(conveniently) left Pace (and Pace's gun) near the Green's home is absurd. It also fails to explain why this fantastic adventure was not related to the Greens, or why Pace told May Green the blood was squirrel blood.

On appeal, Pace tries to attack a limited portion of the State's evidence just as the appellant did in **Law, supra.**

Pace claims that the fact that he was seen riding with the victim minutes before the murder means nothing. Obviously, that is not true. It means that Pace was with the victim, in the cab, and going towards the Rich house on the day of the murder, if not the precise time. It also corroborates Pace's admission that he and the victim went to the Rich home that morning.

Pace's fingerprint (on the cab) standing alone means nothing. In context, however, it again links him to the vehicle.

The attack upon the weight to be afforded the shotgun and shells is speculative to the point of gamesmanship. Floyd Covington was butchered by the two federal shells fired into his body. Two federal shell casings were found in the Rich yard - where Pace confesses he was with Floyd that morning - and the shells were fired by Pace's gun, which Pace had when he left the cab and which Pace **hid** in some bushes. The inference that Pace's gun was the murder weapon is not attenuated or far fetched. The idea that the phantom robber carried a similar shotgun, his own federal shells and independently killed Mr. Covington is, however, far fetched and unreasonable. (We note that Pace's story had him waking up and finding his gun at the scene. No shells were found by Covington's body or the cab, should we also,

therefore, speculate that the phantom robber used Pace's gun to kill Covington but cleaned up the crime scene? Why, then, did he not take the gun, too?)

The defendant's parents turned in their son and were reluctant State witnesses. Pace's clothing was sufficiently identified and no chain of custody issue has been raised on appeal. The defendant's fable had him waking up by a blood soaked cab. His "squirrel blood" lie to Mrs. Green was incriminating. The defendant had no bleeding wounds and the blood stains - which were consistent with having sat on a bloody car seat - were soaked into the clothes from the **outside in**.

As noted above, Pace's statements were very incriminating both in terms of what they admitted and the extremely bizarre stories they told about phantom robbers and squirrel blood. Again, Pace never explained why he told one story to Mr. Rich and another to the Greens.

Mr. Pace's appellate contentions do not weaken the State's case or represent a reasonable hypothesis of innocence which, in turn, would have compelled the trial judge to acquit the appellant. Given Pace's ignoral of the facts, the law and the standard of appellate review, he must fail.

POINT VI

THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND MITIGATION IN THE FACT THAT PACE'S CRIME WAS SENSELESS AND UNNECESSARY

Mitigation is in the eye of the beholder. Pace suggests he is entitled to mercy because he is bright, has athletic and vocational ability, a good family and solid career prospects if he applies himself. In other words, his crime is not the result of mental illness, abuse, poverty or deprivation.

The trial judge recognized this so-called mitigation, but prudently gave it no weight. Mr. Pace, citing **Campbell v. State**, ____ So.2d ____, 15 F.L.W. 342 (Fla. 1990), suggests this was reversible error. We disagree.

Eddings v. Oklahoma, 455 U.S. 104 (1984), forbids capital sentencers from assigning mitigating evidence "no weight" by **not considering** the evidence. **Eddings** does not prevent sentencers from considering so-called "mitigating" evidence and then deciding it is of no value.

This Court's recent decision in **Floyd v. State**, ____ So.2d ____, 15 F.L.W. S465 (Fla. 1990), supports this view. There, as here, the trial judge weighed and even listed the putative mitigating evidence offered by the defense but found that sufficient mitigating factors "do not exist". Looking to the totality of the judge's conduct rather than the wording of his order, this Court held that the judge did, indeed, consider the mitigating evidence.

While **Nibert v. State**, ____ So.2d ____, 15 F.L.W. S415 (Fla. 1990), and **Campbell v. State**, ____ So.2d ____, 15 F.L.W. S342

(Fla. 1990), would require the sentencer to recognize the existence of an unrefuted "mitigating factor", these cases do not ascribe any minimum "weight" to be given to said factors nor do they require the sentencer to agree that the proposed factor was even "mitigating" under the facts of the case.

In our case, Pace put on no "mitigating" evidence that was worthy of significant weight.

The fact that Pace was a gifted athlete does not explain or ameliorate his actions in this case or his previous crimes.

The fact that Pace had a large, stable and supporting family, again, places him at odds with those defendants who, like Nibert, were neglected and abused as children.

The fact that Pace had a "loving" nature towards his family was clearly refuted by his brutal robbery of a store clerk and the murder at bar.

The fact that Pace "behaved in jail" was offset by the commission of this murder while he was on parole. Pace is not a candidate for rehabilitation.

Mr. Pace's employment prospects only enhance the senseless nature of his criminal activities.

Even though the State did not call additional witnesses to offset Mr. Pace's relatives and friends, it is clear that the "facts" Mr. Pace did establish were either not mitigating or they were refuted by the record. The trial judge considered this evidence anyway, and did not err in finding it lacked weight.

POINT VII

THE DEATH PENALTY WAS CORRECTLY IMPOSED

Mr. Pace satisfied three statutory aggravating factors while offering nothing in mitigation.

If Pace needed money he could have gotten a good job from his old boss. Instead, he robbed, beat and killed people.

Pace was nice to his family, but killed strangers.

Pace behaved in jail, but committed murder and robbery while on parole.

In **Eutzy v. State**, 458 So.2d 755 (Fla. 1984), the defendant was properly sentenced to death for killing a cab driver. Like Pace, Eutzy offered unrealistic mitigating evidence which failed to ameliorate his guilt. Pace's death sentence is easily proportional to Eutzy's sentence. Pace's crime also compares with the robbery murders in **Herring v. State**, 446 So.2d 1049 (Fla. 1984), and **Huff v. State**, 465 So.2d 145 (Fla. 1986).

Herring robbed a convenience store and shot the clerk. Herring raised a "phantom robber" defense but later cited his age and the fact that the victim scared him as mitigation.

Huff killed his parents in a manner similar to Pace's killing of Mr. Covington. His death penalty was upheld as well.

Mr. Pace is wrong in alleging that Florida does not recognize death as an appropriate sentence for felony murder. (Pace committed both premeditated and felony murder, however). Mr. Pace is also wrong when he alleges that the only aggravating factor at bar was premeditation. (Brief, page 40). In truth, three aggravating factors applied (prior armed robbery, parole

status and murder during a robbery), any one of which would justify this sentence. For that reason, his case is unlike **Rembert v. State**, 445 So.2d 337 (Fla. 1984); **Caruthers v. State**, 465 So.2d 496 (Fla. 1985), and **Richardson v. State**, 437 So.2d 1091 (Fla. 1983), none of which had the multiple aggravating factors and lack of mitigating factors present in this case.

CONCLUSION

Mr. Pace is not entitled to relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
Assistant Attorney General
Florida Bar No. 239161

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W.C. McLain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 2nd day of October, 1990.

MARK C. MENSER
Assistant Attorney General