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IN THE SUPREME COURT OF FLORIDA

CHARLIE THOMPSON,

Appellant,

v. Case No. 76,147

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

As this Court well knows from the prior appeal, appellant Thompson was charged by indictment with two counts of first degree murder of William Swack and Nancy Walker and two counts of kidnapping of these victims. (FR 1303 - 1305)[1] On direct appeal following conviction this court reversed and remanded for new trial, finding error in the prosecutor's use of peremptory challenges to excuse blacks and the introduction of a portion of his confession after an equivocal request for counsel. Thompson v. State, 548 So.2d 198 (Fla. 1989).

On remand the trial court heard, considered and denied appellant's motions to suppress his confession after listening to the testimony of Detective Childers that he had used the Exhibit 14 consent to interview form to read Thompson his rights; he did not specifically declare that appellant had a right to counsel at no cost. (R 6 - 29)

At trial, witness Vincent Olds testified that he discovered the two victims' bodies in the bushes at William's Park about 150 feet from the pathway. (R 233 - 234)

Homicide Detective Kenneth Burke went to Williams Park on August 27, 1986 that afternoon and observed bodies of a white male and white female. (R 239) The two bodies were about twenty

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[1] Throughout this brief, appellee will use the prefix "FR" when referring to the appellate record from the first appeal (Appellate Case No. 70,401) and the prefix "R" when referring to the present appellate record (Appellate Case No. 76,147).

feet apart. The male was clad only in his underwear, maroon shirt draped over his face, and shoes and socks on. There was an injury to the right side of the head at apex of eye that appeared to be a bullet wound and some injuries to the body. (R 240) The female was lying face down with her hands crossed in front of her with her face lying on her hands. (R 241) There was a ligature mark on the male victim's neck; there was also a gold chain around his neck. There was a bleached out area around his wrist where a watch had been. (R 242) The area appeared to have been the scene of a violent scuffle; the ground was scuffed, there was cast off blood on some of the vegetation, mud all over the man's body. The same conditions did not apply to the area next to the female victim. (R 243) The female victim's clothing was removed at the scene and he observed that she was covered with mud, indicating that she had been undressed and redressed after being on the ground. (R 245) A Cadillac was parked in the parking lot (R 246)

James McKeehan -- superintendent of Myrtle Hill Memorial Park -- knew the victims William Russell Swack and Nancy Walker. Swack was the chief bookkeeper and vice president of the corporation at the time and Nancy Walker was his assistant; they shared the same office. (R 254) He arrived at work that morning (August 27) at about eight o'clock and saw both Swack and Walker, he last saw them at about 10:00 a.m.. McKeehan left the building for an appointment and returned about 35 minutes later. On his return he noticed their office door was closed. Swack's vehicle,

a dark blue Cadillac with white interior, was still in the parking lot when he left but missing when he returned. (R 255 - 256) At 1:30 or 2:00 he made contact with the police and observed the victims' bodies in Williams Park. (R 257) Swack's vehicle was also there. When he returned to Swack's office he found the door locked; Ms. Walker's electric typewriter was still running and her glasses and purse were still in the office. Swack's lighter and cigarettes were on his desk and it's rare for him to go anywhere without them. The calculator was running and had a total on it. The safe was closed but not locked as it normally is. (R 259) The witness identified Exhibit 6, a logsheet out of the checkbook with a notation "Charles Thompson, $1,500" (A cash reimbursement journal) and the date August 27, 1986). (R 261) He notified the police of this discovery. (R 262) Exhibit 7 was a carbon of the original check as it was being written (Charlie Thompson $1,500, 8/27/86). (R 263) McKeehan knew Charles Thompson, an employee he had hired August 30, 1985, as a grounds maintenance man. (R 265) His termination date was June 27, 1986; he just didn't show up anymore. He was not owed any money by the cemetery when he left. Before he left he expressed displeasure about money he felt he was owed. (R 266) Thompson felt that he was owed between $150 and $180 on a Workman's Compensation claim. (R 267 - 268) McKeehan tried to explain why he was not owed more money in the office in the presence of Mr. Swack. (R 268 - 269)

Kathleen Shannon -- testified that on May 5, 1986, she had a conversation with appellant in which he indicated that his employers weren't paying him money owed on his W.C. Claim and that he felt he was owed $150 - 155. (R 276)

The parties stipulated to the identity of the victims. (R 277)

Dr. Charles Diggs -- associate medical examiner (R 279) performed an autopsy on Swack and Walker. (R 282) At the scene of the crime Diggs observed that Swack had been stabbed and had a gunshot wound at the outside corner of his left eye. The female victim had a gunshot wound over the back of the head. (R 283 - 284) Swack was 5'9", 183 lbs. and had nine stab wounds (R 285) (lower left side of neck, non-lethal -- these two stab wounds superficial; 3rd wound over the left chest was a lethal wound, penetrated left lung, causing internal bleeding and shock; 4th stab wound beside 3rd was relatively superficial; 5th in left lower abdomen, 3" deep causing internal hemorrhaging, 6th also penetrated abdomen; 7th on other side of abdomen perforated into abdominal cavity; 8th at base of neck on right side, superficial; 9th right behind the head penetrated skin but not skull -- R 286 - 289). Stab wounds were consistent with a struggle. Victim was alive during these stabbings. (R 290) Stippling on a gunshot wound indicated it was fired at very close range. (R 292) Victim's heart was still beating when shot; cause of death was gunshot wound to head and multiple stab wounds. (R 294) Ms. Walker was 5'5" and 170 lbs. (R 294) The cause of her death was

a gunshot wound to the head (R 295), an instantaneous death. There was no evidence of stippling. (R 269) Heutra Carnegie -- On September, 1986 he gave the police a watch (Exhibit 10) that was given to him by appellant Thompson. Thompson told him he had gotten it from someone at Jackson's store and asked him to hold it for him until he repaid a $40 debt. Kenneth Bell -- On August 27, appellant sold him a ring, Exhibit 11, at the SOS Bar; he subsequently turned it over to the police. (R 308 - 309) He didn't say where he had gotten it. The parties stipulated that appellant sold Bell Exhibit 11 (ring) on August 27, and gave Carnegie Exhibit 10 (watch) on August 28, and the state announced it would not introduce appellant's prior testimony unless he testifies for impeachment. (R 314)

Jim Vanatta -- formerly assistant manager at Auto Plan testified that he had given Mr. Cross a check for $1,500 from Myrtle Hill Cemetery (Exhibit 12) on August 29 the check was made out to Charles Thompson. (R 318 - 319) The witness explained that a man was purchasing a car; he had a State of Florida I.D. card but not a driver's license. Exhibit 13 was I.D. shown seems to be appellant except bearded man on card; second individual with him said he'd furnish driver's license. (R 320 - 321)

Detective Rick Childers -- investigated Swack-Walker murders; he came into contact with Charlie Thompson on August 29, 1986 at Auto Plan auto sales. Appellant was with black female Brenda Johnson, black male Walter Floyd and another black female. (R 325 - 326) Childers and Detective Parish transported

appellant downtown and advised him of his constitutional rights 45 - 60 minutes later. There was no questioning prior to advisement about homicide but he did ask for his employment. Thompson admitted he had been an employee at Myrtle Hill. (R 326 - 327) He used Exhibit 14 as the rights advisement form. (R 328) Appellant indicated that he understood his rights and there was no trouble communicating; he did not appear to be under the influence of drugs or alcohol. There were no threats or coercion. He never invoked his right to remain silent. There were no promises. (R 330 - 333) Questioning began around 3:45 or 4:00. Appellant said he had gone to the office to receive a $150 check that was owed him; that he received it and left. On arrival near his residence he noticed the check was for $1500 not $150 but appellant tried to cash the check at several bars in the area. (R 333 - 334) The interview lasted about four hours and Childers stopped talking to appellant at 7:40 p.m. The defendant used the restroom, purchased cigarettes, was given food, was not handcuffed. (R 335) As to facts furnished Thompson by Childers, it was believed he took the victims from the office to Williams Park and shot them. Childers did not mention about the victim's clothing being removed. (R 336) Appellant agreed to give fingerprints and a hair sample (took 45 - 60 minutes). They made arrangements to bring over laser machinery from Pinellas County, used to locate small items that glow. (R 336) They ascertained that Pinellas Sheriff's Office used it to determine if someone had discharged a firearm by shining the light on the hand of the

suspect (took two hours, equipment arrived at approximately 10:00 p.m.) There was no questioning while awaiting the laser. (R 337) Time of questioning in which he denied involvement lasted approximately four hours. They shone the light on Childers' hand in front of Thompson to show that no harm would come to him and appellant agreed to allow test. (R 338) This laser was used as investigative tool to give some idea whether he fired the firearm; it did glow on appellant's hand. (R 339) Whitfield asked appellant if he wanted to talk to the detectives and he said he did; appellant was not in fear of anything. Appellant then made another statement regarding his involvement in the shootings. (R 340) Appellant stated that he went there with a gun to get the $150 owed to him, met with the victims and received the check. At the time Ms. Walker slapped him. He made both of them leave with him in the Cadillac and directed them to drive to Williams Park. Upon arrival there he wanted them to get out and go to the wooded area so they could talk. There, he made them both take their clothes off. Swack hit him with a branch or limb and appellant shot him. He told Ms. Walker to redress, shot her and fled. He said he used same firearm on both. Up to this point Thompson had not been told they thought the victims' clothing had been removed (R 341 - 342) or where they were shot. Thompson did not admit any stabbing in this statement. Childers then asked appellant to repeat the statement on tape and he agreed to do so, Exhibit 15. (R 342) The tape was played at R 344 - 345. The distance from Myrtle Hill Cemetery office to the

area where the bodies were found is about two and a half miles. (R 346) Subsequently, Bell and Carnegie gave property to Childers.

The jury returned guilty verdicts (R482)

At the penalty phase the state announced that it intended to present two police reports and copies of two judgments of prior convictions -- a no contest plea on November 29, 1983 to aggravated battery and resulting two year prison sentence and in a 1985 conviction for sexual battery on his girlfriend. The defense stipulated that the police reports could be read in lieu of calling live witnesses. (R 496 - 497) The prosecutor read the contents of the police report interviews of witnesses Darlene Lawson, Mary Lawson and Carol Lawson describing the two incidents in State's Exhibit A and B. (R 498 - 510; R 981 - 1001) In summary, as to the 1983 incident appellant became involved in an altercation with victim Charles Lawson at the Lawson residence in which appellant produced a knife, stabbing Lawson in the back and chest. (R 501) Following appellant's release from prison in 1984, he committed a sexual battery on Carol Lawson (the mother of appellant's three children - R 602) by inserting his penis in her vagina for fifteen minutes. (R 508)

Defense witness Dolly Herman, sister of the appellant, testified that Thompson was seventh or eighth in a family of twelve brothers and sisters. Appellant is about forty-one years of age. Their mother died when appellant was about seven years old and their father died when Thompson was twenty-two. Two

relatives were hospitalized for mental problems and there was no electricity or running water in Mississippi. (R 511 - 515)

Marilyn Hall stated that appellant was not a disciplinary problem in the county jail in 1986. (R 516)

Psychiatrist Dr. Michael Scott Maher opined that appellant was criminally responsible for his actions, borderline mentally retarded with full scale I.Q. of about 70. (R 522 - 523) He described him as an extremely suspicious, easily offended individual with paranoid personality traits. (R 525) On cross-examination he conceded that appellant knows what he is doing when he pulls the trigger of a gun (R 531 - 532), that our jails are filled with sociopaths (or antisocial personalities) (R 533); the witness did not know what appellant's intention was when he went to the victim's office with a gun. (R 535) The witness could not opine that the victim was forced to write a check for $1,500 from the fact that appellant believed he was owed $150 and that he received a $1,500 check from the victim. (R 536) The episode of killing the two people who witnessed his obtaining the check "tells me that he wasn't thinking clearly" (R 540). He has testified about a dozen times for the defense in penalty phase and never been asked by the state to testify. (R 543)

Dr. Berland, a psychologist, opined that Thompson was under the influence of extreme mental or emotional disturbance, that he was able to appreciate the criminality of his conduct and that he was not substantially impaired in conforming to the requirements of law. (R 576) (in disagreement with Dr. Maher -- (R 589). Dr.

Berland has testified for the defense twelve to fifteen times in penalty phase-- murder cases -- never for the state. (R 586 - 587)

Linda Lawson, sister of Carol Lawson, testified that appellant loved his three children. (R 603)

The jury recommended death on both murder counts by a 7 - 5 vote. (R 652 - 653; R 927 - 928) The trial court imposed a sentence of death and this appeal follows.

SUMMARY OF THE ARGUMENTS

I. The lower court correctly denied appellant's motion to suppress. Appellant gave a voluntary statement after warnings which substantially complied with Miranda. This court on the prior appeal considered and rejected appellant's argument that mental subnormality rendered the confession involuntary and need not revisit the claim; in any event it is meritless.

II. The testimony of Detective Childers was permissible especially since elicited on redirect examination in response to an area which the defense opened the door on in cross-examination.

III. There was no improper threats by the prosecutor. Appellant acquiesced to the trial court's ruling. Lucas v. State, 376 So.2d 1149 (Fla. 1979). And he now changes the basis of his objection on appeal. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). No improper testimony was introduced.

IV. No fundamental error occurred in the playing of the tape in the jury room.

V. The record reflects an appropriate finding that the killings were cold, calculated and premeditated without moral justification.

VI. Appellant's complaint with respect to the HAC aggravating factor has not been preserved for appellate review and is meritless.

VII. The trial court correctly found the aggravating factor of heinous, atrocious or cruel.

VIII. The trial court did not err in its preparation of a written order finding death to be the appropriate sanction. Appellant's double jeopardy claim is without merit.

IX. The trial court did not fail to consider proffered statutory and nonstatutory mitigating factors and conducted an appropriate weighing process to conclude that death was appropriate.

X. Executing the mentally retarded is not unconstitutional Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989). Appellant's attempt to recast his argument in terms of state law must fail since not adequately presented or preserved in the lower court. It is meritless. Finally, the requirement of individualized sentencing requires consideration of the unique moral culpability of each capital defendant which would be rendered nugatory by the per se rule sought by appellant.

XI. The imposed death sentences are in conformity with this Court's proportionality jurisprudence.

XII. Appellant impermissibly is changing the basis of his objection below. This Court has rejected the merits of appellant's claim in Combs v. State, 525 So.2d 853 (Fla. 1988).

XIII. The departure sentence imposed for the non-capital counts was permissible under Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988).

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN ADMITTING APPELLANT'S STATEMENT TO POLICE.

In the instant case, the warnings provided to appellant Thompson prior to questioning included the following:

> I understand that I need not consent to being interviewed nor am I required to make any further statement whatsoever, that I have the right to remain silent and not answer any questions asked of me relative to this crime. I further understand that if I do make a statement or answer any questions that said statement, whether written or oral, could and will be used against me if I am prosecuted for this offense. I further understand that prior to or during this interview that I have the right to have an attorney present. I further understand that if I am unable to hire an attorney and I desire to consult with an attorney or have one present during this interview that I may do so and this interview will terminate. I further understand that at any time that I desire I can have this interview stopped. Knowing my rights, I hereby, prior to being interviewed, waive my rights to consult with an attorney or to have one present during this interview. Any and all statements I will make will be freely and voluntarily made. No promises, threats or inducements of any kind or nature whatsoever have been promised me in order to consent to this interview. Prior to my signature being affixed hereto, this statement has been read to me in its entirety and I fully understand the same.
>
> (emphasis supplied) (Exhibit 14, R 979)

At the suppression hearing on May 8, 1990, Detective Childers explained that he relied on the consent to interview form; he did not use the terminology that Thompson had the absolute right to have an attorney appointed at no cost to him.

(R 8 - 9) He used the form, Exhibit 14 (R 16, R 979) At trial Childers repeated that he advised the defendant of his rights using the Exhibit 14 consent form. (R 326 - 328) These warnings included:

> " . . . I further understand that prior to or during this interview that I have the right to have an attorney present . . . I further understand that if I am unable to hire an attorney and I desire to consult with an attorney or have one present during this interview, that I may do so and this interview will be terminated . . .
>
> * * *
>
> Knowing my rights, I hereby prior to being interviewed waive my rights to counsel with an attorney or to have one present during this interview."

(R 331)

Appellant indicated that he understood his rights and Childers had no trouble communicating with him. (R 332) On cross-examination, the witness stated that he had not told appellant he had the right to have an attorney appointed at no cost (R 365); but Thompson did indicate that he understood his rights that were read to him. (R 367)

In Duckworth v. Eagan, 492 U.S. ___, 106 L.Ed.2d 166 (1989), the defendant was read and signed an advice of rights form which included the warning "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." Subsequently, he signed another form providing "that if I do not hire an attorney, one will be provided for me." The defendant then confessed to stabbing the victim.

The Supreme Court agreed with a majority of the lower courts that informing a defendant that an attorney would be appointed if and when you go to court does not render Miranda warnings inadequate.

The Court observed that it had never insisted that warnings be given in the exact form described in the Miranda decision. Reviewing courts need not examine Miranda warnings as if construing a will or defining the terms of an easement; rather, the inquiry is simply whether the warnings reasonably convey to the suspect his rights as required by Miranda. 106 L.Ed.2d at 177. In Duckworth, the initial warning touched all the bases required by Miranda . The accused was told:

> (1) He had the right to remain silent;
> (2) that anything he said could be used against him in court;
> (3) that he had the right to speak to an attorney before and during questioning;
> (4) that he had the right to the advice and presence of a lawyer even if he could not afford to hire one;
> (5) and he had right to stop answering at anytime until he talked to a lawyer;
> (6) additionally, although the police could not provide a lawyer, one would be appointed "if and when you go to court."

The Court concluded that the lower court had misapprehended the effect of the inclusion of "if and when you go to court," that it simply anticipated a commonplace question by suspects; moreover, Miranda does not require that attorneys be producible on call. The court explained that the vice presented in California v. Prysock, 453 U.S. 355, 69 L.Ed.2d 696 (1981) was that the accused was not apprised of the right to have an

attorney present if he chose to answer questions -- a defect not presented in Duckworth. The warnings totally satisfied Miranda.

Appellant's citation of United States v. Stewart, 576 F.2d 50 (5th Cir. 1978) and United States v. Connell, 869 F.2d 1349 (9th Cir. 1989) is also instructive. In Stewart the court made clear that:

> "It is undisputed that he was never advised that he had a right to have an attorney present during the interrogation."
>
> (Id. at 52)

This contrasts sharply with the given warning sub judice that:

> "I further understand that prior to or during this interview that I have the right to have an attorney present. I further understand that if I am unable to hire an attorney and I desire to consult with an attorney or have one present during this interview that I may do so and this interview will terminate." (R 979)

In Connell, supra, the court found the simultaneous use of two different versions of the Miranda warning inherently misleading and confusing[2] The court concluded:

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[2] The vice present included an oral warning that counsel may be appointed if the suspect could not afford one(leaving the impression appointment was discretionary) and a written warning advising that the accused must make his own arrangements to obtain a lawyer which would be at no expense to the government immediately followed by a sentence that if he could not afford a lawyer arrangements would be made to obtain a lawyer in accordance with the law (which did not inform the accused of the requirements of law).

". . . Connell's case is not analogous to those situations, where, though not made explicit, the right to appointed counsel before and during questioning can readily be inferred from the combination of other warnings given. Rather, the ambiguous warnings he was given operated to dispel such an inference."

(text at 1353)

In the instant case appellant was specifically informed of the right to counsel during questioning, was not told that he had to make arrangements at no expense to the government, and was told he could consult with counsel and the interview would terminate. The United States Supreme Court has consistently noted that the warnings required by Miranda. v. Arizona need not be a verbatim repetition of the precise language contained in the Miranda opinion. No talismanic incantation is required. California v. Prysock, 453 U.S. 355, 69 L.Ed.2d 696 (1981); see also, Rhode Island v. Innis, 446 U.S. 291, 297, 64 L.Ed.2d 297, 305 (1980) noting that Miranda announced procedural safeguards including "the now familiar Miranda warnings . . . or their equivalent." (Emphasis supplied).

Furthermore, reversal is not required by Caso v. State, 524 So.2d 422 (Fla. 1988) when one examines closely the facts and record in that case. In the Caso record on appeal, the transcript reveals the following pertaining to the advisement of rights:

A. Before we ask you any questions, you need to know your rights. And there is prefix with a Q, which in Spanish is meaning a question. Okay?

You have the right to remain silent. Do you understand that?

Q. And the initials after that is whose?

A. Well, there's an answer and the date, and the answer is yes and the initials R.C. for Rigoberto Caso. Which means -- that implicates he understood.

The second one is anything that you say can be used against you a in tribunal or court of law. Do you understand that? The reply here is yes. R.C., indicating the defendant Rigoberto Caso.

Next question is you have a right to consult with an attorney, and to consult with him before we may ask you any questions, you also have the right to the presence of your attorney during any of the interrogation. Do you understand that?

Q. Did he ask for a lawyer at that time?

A. No ma'am. The reply is yes, I understand an the initials, R.C., indicating Rigoberto Caso.

The very next question is do you want an attorney present now? Okay.

Q. What did he say to that?

A. The answer has a question mark on it which is preprinted on here for him to say yes or no. In his own handwriting I got N-O, R.C., indicating No R.C. for Rigoberto Caso.

The very next question is if you decide to answer any questions now, without the presence of an attorney, you still have the right to terminate the answering at any time, you also have the right to stop the questioning at any time you wish to consult with an attorney.

And then at that point, the defendant's signature appears at the very bottom, and my signature verifying this is the defendant's

> signature and Detective Gondar's signature doing the same.
>
> (R 233 - 234, Caso record)

The vice which is present in Caso is that in that colloquy there was no mention of what option was available if the defendant could not afford a lawyer. That is in contrast to the instant case where the accused was informed:

> " . . . that if I am unable to hire an attorney and I desire to consult with an attorney or have one present during this interview that I may do so and this interview will terminate." (R 979)

In the instant case appellant was informed of the option that the interview would terminate if he was unable to hire an attorney and desired to consult with one. As Prysock and Duckworth make clear the gist of Miranda warnings were provided and it is not essential that the accused be told that the ultimate cost will be borne by the state or the county.

Appellant urges again on this appeal -- as he did in his prior appeal -- that his mental subnormality should render his confession involuntary and inadmissible. The argument was rejected by a majority of this Court and should not be revisited again. See Preston v. State, 444 So.2d 939 (Fla. 1989) (regarding the law of the case doctrine).

This Court declared in Thompson v. State, 548 So.2d 198, 203 - 204 (Fla. 1989):

> The second subissue deals with those portions of the confession occurring prior to Thompson's equivocal request for counsel In support of this argument, Thompson primarily

rests his argument on evidence of mental subnormality contained in the record as well as in the police trickery in using the laser. This subnormality, he argues, renders his entire confession nonvoluntary and inadmissible.

[8] The fact of mental subnormality or impairment alone does not render a confession involuntary, *Ross v. State,* 386 So.2d 1191 (Fla. 1989), except in those rare cases involving subnormality or impairment so severe as to render the defendant unable to communicate intelligibly or understand the meaning of *Miranda* warnings even when presented in simplified form. *Cooper v. Griffin,* 455 F.2d 1142 (5th Cir. 1972).

A number of courts have considered this problem in analogous situations in which the *Miranda* warnings may have been misunderstood by a mentally retarded or otherwise impaired defendant. The United States Supreme Court, for instance, has held that permanent or temporary mental subnormality is a factor that must be considered in the totality of the circumstances to determine the voluntariness of a confession. *Sims v. Georgia* 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967) (confession suppressed when defendant who was illiterate, with third-grade education and "decidedly limited" intellectual abilities, had been interrogated for eight hours). *Accord Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) (pre-*Miranda* case in which confession was suppressed when drug-addicted defendant had been administered a medication that had properties of "truth serum"). This is in keeping with the "totality of the circumstances" test used in cases involving the alleged waiver of constitutional rights. *North Carolina v. Butler,* 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *Henry v. Dees,* 658 F.2d 406 (5th Cir. 1981).

It appears that a majority of American jurisdictions expressly adhere to the totality of the circumstances approach. *See* Annotation, *Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession,* 8

A.L.R.4th 16, 24 - 28 (1981) & 3-4 (Supp. 1988) (citing cases). This includes Florida. *Kight v. State*, 512 So.2d 922 (Fla. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); *Ross; Myles v. State*, 399 So.2d 481 (Fla. 3d DCA 1981).

[9] The question of voluntariness is, in the first instance, a question to be determined by state law, subject to the minimum requirements of the fourteenth amendment's due process clause. *Jackson v. Denno*, 378 U.S. 368, 393, 84 S.Ct. 1774, 1789, 12 L.Ed.2d 908 (1964). While the United States Supreme Court has not explicitly provided a standard for determining voluntariness, *see* Martens, *The Standard of Proof for Preliminary Questions of Fact under the Fourth and Fifth Amendments*, 30 Ariz.L.Rev. 119, 119 (1988), other federal court have held that

> [i]n considering the voluntariness of a confession, this court must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confessions was not a product of his own free will.

Jurek v. Estelle, 623 F.2d 929, 937 (5th Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). One of the central concerns in this inquiry is "a mentally deficient accused's vulnerability to suggestion." *Henry*, 658 F.2d at 409.

[10 - 13] We agree with this assessment. Florida case law holds that mental weakness of the accused is a factor in the determination, and that the courts also should consider

> comprehension of the rights described to him, . . . a full awareness of the nature of the rights being abandoned and the consequences of the abandonment.

Kight, 512 So.2d at 926. *See* art. I, § 9, Fla. Const. To this end, the burden is on the state to show by a preponderance of the evidence that the confession was freely and voluntarily given and that the rights of the accused were knowingly and intelligently waived.[5] *Henry,* 658 F.2d at 409; *Ross,* 386 So.2d at 1194. *Accord Doerr v. State,* 383 So.2d 905 (Fla. 1980); *Fields v. State,* 402 So.2d 46 (Fla. 1st DCA 1981).

Accordingly, we must consider Thompson's claims of subnormality in light of all the evidence in the record.

[14] We find that there was other substantial evidence suggesting that this subnormality was not so severe as to render his entire exchange with the police inadmissible. Indeed, some evidence shows that Thompson was capable of understanding his *Miranda rights.* For instance, Detective Childers testified that during the initial interview Thompson talked with police for more than two hours without having difficulty understanding the questions. The trial court was entitled to weigh the credibility of this testimony against that of Thompson. Thompson also attempted to provide an alibi during this period of time, suggesting that he realized he was in trouble and appreciated the consequences of his conversation with the police. We thus must conclude that sufficient evidence exists on this record to support the trial court's decision to allow into evidence that portion of the confession

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[5] The trial court's conclusion on this question will not be upset on appeal unless clearly erroneous; however, the clearly erroneous standard does not apply with full force in those instances in which the determination turns in whole or in part, not upon live testifmony, but on the meaning of transcripts, depositions or other documents reviewed by the trial court, which are presented in essentially the same form to the appellate court. *Jurek v. Estelle* 623 F.2d 929, 932 (5th Cir. 1980), *cert. denied,* 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981).

occurring prior to Thompson's equivocal request for counsel.

Appellant argues that this Court should not apply the law of the case sub judice because he contends the facts are different than at the time of the prior appeal. The additional fact he points to is the admission by Detective Childers that he did not inform Thompson of the "no-charge" appointment of counsel. This "fact" should not change the Court's prior analysis and conclusion. Appellant was told and was aware that he had a right to remain silent, that his statements could be used against him, that prior to the interview he had a right to an attorney present and that if unable to hire an attorney but desirous of having one he could consult with one and the interview would terminate. And that at anytime he could terminate the interview. (R 979) The uncontradicted testimony of Childers was that appellant did not have trouble understanding what Childers was talking about and appeared to understand his rights. (R 741, 745) Appellant himself did not testify below that he did not understand. According to the report of Dr. Sprehe, appellant Thompson did "remember having his rights read to him when he gave his statement to the police and he does understand the meaning of the Miranda Warning." (R 950)

Moreover, it must be remembered that appellant was not inexperienced in his involvement with the criminal justice system, having prior convictions in 1983 for aggravated battery and a sexual battery conviction in 1985 (R 980 - 1001) -- a

relevant circumstance in considering the admissibility of his statement.

Appellant's effort to have this Court substitute its judgment for that of the trial court should be rejected. Wasko v. State, 505 So.2d 1314 (Fla. 1987). Similarly his request to have this Court reconsider its prior holding should be rejected since the officer's warnings were in substantial compliance with Miranda as interpreted in Duckworth v. Eagan, 492 U.S. ___, 16 L.Ed.2d 166 (1989).

Appellant, both in the lower court and in this tribunal, places great emphasis on Smith v. Zant, 855 F.2d 712 (11th Cir. 1988) which presumably held that the petitioner did not knowingly waive his Miranda rights when he confessed to the murder and that federal habeas relief was available in both the guilt and penalty phases. Unfortunately for appellant, the Court of Appeals vacated the panel opinion in Smith v. Zant, 873 F.2d 253 (11th Cir. 1989). Subsequently, in an en banc decision Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989) the Court became equally divided on the proper disposition of the case resulting in affirmance as a matter of law of the district court order. [The district court's order granted habeas relief on the penalty aspect only, finding the admissibility of the confession harmless error in the guilt phase. Smith v. Kemp, 664 F.Supp. 500 (M.D. Ga. 1987)].

Even if Smith, supra, were to be compared, appellant is not entitled to any relief. The circumstances in Smith included:

1. The petitioner was arrested late at night; he had been hiding out in the woods all day and came out of the woods only after his father got on a megaphone and talked him into coming out;

2. In a state of hunger and exhaustion he was taken immediately to a jail in another county and held incommunicado in a private cell for 12 hours;

3. He was placed in the custody of two officers, one of whom had known him since childhood and called him by his nickname Noodle.

In contrast, Detective Childers testified that he arrested appellant in the afternoon at the auto rental sales car lot and took him to the police department. (R 7). He was picked up at about 1:35 and the interview started at about 2:15. There was not a constant interview; there were food breaks, he was taken to the rest room, given cigarettes. (R 13-14). The interview lasted "three to four hours, maybe five." (R 16). Childers had breaks in the interview so that Childers could talk to other persons. (R 20 - 21). And unlike Smith where there was uncontradicted testimony that the petitioner could not possibly waive Miranda rights, in the instant case even defense "expert" Maher conceded it was possible Thompson understood he had the right to have an attorney present. (R 767) and likely that he understood he had the right to remain silent. (R 766, 768). The witness declined to opine on Thompson's state of mind when attempting to establish an alibi to the police. (R 770). Similarly, defense expert

Berland acknowledged that it was possible the concern expressed by Thompson on the tape was that he knew he could get a public defender but that the only lawyer he wanted was a private lawyer (R 801-802). Moreover, Dr. Sprehe's report disclosed that:

> ". . . He made it clear that he has been through the legal process in criminal court on several occasions as he has a previous record of encounters with the law and so he is thoroughly aware of what goes on in court. . . . . He does remember having his rights read to him when he gave his statement to the police and he does understand the meaning of the Miranda Warning."

(R 949 - 950)

The contrary view expressed in Dr. Sprehe's report along with appellant's behavior at the police station warrants rejection of appellant's claim -- as this Court previously decided. 548 So.2d at 204.

ISSUE II

WHETHER THE LOWER COURT IMPROPERLY ALLOWED THE OFFICER TO INVADE THE PROVINCE OF THE JURY BY GIVING HIS OPINION THAT THOMPSON WAS GUILTY.

The testimony of Detective Childers must be read in context. In his direct examination the witness did not express any opinion as to appellant's guilt or innocence. (R 322 - 346) On cross-examination defense counsel suggested that the witness was lying and that the witness had furnished the information of the crimes to the appellant and inquired of the officer whether he believed appellant during his protestations of innocence.

> "Q. And the fact of the matter is that but for your testimony here today there is nothing else to corroborate what you said about what happened during that period of time: isn't that also correct?
>
> (R 347)
>
> * * *
>
> Q. Okay. Now -- and the truth of the matter is that during the course of the four hours of interrogation of Charlie Thompson you, in fact, told him that, I think you kidnaped them and you took them to the park, didn't you?
>
> (R 350 - 351)
>
> * * *
>
> Q. Well -- the truth of the matter is that what he told you largely was what had been told to him by your during the four hours in which he denied any involvement in the homicide; is that correct, sir?
>
> (R 360)
>
> * * *

> Q. Yet, when he denied the offense, you didn't believe that even though he said he had denied an involvement in the crime prior to the laser test; correct sir?"
>
> (R 367)

On re-cross examination defense counsel asked for the following opinion:

> "Q. But, the fact of the matter is, Detective Childers, is that you don't know and you can't tell this jury whether or not Charlie Thompson said he committed those homicides because you suggested him the fact or whether or not he in fact had done it; isn't that correct, sir?"
>
> (R 368)

The witness replied that he could not answer the question in a yes or no fashion. (R 369)

Then, the prosecutor on further redirect then made the inquiry which appellant now challenges:

> "Q. It's your opinion that Mr. Thompson confessed to the crime because he committed the crimes or did he confess to the crime because he was being a parrot and just spitting back what you told him?"
>
> (R 369)

> "Q. You opinion -- in your opinion, did Mr. Thompson admit to those offenses because he committed the offenses or did he admit because he was just repeating back what you told him?
>
> A. Because he committed the offenses."
>
> (R 370)

Appellant cites Kight v. State, 512 So.2d 922 (Fla. 1987) for the proposition that it was unnecessary for the officer to

give an opinion of appellant's guilt having already communicated his perceptions to the jury. Appellant is ignoring the fact that the prosecutor on redirect was simply asking for a clarifying opinion to the opinion elicited by the defense as to whether the witness thought Thompson's admissions of the homicides were due to suggestions of the facts to the defendant by the officer or rather because he committed the crime. (R 368, 370) Since the issue was raised by the defense, the prosecutor could pursue it.[4] See McCrae v. State, 395 So.2d 1145 (Fla. 1980) (state permitted to examine the accused to negate delusive innuendoes of his counsel); Ashcraft v. State, 465 So.2d 1374 (Fla. 2d DCA 1984) (defendant opened door to question about details of prior rape confession upon testifying he had never hurt anyone); Nelson v. State, 395 So.2d 176 (Fla. 1st DCA 1980) (defendant opened the door when additional questions on redirect examination elicited self-serving declarations); Lucas v. State, 568 So.2d 18, 21 (Fla. 1990) (only on redirect examination did the state ask about the victim's telling the witness about threats made against her -- the defense opened the door to the line of questioning); Tompkins v. State, 502 So.2d 415 (Fla. 1986) (state permitted on

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[4] And the officer did not opine that appellant was guilty -- only upon questioning by both sides that appellant confessed because he committed the offenses and not that he was merely parroting back information furnished him.

redirect examination to pursue line of questioning of which the defense had opened the door).

Appellant's claim must be rejected.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO "THREATEN" TO USE THOMPSON'S TESTIMONY AT THE FIRST TRIAL AS SUBSTANTIVE EVIDENCE.

At the beginning of trial, defense counsel complained that the prosecutor intended to use appellant's testimony in the prior trial regarding his holding or selling a watch and ring to Mr. Carnegie and Mr. Bell; the defense complained this would violate the Fifth Amendment. (R 204 - 205) The prosecutor responded that defense counsel had indicated to him that he was going to try and attack the credibility of Bell and Carnegie and he pondered the appropriateness of defense counsel challenging credibility on facts his client had admitted on the stand. The prosecutor wanted to check the case law and not mention appellant's prior testimony in opening argument and that if the appellant's testimony were admissible the defense might be prepared to stipulate that Carnegie and Bell wouldn't have to be called. (R 206 - 207)

A little bit later the prosecutor informed the court of the case law he had provided to defense counsel -- Pendleton v. State, 348 So.2d 1206 (Fla. 4th DCA 1977) and Edmonds v. United States, 273 F.2d 108 (D.C. Cir. 1959) and defense counsel announced, "I can't disagree with that law" (R 229) and the Court then ruled it would allow the state to use it. The defense then stated that in light of the ruling they would stipulate that the watch and ring belonging to the victim Swack was provided by

appellant to Carnegie and Bell and the prosecutor agreed not to utilize the former testimony. (R 230 - 231) The stipulation was read to the jury. (R 315 - 316)

B.

First of all, appellant should not be allowed to complain here about the stipulation entered into since he had the opportunity below to challenge the correctness of the case law and declined that opportunity. (R 229) In Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979), the Court declared:

> "This Court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law."

Secondly, appellant has initiated an entirely new argument here never presented below, to wit: that his prior testimony in the first trial constituted "fruit of the poisonous tree" of the allegedly improperly obtained statements. Since this argument was not advanced below, it should not be allowed now.[5] See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Bertolotti v. State, 565 So.2d 1343 (Fla. 1990).

Even if this Court were to allow consideration now of this new claim, appellant's reliance on Harrison v. United States, 392

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[5] Below defense counsel recited merely that appellant did not elect to preserve his Fifth Amendment right of not testifying in the first trial. (R 285)

U.S. 219, 20 L.Ed.2d 1047 (1968) would be unavailing. Unlike Harrison the prosecution did not in the instant case introduce into evidence either any illegally obtained evidence or the fruit of illegally-obtained evidence; nor did he even use it permissibly as impeachment evidence, as permitted under Harris v. New York, 401 U.S. 222, 28 L.Ed.2d 1 (1971).

ISSUE IV

WHETHER FUNDAMENTAL ERROR OCCURRED WHEN THE ATTORNEYS PLAYED A TAPE FOR THE JURORS WHILE THE COURT WAS NOT PRESENT IN THE DELIBERATIONS ROOM.

The record reflects that as the jury entered the deliberations room, they requested the bailiff to hear the tape. The trial court suggested to the prosecutor and defense counsel that the bailiff go in there with the tape and tape recorder, put it on the table and play it -- the attorneys would be permitted to be present to listen to the tape -- and then return with the tape and tape recorder. (R 475) Defense counsel stated that he had no problem with that. Prosecutor, defense lawyer and bailiff went in and played the tape in the jury room. (R 476) On their return prosecutor Benito asked to put on the record what happened. The bailiff declared that he took the tape player in and plugged it in. A few minutes before the attorneys arrived the bailiff advised the jurors that the attorney would not be able to be asked or answer any questions and they were just going to listen to the tape.

Prosecutor Benito and defense counsel agreed that Benito turned on the tape, they listened to the same part of the tape that was heard in court, that no questions were asked, Benito stopped the tape and they walked out. (R 476 - 477)

Appellant relies on Brown v. State, 538 So.2d 833 (Fla. 1989). There the Court found the judge's absence from the proceedings where his presence was required by law, absent a

personal waiver by the accused, constituted reversible error. In Brown, the trial judge had left the courthouse and in response to the jury's request for transcripts of witnesses' testimony, counsel and the judge agreed the jurors should be told they could not have the transcripts and they would have to rely on their memories. In its analysis the Court noted the jurors might have requested that portions of the testimony be read back to them when informed they could not have the transcripts, it was asserted that the prosecutor did most of the talking to the jurors and that he told them that he did not want any more questions.

> " . . . We do not know what tone of voice this might have been said in, nor do we know the prosecutor's demeanor and manner in dealing with the jury. The prosecutor's statements and conduct, indeed this whole procedure might well have had a chilling effect on the jury's deliberations. No one can say at this point that the judge's absence did not have a detrimental effect on the jury's deliberations.
>
> (538 So.2d at 836)

The instant case is distinguishable. First of all, the trial judge was not absent from the courthouse (albeit he was not present in the deliberations room when the tape player was set up). There was no inquiry by the jury with respect to the availability of transcripts which required judicial handling and resolution. We do know that there was no improper conduct or behavior by the prosecutor because both prosecutor and defense counsel agreed that there were no questions and answers, that

only the tape was played and then they left the room. (R 476 - 477) Brown is inapposite and this claim is without merit.

ISSUE V

WHETHER THE KILLINGS WERE COLD, CALCULATED AND PREMEDITATED.

Appellant next challenges the lower court's determination that the killings were cold, calculated and premeditated without pretense of moral or legal justification. Appellant argues that rather than demonstrating heightened premeditation, the evidence more plausibly is in agreement with the version provided by appellant. According to the taped confession of appellant played to the jury, Thompson went to the victims' office to get his check, victim Walker slapped him in the face and Swack wrote him a check for $1,500 instead of $150. Appellant told them to walk out to the car and they went to the park. Swack hit him with a stick, he told the victims to remove their clothes -- not intending to shoot anybody -- and then he shot them. (R 344 - 345; see also R 773 - 774)[6] Appellant posits that if Thompson had a plan to kill then the struggle and knife wounds would not have occurred -- both victims would simply have been shot.

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[6] Appellant also mentioned on the portion of the tape edited and not heard by the jury that the reason he shot Nancy Walker was that she had slapped him earlier in the office and she could identify him at just having shot Mr. Swack. (R 781) While the jury may not have heard this, at the very least the argument presented by counsel for appellant that Thompson did not have a prearranged design to kill cannot stand in light of his admissions. Just as a trial or appellate lawyer cannot be critized for the failure to present a false defense -- see Scott v. Dugger, 891 F.2d 800, 803 - 805 (11th Cir. 1989) -- so too counsel should not advance an appellate argument known to be contrary to the admissions made by his client.

Appellee submits that there is no inconsistency. Swack certainly could have turned on his kidnapper when the latter didn't expect it, precipitating a struggle, the use of the knife and the subsequent execution of the mortally-wounded Swack.

Appellant now offers as an explanation, non-testimonial of course, that he did not know what he would do, that he simply wanted his workmen's compensation check, that he confused the aggressor and victim, that he acted in self-defense when Swack attacked him, stabbed Swack several times (in self-defense) and then executed both victims with gunshots to the head.[7] He cites Mitchell v. State, 527 So.2d 179 (Fla. 1988) and Thompson v. State, 565 So.2d 1311 (Fla. 1990). In Mitchell this Court opined that no other evidence of premeditation was present other than numerous stab wounds; sub judice, there is evidence of appellant's removing the victims to a secluded area plus execution-style shooting in addition to the stabbing of Swack. Similarly in Thompson there was no evidence of reflective action, whereas in the instant case appellant took a gun to the office, obtained the check he desired, kidnapped his victims and removed

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[7] Among the reasons that we may disbelieve appellant's version is that the facts contradict it. Thompson steadfastly has denied in his confession that he stole Swack's ring and watch, when it was stipulated and the testimony of Carnegie and Bell established that appellant was in possession of them shortly after the double homicide. (R 314, 300 - 312)

them to a secluded area and executed them. More than mere rage is present.

Appellant next argues that the circumstances do not establish that the homicides were committed "without any pretense of moral or legal justification" *Florida Statute 921.141(5)(h)*. It is understandable that trial counsel did not argue this to the jury. (R 624 - 636). Citing cases such as Banda v. State, 536 So.2d 221 (Fla. 1988), Christian v. State, 550 So.2d 450 (Fla. 1989) and Cannady v. State, 427 So.2d 723 (Fla. 1983) appellant argues that this aggravating factor must be overturned. In Banda there was substantial uncontroverted testimony of several witnesses that the victim was a violent man who made threats against the accused and the state's own theory of prosecution was that Banda plotted to kill the victim to prevent the latter from killing him. Christian, supra, in addition to being a jury override case, also involved a record "replete with unrebutted evidence of the victim's threats of violence to Christian and his apparent inclination to fulfill them." 550 So.2d at 452.

In Williamson v. State, 511 So.2d 289 (Fla. 1989), cited approvingly in Banda, supra, the Court rejected a pretense of moral or legal justification argument where there was no supporting evidence of violence or threats by the victim and the victim was stabbed repeatedly. In Cannaday, the defendant repeatedly denied intending to kill the victim, explaining that he shot when the victim jumped him. There was a pretense -- protecting his own life, 427 So.2d at 730. Unlike Cannaday,

appellant did not act merely on the pretense of self-defense. Since appellant has chosen to rely on a portion of appellant's suppressed taped confession, appellee will do likewise and refer to the Court to R 781 where the following colloquy occurs:

> "DETECTIVE CHILDERS: And why did you shoot Nancy?
>
> THE DEFENDANT: Well, because she's the one that slapped me before we left the office.
>
> DETECTIVE CHILDERS: She was the one that slapped you so you shot her?
>
> THE DEFENDANT: Yeah.
>
> DETECTIVE CHILDERS: And maybe too because she would be the one that identified that you just killed Mr. Swack?
>
> THE DEFENDANT: Yes."

Assuming, arguendo of course, that we accept Thompson's assertion that he was attacked by Swack and that he had moral justification to respond by stabbing him nine times and shooting him in the head, what moral or legal justification can there be for the execution-killing of Nancy Walker? If this Court finds it a persuasive contention that the alleged slap in the face earlier constitutes a sufficient provocation to defeat the applicability of *Florida Statute 921.141(5)(i)*, then we submit that no homicide can so qualify because every murderer's feelings will have been hurt by some conduct of the victim, at some time or place.

ISSUE VI

WHETHER HEINOUS, ATROCIOUS OR CRUEL AND COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTORS ARE UNCONSTITUTIONALLY APPLIED AND THE JURY INSTRUCTIONS VAGUE.

Appellant filed pretrial motions seeking to have the death penalty statute ruled unconstitutional, urging, inter alia, that the statutory aggravating factors of heinous, atrocious or cruel and cold, calculated and premeditated were unconstitutionally applied. (R 910 - 925) He requested no particular, specific instruction to correct the alleged perceived deficiencies other than to refer to his pretrial motions (R 607) and appellee therefore submits that any jury instruction issue has not been preserved for appellate review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990).

Appellant acknowledges that his Maynard v. Cartwright, 486 U.S. 356 (1988) argument has been rejected in Smalley v. State, 546 So.2d 720 (Fla. 1989). See also Occhicone v. State, supra, (Maynard did not make Florida's penalty instruction on cold, calculated and premeditated and heinous, atrocious or cruel unconstitutionally); Brown v. State, 565 So.2d 304 (Fla. 1990).

Nevertheless, appellant seeks relief, citing Shell v. Mississippi, 498 U.S. ___, 112 L.Ed.2d 1 (1990), wherein the Supreme Court in a summary opinion granted certiorari relief on the authority of Maynard v. Cartwright, 486 U.S. 356, 10 L.Ed.2d 372 (1988). Shell provides no relief to appellant for the reasons explicated in Walton v. Arizona, 497 U.S. ___, 111 L.Ed.2d 511 (1990):

Maynard v. Cartwright, and Godfrey v. Georgia, however, are distinguishable in two constitutionally significant respects. First, in both Maynard and Godfrey the defendant was sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly as vague. See 486 U.S. at 358 - 359, 363 - 364, 100 L.Ed.2d 372, 108 S.Ct. 1853; 446 U.S., at 426, 64 L.Ed.2d 398, 100 S.Ct. 1759. Neither jury was given a constitutional limiting definition of the challenged aggravating factor. Second, in neither case did the State appellate court, in reviewing the propriety of the death sentence purport to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented. 486 U.S., at 364, 100 L.Ed.2d 372, 108 S.Ct. 1853; 446 U.S., at 429, 64 L.Ed.2d 398, 100 S.Ct. 1759. These points were crucial to the conclusion we reached in Maynard. See 486 U.S., at 363 - 364, 100 L.Ed.2d 372, 108 S.Ct. 1853. They are equally crucial to our decision in this case.

[5-8] When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all the facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey. But the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions. If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor. Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in Clemons

> v. Mississippi, 494 US. ___ 108 L.Ed.2d 725, 110 S.Ct. 1441 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.
>
> (emphasis supplied)
> (111 L.Ed.2d at 528)

Florida, like Arizona, and unlike Mississippi and Maryland is a judge-sentencing capital state not a jury sentencing state. Thus, Maynard is inapplicable.

ISSUE VII

WHETHER THE KILLINGS WERE HEINOUS, ATROCIOUS OR CRUEL.

The trial court in its written order found that the crimes were especially heinous, atrocious or cruel:

> " . . . to wit: kidnapping his previously known murder victims at gunpoint from their office; causing them to be driven approximately 2 miles to a recreational park where they were both forced to remove their outer clothing in a secluded area of the park; stabbing the male victim 9 times and then shooting him in the face in front of the female victim; and finally, shooting the female victim in the back of the head after allowing her to put her outer clothing back on and forcing her to be on the ground with her face buried in her arms."

(R 935, 684 - 685)

Appellant argues that single gunshot wounds to the head are not heinous, atrocious or cruel. With respect to victim Swack the evidence shows not only a single gunshot to the head but also nine stab wounds, their character and location indicating a struggle. (R 290) At least one of the stab wounds was lethal (R 286 - 289) and the cause of death was gunshot wound to the head and multiple stab wounds. (R 294) This Court has previously recognized that multiple stab wounds can qualify for a finding of HAC. See Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Nibert v. State, 508 So.2d 1 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Johnston v. State, 497 So.2d 863 (Fla. 1986). Additionally, a HAC finding can be supported for both the Swack killing and the Walker homicide because of the fear and emotional

strain on the victims prior to death. The evidence shows that subsequent to appellant's coercing the $1,500 check at the office, he kidnapped the two victims, took them to a secluded area, forced them to remove their clothes, stabbed Swack nine times and shot, then turned his attention to victim Walker who had witnessed the incident.

See Cooper v. State, 492 So.2d 1059 (Fla. 1986) (victims aware of impending death); Ruff v. State, 495 So.2d 145 (Fla. 1986) (victim aware he was about to be murdered by his son); Jackson v. State, 522 So.2d 802 (Fla. 1988) (victim undoubtedly aware of his impending death); Parker v. State, 476 So.2d 134 (Fla. 1985) (seventeen mile death ride, victim shot execution-style after being stabbed); Kokal v. State, 492 So.2d 1317 (Fla. 1986) (marching victim to execution site, beating and shooting him); Bryan v. State, 533 So.2d 744 (Fla. 1988) (victim kidnapped, held under duress and fear, transported to isolated area, struck in head and killed with shotgun blast to face); Koon v. State, 513 So.2d 1253 (Fla. 1987) (victim marched into swamp at gunpoint and executed).

Appellant argues "that the evidence suggested that Thompson never meant to kill them" and then hypothesizes that "if he did not know that he would kill them, they could not have known either" (Brief, p. 49). First of all, an evaluation of the defendant's mental process may be appropriate for a cold, calculated and premeditation analysis but is of little import in HAC analysis where the focus is upon the suffering of the victim.

Cf. Johnson v. State, 465 So.2d 499 (Fla. 1985); Hitchcock v. State, ___ So.2d ___, 16 F.L.W. S23, 26 (Fla. 1991).

Secondly, we need not accept appellant's vision of an unreflected killing. Thompson, as a former employee of Myrtle Hill Memorial Park, would certainly have known that had he simply left Swack's office with the check obtained at gunpoint, he would soon be apprehended by police; removing them from the scene, transporting them to a secluded site and executing them would take longer for him to be apprehended. In any event the mental terror to the victims is obvious from their being taken from the office, removal to an isolated area, being required to remove their clothing before the killings, the struggle with victim Swack as Walker looked on.

Appellant also argues that the standard of HAC is not sufficiently clear. This Honorable Court has rejected such a claim in Smalley v. State, 546 So.2d 720 (Fla. 1989), Randolph v. State, 562 So.2d 331 (Fla. 1990); Smith v. Dugger, 565 So.2d 1293 (Fla. 1990), Sanchez-Velasco v. State, ___ So.2d ___, 15 F.L.W. S538 (Fla. Case No. 73,143, October 11, 1990).

ISSUE VIII

WHETHER THE TRIAL COURT FAILED TO FILE A PROPER WRITTEN ORDER AND WHETHER THE ORDER VIOLATED DOUBLE JEOPARDY.

Appellee disagrees with appellant's contention herein. While the trial court did consider both the proposed findings submitted by the appellant (R 931 - 933) and that submitted by the state (R 934 - 938), on May 25, 1990, the Court adopted and recited as its findings the sentence of death declared in open court. (R 682 - R 688; R 934 - 938)

Appellant argues that double jeopardy has been violated because the Court earlier had signed a proposed order of life imprisonment. Florida law is clear that a written sentence must comport with the judge's oral pronouncement at sentencing. Zachary v. State, 559 So.2d 105 (Fla. 2d DCA 1990); Rowland v. State, 548 So.2d 812 (Fla. 1st DCA 1989); Wilcher v. State, 524 So.2d 1105 (Fla. 3d DCA 1988); Kord v. State, 508 So.2d 758 (Fla. 4th DCA 1987); Wilkins v. State, 543 So.2d 800 (Fla 5th DCA 1989). And the only oral pronouncement of sentence is that imposing death. (R 686)

Additionally, following a remand order by this Honorable Court, on March 7, 1991, the Honorable Robert H. Bonnano clarified what had previously transpired.

> In an abundance of caution, and for the purpose of having the record reflect that the Court had in fact received the proposed judgment, order and sentence of the defense and had considered same, I filed it with the -- with the clerk and intended to just sign it -- initial it that I had received it

> and considered it. But the Court inadvertently signed it in the -- in the -- and dated it as if I had -- was entering that order, which, of course, I did not.
>
> The entering of the order, judgement [sic] and sentence as to Mr. Thompson was done in open court, and that order was signed in open court contemporaneously with my making my ruling orally on the record. So the record of the transcript of what occurred on May 25th, 1990, is in fact the transcript of what happened as far as sentencing is determined as to Mr. Thompson.
>
> This other order which is signed by the Court on the 24th, that signature was placed there only to indicate that I had in fact received it and considered it, and it was not the entering of -- the Court never intended to enter that order and judgment. (SR 6 - 7)

Indeed, there was no complaint below by appellant that there was any impropriety.

Appellant also argues that there is no final written order in the case and therefore a life sentence must be imposed pursuant to Grossman v. State, 525 So.2d 833 (Fla. 1988). But here, we do not have a final written order lacking; rather, the trial court's acceptance and adoption of the proposed written order submitted by the state became final upon the court's oral imposition of the sentence of death and the filing of the written order.

Next appellant argues that it was improper "arbitration" - like behavior for the trial judge to submit proposed sentencing orders, and that it is not a sufficiently adversarial process. Appellee disagrees. Appellee does not understand how the adversarial nature of the proceedings is changed by allowing the

respective sides to submit proposed orders for the court's consideration and indeed no citation of authority is made condemning the practice; obviously, the trial court is not bound to accept one version in toto over another and if it wants to adopt in whole or in part a submitted order (or reject it in whole or in part) it may do so.

Appellant insists that there must be an independent weighing of the aggravating and mitigating circumstances, a contention to which appellee adds full concurrence. This case is not like Patterson v. State, 513 So.2d 1257 (Fla. 1987) where the trial judge delegated to the prosecutor the duty to draft an order where the court had not articulated at all the specific aggravating and mitigating factors relied upon. The instant case is more like Nibert v. State, 508 So.2d 1 (Fla. 1987), where there was no complaint by the defense; indeed, the instant record suggests satisfaction that the court was giving each side an opportunity to present proposed findings.

Moreover, the proposed order submitted by the prosecutor in the instant case is not merely the application of an advocate; it borrowed extensively from the final judicial order previously signed by Judge Graybill following the first trial (on April 6, 1987) (FR 1509 - 1512), omitting only appellant's age of 36 and the general phrase "any other aspect of his character or record".

The trial court did not err and his order should be affirmed.

ISSUE IX

WHETHER THE TRIAL COURT FAILED TO CONSIDER MENTAL RETARDATION AND OTHER NONSTATUTORY MITIGATION.

Appellant next complains that the lower court's sentencing order failed to take into account his retardation, that he had not had any disciplinary problems and was a loving parent to his three children.[8] With respect to the brief testimony that appellant was the loving father of three children and not a disciplinary problem during his stay in the county jail in 1986, suffice it to say that it is offset by the evidence that Thompson committed a sexual battery on the mother of his three children Carol Lawson following his release from prison for committing an aggravated battery on her brother. (R 504 - 510) His momentary peacefulness in the county jail awaiting his murder trial is insignificant. And we know that the trial court considered this proffered evidence because of the proposed findings submitted to the court. (R 931 - 933)[9]

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[8] Appellant also takes issue with the failure to mention other factors such as his deprived childhood but since these factors were not advanced by appellant in his proposed order (R 931 - 933) they need not be considered and advanced now for the failure to comply with the precepts of Lucas v. State, 568 So.2d 18, 15 F.L.W. S473, 475 (Case No. 70,653, September 20, 1990) that the defense must share the burden of identifying mitigating factors relied on.

[9] Appellant complains also that in the first trial, Judge Graybill found age to be a mitigating factor whereas Judge Bonanno did not in the second trial. The age of thirty-six (now forty-one) cannot be deemed significantly mitigating.

With respect to appellant's mental retardation, appellee submits that the trial judge's order covers it:

> "a. The capital crimes for which the defendant is to be sentenced were committed while he may have been under the influence of extreme mental or emotional disturbance as evidenced by expert testimony in the case."
>
> b. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law may have been substantially impaired as evidenced by expert testimony in the case."

(R 935 - 936)

The judge's acceptance of these mental mitigating factors (provided through the testimony of experts Maher and Berland) satisfies the law. Appellant criticizes the lower court for alleged noncompliance with Campbell v. State, ___ So.2d ___, 15 F.L.W. S342 (June 14, 1990), corrected opinion at 16 F.L.W. S1 (December 13, 1990). As he acknowledges, the trial court's order was signed May 25, 1990, antedating the original Campbell opinion; even the most talented of lawyers and judges cannot with precision predict the contents of changing appellate requirements. Appellee submits respectfully that the lower court did consider and weigh (and find mental mitigating and appropriately concluded that death was the appropriate sanction).[10] Cf. Downs v. State, ___ So.2d ___, 16 F.L.W. S55

[10] In any event, Campbell is not of such significant import to require retroactive application.

(Fla. Case No. 73,988, January 3, 1991) (rejecting attack on the lack of discussion of mitigation in the sentencing order because a review of the order revealed the trial court considered the evidence and conducted the appropriate balance).[11]

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[11] Even if the trial judge had not considered it, affirmance would still be appropriate. In Kight v. State, 512 So.2d 922 (Fla. 1987), the defendant urged on direct appeal that the trial court had erred in failing to find as mitigation his low I.Q. (69) and history of abusive childhood. The Court concluded:

> " . . . we find no error in the trial court's failure to find Kight's low I.Q. and history of abusive childhood as non-statutory mitigating factors. See Mills v. State, 462 So.2d 1075, 1081 (Fla.), cert. denied, 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985) (trial court need not consider low intelligence alone as mitigating circumstance); and Lara v. State, 464 So.2d 1173, 1180 (Fla. 1985) (trial court need not consider history of abusive childhood as mitigating factor where murder was not signficantly influenced by childhood experiences)." (512 So.2d at 933)

ISSUE X

WHETHER EXECUTING THE MENTALLY RETARDED IS CRUEL AND UNUSUAL PUNISHMENT.

Appellant argues that testimony was presented below that his overall I.Q. was seventy and his verbal I.Q. was 66 (R 558), that Dr. Berland and Dr. Maher testified that Thompson was mentally retarded. (R 523, 558) While acknowledging that Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989) defeats his federal constitutional claim he urges reconsideration under Article I, section 17 of the Florida Constitution. He points to polls considered and rejected in Penry, the legislative views of our sister state Georgia (also mentioned in Penry), and the alleged plethora of laws passed by the Florida legislature to protect the retarded. He particularly seeks reliance on *Florida Statute 393.13* and the provision therein that retarded persons should not be subjected to treatment programs involving the use of painful stimuli: *Florida Statute 393.13(4)(g)(1).* Further, he contends that the retribution and deterrence rationale are inapplicable.

On June 26, 1989, the United States Supreme Court decided Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989), holding, inter alia, that the Constitutional prohibition against cruel and unusual punishments is not offended by execution of mentally retarded defendants. In rejecting the defense argument there, the Court noted that only one state (Georgia) explicitly banned executions of retarded persons found guilty of a capital offense. 106 L.Ed.2d at 288. The Court found the evidence insufficient to

demonstrate a national consensus of opposition. The Court also rejected the defendant's reliance on alleged public sentiment reflected in certain public opinion surveys, observing:

> "The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment."
>
> (106 L.Ed.2d at 289)

See also Stanford v. Kentucky, 492 U.S. ___, 106 L.Ed.2d 306 (1989) (rejecting an Eighth Amendment claim for those sentenced to be executed for murders committed at age sixteen or seventeen, finding the use of polls, the views of interest groups and the positions of professional associations too uncertain a foundation for constitutional law). And see Carter v. State, ____ So.2d ____, 14 F.L.W. S25 (Case NO. 71,714, October 19, 1989) (rejecting an argument that appellant's retardation should preclude execution).

Appellant apparently argues that his current contention has been preserved by his argument in the motion in the first trial (FR 1516 - 1518) and at the second trial by renewal of all prior motions. However, in the first trial his argument relied totally on a claim of violation of the federal constitution, an argument that predated and has now been foreclosed by Penry v. Lynaugh, supra.

Appellant's attempt now to change the basis of his argument below (an alleged federal constitutional violation) to that presented on appeal (an alleged state constitutional violation) must be rejected for the reasons stated in Steinhorst v. State, 412 So.2d 32 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Bertolotti v. State, 565 So.2d 1343 (Fla. 1990) and Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987) -- the specific legal ground upon which a claim is based must be presented to the trial court in order for it to be preserved for appeal. See also Hitchcock v. State, ___ So.2d ___, 16 F.L.W. S23, 26 (December 20, 1990).

Even if appellant's argument had been adequately preserved, it should be rejected as meritless.

Appellant attempts to argue, by relying on certain polls and public opinion surveys that a consensus has emerged to prohibit the execution of those with less than average intelligence quotients. But in a recent article in the Florida Bar Journal -- Davis, Executing the Mentally Retarded (February, 1991), pp. 12 - 17, the author observes at footnote 20:

> "The Florida Legislature also considered similar legislation for the first time in the 1990 session, but it did not get out of committee."

The refusal of the Florida Legislature to act on the request to provide immunity -- protection from the electric chair for

mentally-retarded defendants is the best expression -- according to Penry and Stanford -- of the existing societal consensus.[12]

The attempt to transmogrify *Florida Statute 393.13(4)(g)(i)* into an anti-death penalty injunction must fail. Obviously, the concern of the Legislature in that statute is to eliminate unnecessary "medical" cruelty in various treatment programs. The state in no way is making an argument that electrocution pursuant to *Florida Statute 921.141* constitutes medical treatment nor should it serve as a management device in any of our institutions. The effort to combine the two concepts so disparate would likely yield a result as bizarre as the temporary ruling a few years ago that the chemicals used in lethal-injunction capital states were impermissible since not approved for safety by the F.D.A. See Heckler v. Chaney, 470 U.S. 821, 84 L.Ed.2d 714 (1985), reversing Chaney v. Heckler, 718 F.2d 1174 (D.C. Cir. 1983)

As to his attack on deterrence and retribution, appellee will only point out that this argument too was rejected in Penry and need not be revisited again.

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[12] The author also cites a number of decisions including Kight v. State, 512 So.2d 922 (Fla. 1987), where the Court affirmed a death sentence of a defendant with a 69 I.Q.. The author finds Kight distinguishable because he showed "more deliberation and planning than is typical of most mentally retarded persons . . . Kight took several other measures to avoid detection." Florida Bar Journal at 14. Thompson of course is like Kight in that he planned the crime by bringing a gun to the Swack office to obtain his check, then removing the two victims to a secluded area for elimination.

Appellant's suggestion to create a per se rule that all persons below a certain I.Q. score be immune from the sanction of capital punishment -- to give them a license to kill with only life imprisonment as a sanction -- without consideration of their individual capacity and moral culpability for the conduct in question is unwise public policy and should not be adopted.

Moreover, such a per se categorical approach would contravene the long-standing capital jurisprudence that attention should be given to the individualized characteristics of the accused

ISSUE XI

WHETHER THE IMPOSED SENTENCES ARE DISPROPORTIONATE.

The instant death sentences for the brutal double homicides of William Swack and Nancy Walker are not disproportionate. Appellant relies on a number of cases totally inapposite to the facts presented sub judice.[13] In Hitchcock v. State, ___ So.2d ___, 16 F.L.W. S23 (Fla. December 20, 1990), this Court denied relief, rejecting a proportionality argument when defendant improperly attempted to compare his case to inapposite jury override cases, domestic dispute cases or cases with few

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[13] Smalley v. State, 546 So.2d 720 (Fla. 1989) involved one aggravating factor, seven mitigating factors and no intent to kill; without a felony murder theory, it is doubtful that a conviction higher than second degree murder would be obtained. Songer v. State, 544 So.2d 1010 (Fla. 1989) involved one aggravating factor -- an almost total lack of aggravation and almost a dozen factors in mitigation. Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) involved actiosn of a "serious emotioally disturbed man-child, not those of a cold-blooded, hearless killer." Id. at 812. The aggravating circumstances of heinous, atrocious and cruel and cold, calculated and premeditated are "conspicuously absent." Id. at 812. Ferry v. State, 507 So.2d 1373 (Fla. 1987) involved life recommendations on a defendant whom all agreed suffered from paranoid schizophrenia. Similarly, Amazon v. State, 487 So.2d 8 (Fla. 1986) involved a life recommendation and the record failed to satisfy the Tedder standards, as did Brown v. State, 526 So.2d 903 (Fla. 1988), and Thompson v. State, 456 So.2d 903 (Fla. 1988) and Burch v. State, 343 So.2d 831 (Fla. 1977) and Jones v. State, 332 So.2d 615 (Fla. 1976).

In Huckaby v. State, 343 So.2d 29 (Fla. 1977) involved an improper aggravating factor and the trial court ignored "every aspect of the medical testimony," finding no mitigating circumstances when there was almost total agreement on his mental illness and its controlling influence on him.

aggravating and considerable mitigating evidence. 16 F.L.W. at 526.

The instant case is not a jury override case, nor a case in which the trial judge failed to find mental mitigating factors urged by the appellant. Instead, it represents a case where the court considered and found the presence of mental mitigating factors, weighed them, and properly concluded that the facts of the double homicide militated against a determination that life imprisonment was an appropriate sentence.

Here, the trial judge in large measure accepted the proffered testimony of Dr. Michael Scott Maher and Dr. Robert Berland in determining that appellant may have been under extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct may have been substantially impaired. (R 685)

But whatever may be the extent or degree of mental impairment by other defendants in other criminal contexts it is abundantly clear in this case that Thompson's mental problem did not inhibit him from committing a calculated, premeditated double homicide. This case does not exemplify a sudden passion killing or an overreaction to a stressful situation put in the way of the accused. Rather, Thompson went to the victim's office with a gun for the purpose of obtaining money from them; he then kidnapped the two victims and transported them to a secluded location where he shot both of them in the head execution-style (after stabbing Swack nine times).

The truth of the matter is that appellant is an extremely violent man -- witness his prior sexual battery of his girlfriend and stabbing of her brother and despite a lower than average intelligence is fully capable of planning and carrying out a kidnapping removing his victims to a secluded area where he will remain undetected and killing them in cold blood.

Acceptance of appellant's claim would lead invariably to the result that those defendants able to bring forward a "mental health expert"[14] to bemoan the stress visited upon the accused by life's vicissitudes (and we know how frequently and regularly such experts can be made available)[15] would obtain the reward of life imprisonment, irrespective of the viciousness of their murders or the minimal degree that an emotional impediment played in the homicidal episode.

The contention that the killings probably occurred upon reflection of short duration seems contrary to the evidence. After coercing the victims to write him a check for $1500,

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[14] Even the defense "expert" witnesses Maher and Berland were in disagreement; Berland did not believe that Thompson was unable to appreciate the criminality of his conduct or that his capacity was substantially impaired. (R 576).

[15] This Court is aware that Dr. Berland has testified in the past that 98% of his clientele consisted of criminal defendants and that 40% of his practice consisted of first degree murder defendants represented by the Hillsborough County Public Defender's Office. Henry v. State, ____ So.2d ___, 16 F.L.W. S58, S59 (Fla. Case No. 70,554, January 3, 1991).

Thompson kidnapped them and forced them to drive two and a half miles to Williams Park, to walk one hundred and fifty feet beyond the path, ordered them to disrobe, engaged in a struggle with Swack (stabbing him nine times), shooting Swack in the head, ordering Nancy Walker to redress; he then executed her with a gunshot wound to the head as she lay on the ground with her face in her hands.

ISSUE XII

WHETHER FLORIDA'S STANDARD JURY INSTRUCTIONS IMPROPERLY MINIMIZE THE CAPITAL SENTENCING JURY'S ROLE DURING PENALTY PHASE.

There are several reasons why appellant may not prevail. First of all, appellant has not preserved for appellate review any question of the correctness of jury instructions since he did not object below or seek other, more preferable instructions. Instead, he filed pretrial motions challenging the constitutionality of the statute. (R 910 - 925) Appellant may not permissibly change the ground of an objection at the trial court level when he gets to the appellate court. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Bertolotti v. State, 565 So.2d 1343 (Fla. 1990). Appellee requests this Court specifically declare that it is denying relief for procedural reasons. See Harris v. Reed, 489 U.S. ___, 103 L.Ed.2d 308 (1989). Alternatively, as appellant recognizes, this Court has rejected his argument in Combs v. State, 525 So.2d 853 (Fla. 1988). The jury's role was not unconstitutionally diminished and the jury with its 7 to 5 vote did not deem it so.

ISSUE XIII

WHETHER THE REASON FOR THE DEPARTURE WAS INVALID.

In addition to the death sentences imposed (R 942 - 944), the trial court imposed consecutive life sentences for kidnapping and robbery. (R 945 - 946) The trial court explained as the reason for its departure that appellant stood convicted of two counts of first degree murder arising out the same kidnapping criminal episode (R 687 - 688). In Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), this Court held that use of a first degree murder conviction, a capital felony, which cannot be scored as an additional offense at conviction, may serve as a clear and convincing reasons for departure.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Stephen Krosschell, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 7th day of May, 1991.

OF COUNSEL FOR APPELLEE