IN THE SUPREME COURT OF FLORIDA

JEFFREY ATWATER,

Appellant/Cross-Appellee

v. Case No. 76,327

STATE OF FLORIDA,

Appellee/Cross-Appellant.

ANSWER BRIEF OF THE APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

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SUMMARY OF THE ARGUMENT

I. Appellant challenges the sufficiency of the evidence to support the robbery conviction. A review of the evidence, however, shows that Mr. Atwater received money from Mr. Smith on other occasions, that Mr. Smith was afraid of Mr. Atwater, and refused to give him any more money, that Mr. Smith had money on him at the time of the murder, that Mr. Atwater took the money from the person of Mr. Smith, that force or violence was used in the taking and that the taking was done with the intent to deprive. Accordingly, the trial court properly denied the motion as there was competent substantial evidence to establish both intent and a taking.

II. First, the state does not agree that the evidence for robbery was insufficient and in fact, contends that the evidence was clearly sufficient to support the robbery conviction and the felony murder. Further, this claim is procedurally barred as appellant did not present this argument to the trial court below. And, finally, a general verdict is not rendered void by a challenge to the sufficiency of one of the alternate bases of the conviction.

III. The trial court did not err in allowing the prosecutor to exercise a peremptory challenge on prospective juror Ellison. The trial judge specifically confirmed and approved the prosecutor's concerns about Ellison's demeanor and hesitancy, and recognized that the peremptory challenge was "well taken."

IV. The juror's question and the court's response was clearly in the presence of defense counsel and even though he had every opportunity to object, no objection was rendered. Further, the instruction given by the trial court was entirely proper and was a matter within the trial court's discretion. Therefore, error, if any, is harmless.

V. The state did not present and the trial court did not find lack of remorse as an aggravating factor. Evidence of the defendant's statements after the murder were relevant to the circumstances surrounding the murder.

VI. The trial court properly refused defense counsel's request to call Michael Painter as a court witness. Defense counsel failed to demonstrate any adverse, material inconsistencies in Painter's testimony so as to warrant the severe measure of calling Painter as a court witness, where Painter's deposition statements were not contradicted by his in-court testimony.

VII. Appellant contends that even the expanded instruction given by the trial court was insufficient to fully apprise the jury of the nature of the heinous, atrocious or cruel factor. This Court has consistently rejected challenges to the propriety of the heinous, atrocious, or cruel instruction on this basis. Accordingly, the trial court did not err.

VIII. Appellant contends that the trial court erred in finding the aggravating factor of heinous, atrocious, or cruel, contending that there was a reasonable hypothesis that the victim

died instantly and that the forty-plus stab wounds occurred after death. It is the state's contention that this hypothesis is not reasonably supported by the evidence and that the trial court's finding is correct.

IX. Evidence of multiple stab wounds, inflicted after severely beating an elderly victim is sufficient to support the court's finding of heinous, atrocious, or cruel.

X. As the state contended in Issue I, the evidence to support the robbery was clearly sufficient and therefore, the trial court properly instructed the jury on this aggravating circumstance and properly found the existence of this factor.

XI. As the evidence shows preplanning and the defendant's own evidence refuted any claim of justification, the finding of cold, calculated and premeditated was well supported by the evidence and should be upheld by this Court.

XII. The evidence shows that this was a cold, calculated, premeditated murder that was committed in the most heinous fashion. This is the type of defendant for which the death sentence was instituted and the sentence was properly imposed in the instant case.

CROSS-APPEAL. The trial court erred in deleting the instruction to the jury concerning the weighing of aggravating and mitigating circumstances.

ARGUMENT

ISSUE I

WHETHER THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD HAVE INFERRED ROBBERY TO THE EXCLUSION OF ALL OTHER POSSIBLE INFERENCES.

Appellant contends that the trial court erred in denying his motion for judgment of acquittal in that the state failed to introduce competent evidence inconsistent with the two defense theories presented on the issue of robbery. Defense counsel argued to the court below that there was insufficient evidence that Mr. Smith actually had money at the time of the murder. (R 1377) He also argued that Mr. Atwater did not have the intent to rob when he went to the apartment. (R 1378) Appellant now contends that after the homicide he might have pulled out Smith's pockets and taken its contents as an afterthought or that he might have pulled out the pockets after which to make the death look like a robbery, or that he might have left and another person might have entered the room and emptied Smith's pockets. (Brief of Appellant, pages 18 & 19) It is the state's contention that the motion was properly denied as there was sufficient, competent evidence established to rebut any reasonable hypothesis of innocence presented to the court below.

In general, this Court has consistently held that "a court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorably to the opposite party that can be sustained under the law." Taylor

v. State, 583 So.2d 323 (Fla. 1991), citing Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). This Court further noted in Taylor that, "If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury." Id. at 328.

To prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all reasonable hypothesis of innocence is to be decided by the jury. Taylor v. State, citing Cochran v. State, 547 So.2d 928, 930 (Fla. 1989). The jury need not believe the defense's version of the facts for which the state has produced conflicting evidence.

Further, as intent is usually established by circumstantial evidence, our courts have consistently held that trial courts should rarely, if ever, grant a motion for judgment of acquittal based on the state's failure to prove intent. As the court noted in King v. State, 545 So.2d 375 (Fla. 4th DCA 1989):

> "A trial court should rarely, if ever, grant a judgment of acquittal based on the state's failure to prove mental intent. *Brewer v. State*, 43 So.2d 1217 (Fla. 5th DCA 1982). This is because the proof of intent usually consists of the surrounding circumstances of the case. *Id.* Where reasonable persons may differ as to the existence of facts tending to prove ultimate facts, or inferences to be drawn from the facts, the case should be submitted to the jury. *Victor v. State*, 141 Fla. 508, 193 So. 762 (1939). A directed verdict cannot be given if the testimony is

> conflicting, or lends to different reasonable inferences, tending to prove the issues. *Snipes v. State*, 154 Fla. 262, 17 So.2d 93 (1944)."

(545 So.2d at 378)

The evidence in this case shows that Mr. Atwater received money from Mr. Smith on other occasions, that Mr. Smith was afraid of Mr. Atwater, and refused to give him any more money,[1] that Mr. Smith had money on him at the time of the murder, that Mr. Atwater took the money from the person of Mr. Smith, that force or violence was used in the taking and that the taking was done with the intent to deprive. (R 501, 1042, 1047 - 49, 1101, 1234 - 96, 1307) Accordingly, the trial court properly denied the motion as there was competent substantial evidence to establish both intent and a taking.

Appellant's argument now that the taking was a mere afterthought was not presented to the court below, and is not supported by any of the cases cited by appellant. In each of those cases there was clear evidence that the theft occurred as an afterthought. There is no evidence to support the contention in the instant case that the taking was a mere afterthought. Cf. Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986); Parker v. State, 458 So.2d 750 (Fla. 1984). Even where there are conflicts in testimony or the theories of the case, the jury has the

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[1] Appellant challenges the admission of this statement as impermissible hearsay, but concedes that it was admitted without objection. Therefore, this claim was not preserved for appellate review.

prerogative to resolve those conflicts in favor of the state, as it apparently did. Riechmann v. State, 581 So.2d 133 (Fla. 1991). Bedford v. State, 589 So.2d 245 (Fla. 1991) (the circumstantial evidence rule does not require that jury to believe the defense's version of the facts when the state has produced conflicting evidence). Accordingly, as there was substantial, competent evidence to support the jury's verdict, the trial court correctly denied the motion for judgment of acquittal. Holton v. State, 573 So.2d 284 (Fla. 1990).

ISSUE II

WHETHER IT WAS ERRONEOUS TO INSTRUCT THE JURY ON FELONY MURDER AND RECEIVE A GENERAL VERDICT ON MURDER IF THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE UNDERLYING FELONY OF ROBBERY.

Appellant contends that there was insufficient evidence to support the underlying felony of robbery and therefore it was erroneous to instruct the jury on felony murder. He contends that since the jury was instructed both on felony murder and first degree murder that there was no way of knowing if the jury relied on felony murder for which there was insufficient evidence.

First, the state does not agree that the evidence for robbery was insufficient and in fact, contends that the evidence was clearly sufficient to support the robbery conviction and a felony murder conviction. Further, this claim is procedurally barred as appellant did not present this argument to the trial court below. Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987). In Bertolotti, the defendant contended that the state had failed to prove sexual battery and burglary beyond a reasonable doubt and therefore, Bertolotti maintained that counsel should have argued on appeal that the general verdict was void under Stromberg v. California, 283 U.S. 359 (1931), because it might have been based on felony murder with either sexual battery or burglary as the underlying felony. This Court rejected Bertolotti's claim stating that since the issue was not preserved for appellate consideration, that appellate counsel could not

have been ineffective in failing to raise it. Because the "Stromberg issue" was never presented to the trial court, appellate counsel's failure to raise an issue which was not preserved for appellate review and which does not present a fundamental error does not amount to a serious deficiency in performance. Id. at 1097. Defense counsel below made a motion for judgment of acquittal for the robbery and for the felony murder. At no time, however, did defense counsel present the argument now presented to this Court. Accordingly, this issue is procedurally barred.

Furthermore, even if this issue was not procedurally barred, it is without merit. In Griffin v. United States, 502 U.S. ____, 116 L.Ed.2d 371, 112 S.Ct. ____ (1991), the United States Supreme Court rejected an identical argument.

> "Petitioner cites no case, and we are aware of none, in which we have set aside a general verdict because one of the possible basis of conviction was neither unconstitutional as in *Stromberg*, nor even illegal as in *Yates v. United States* [354 U.S. 298 (1957)], but merely unsupported by sufficient evidence. If such invalidation on evidentiary grounds were appropriate, it is hard to see how it could be limited to those alternative basis of conviction that constitute separate legal grounds; merely the underlying principle would apply equally, for example, to an indictment charging murder by shooting or drowning, where the evidence of drowning proves inadequate. See *Schad v. Arizona*, 501 U.S. ___, 115 L.Ed.2d 555, 111 S.Ct. 2491. But petitioner's requested extension is not merely unprecedented and extreme; it also contradicts another case, postdating *Yates*, that in our view must govern here.

> *Turner v. United States*, 396 U.S. 398, 24 L.Ed.2d 610, 90 S.Ct. 642 (1970), involved a claim that the evidence was insufficient to support a general guilty verdict under a one count indictment charging the defendant with knowingly purchasing, possessing, dispensing, and distributing heroin not in or from the original stamp package, in violation of 26 U.S.C. §4704(a) (1964 Ed.). We held that the conviction would have to be sustained if there were sufficient evidence of distribution *alone*. We set forth as the prevailing rule: "When a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged."

Griffin v. United States, 116 L.Ed.2d 371, at 380 - 81. (emphasis added).

The Court noted that while jurors are not generally equipped to determine whether a particular theory of conviction is contrary to the law, they are well equipped to determine whether the theory is supported by the facts. And although, it would generally be preferable to give an instruction removing from the jury's consideration an alternative basis of liability that does not have adequate evidentiary support, the refusal to do so does not provide an independent basis for reversing an otherwise valid conviction.

Likewise, this Court has also consistently rejected similar arguments. Tefteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984); Knight v. State, 394 So.2d 997 (Fla. 1991).

Accordingly, the state urges this Court to find that this claim is procedurally barred. If, however, this Court should find that the motion for judgement of acquittal was sufficient to preserve the issue, then the state urges this Court to find that a general verdict is not rendered void by a challenge to the sufficiency of one of the alternate grounds for the conviction.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO EXERCISE A PEREMPTORY CHALLENGE.

The appellant also challenges the trial court's ruling permitting the state to exercise a peremptory challenge on the only black person in the jury venire. However, a review of the record presented and relevant case law demonstrates that the trial court properly found the state's use of this peremptory challenge to be appropriate, and therefore the appellant is not entitled to relief.

In addition, although the appellant now argues that the reason given by the prosecutor was applicable to white jurors who were not challenged, this argument was never presented to the trial court for consideration. Although the appellant objected to excusing Ellison, defense counsel did not suggest that the reason offered by the prosecutor was equally applicable to unchallenged white jurors. Therefore, this argument has not been preserved for appellate review. Floyd v. State, 569 So.2d 1225 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991); McNair v. State, 579 So.2d 264 (Fla. 2d DCA 1991). Similarly, the appellant's argument that the trial court's allowance of this peremptory challenge resulted in a jury which was not representative of the community and therefore violated the legislative intent of Section 921.141, Florida Statutes, and the dictates of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) was never suggested to

the trial court, so this specific contention has not been preserved for appellate review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

The court below followed the mandate of State v. Slappy, 522 So.2d 18 (Fla.), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), and required the prosecutor to explain the peremptory challenge (R. 851). However, the court specifically found that the state's reason to excuse Ellison was not a pretext, as the court had also observed Ellison's difficulty with the questions and hesitant demeanor (R. 852). This finding is entitled to great deference, since the prospective jurors' demeanor and attitude was much more evident to the parties below than can be gleaned from the cold record on appeal. McNair, supra. Broad discretion is given to the judge's finding that the state's reason was race-neutral, since the judge was present and able to discern the nuances of the spoken words and the demeanor of those involved. Reed v. State, 560 So.2d 203 (Fla.), cert. denied, ___ U.S. ___, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990). Since the instant record supports the trial court's ruling that the peremptory challenge was "well taken," that ruling should not be disturbed on appeal (R. 852).

Thus, the appellant's cognizable argument that the record does not support the prosecutor's reason does not demonstrate that he is entitled to relief. The trial court specifically confirmed Ellison's hesitant demeanor, despite the appellant's best effort on appeal to argue that the cold transcript does not

reflect that Ellison lowered her voice (R. 852). A reviewing court is not authorized to conduct a *de novo* review of the entire voir dire proceedings. Files v. State, 586 So.2d 352 (Fla. 1st DCA 1991). Given the trial court's clear recognition of the prosecutor's concerns about Ellison's demeanor and difficulty in answering the questions, the reason for the challenge is amply supported by the record. See, Wright v. State, 586 So.2d 1024 (Fla. 1991); Tillman v. State, 522 So.2d 14 (Fla. 1988).

The appellant has failed to demonstrate any error in the trial court's allowing the state to peremptorily excuse prospective juror Ellison. Therefore, he is not entitled to a new trial on this issue.

ISSUE IV

WHETHER FUNDAMENTAL ERROR OCCURRED WHEN THE TRIAL JUDGE TOLD THE JURY THAT HE COULD NOT ANSWER A JUROR'S QUESTION ABOUT THE LAW OR PROVIDE ADDITIONAL INSTRUCTIONS.

After receiving instructions at the close of the guilt phase, in the presence of the defendant, defense counsel and the prosecutor, a juror told the court that he had a question that has to do with the interpretation of the law. In the presence of all the parties and without objection by either party, the trial court told the juror that,

> "All right. Let me ask and I'll tell you that I can tell you nothing more than I have given in these particular instructions, so if you will read the instructions again, if you have difficulty in understanding them, these are the only instructions I can give you, so I would hope that you will read the instructions very fully and completely and in consultation with you fellow jurors, I think that you can come, hopefully, to a conclusion that's necessary for you to deliberate here.
>
> If you have some other question, though, if you go back into the jury room and as a group wish to have that question asked, then you may come back in, letting the bailiff know that you need to address the court with a question. All right, sir?" (R 1489)

Appellant contends that this colloquy between the court and the jury constituted fundamental error. He contends that the court's message was that the juror should not ask the judge any questions about the law because he could not answer them and that the court's comment that the jurors could ask any other question necessarily led to a belief that to a reasonable understanding that these "other questions" were limited to nonlegal questions

about matters not dealing with the law. He also contends that although the question and answer were in the presence of counsel and without objection by counsel, that the court's sua sponte instruction was erroneous under *Criminal Rule of Procedure 3.410*, in that defense counsel was not given the opportunity to be heard. Neither position is supported by the facts or the law.

First, while it is true that the court did not ask counsel his opinion before responding to the jurors instructions, it is also clear that defense counsel did not voice an objection to the instruction before or after the instruction was given. In Colbert v. State, 569 So.2d 433 (Fla. 1990), this Honorable Court reviewed the per se error rule announced in Ivory v. State, 351 So.2d 26, 28 (Fla. 1977), where this Court held that it was prejudicial error for a trial judge to respond to a request covered under *Rule 3.410* without counsel being present and having the opportunity to participate in discussion of the action to be taken on the jury's request. The court noted that this per se reversible error rule evolved as a prophylactic procedure to ensure that a trial judge's response to a jury request for additional instructions or to have testimony read is made in the presence of counsel. Noting that without this participation process, it is impossible to determine whether prejudice has occurred during one of the most sensitive stages of the trial, this Court held that the particular evil *Rule 3.410* and the per se error standard of Ivory were designed to prevent is the lack of notice to counsel, coupled with the lost opportunity for counsel

to argue and to place objections on the record. This Court affirmed Colbert because, unlike Ivory and its progeny, the notice requirement of *Rule 3.410* was effectively satisfied where counsel had notice, an opportunity to argue, and to object, both before and after the instructions were given. This was true even though the trial judge in Colbert gave an instruction to the jury without telling counsel the content of the instruction beforehand.

Similarly, in Mills v. State, 17 F.L.W. D798 (Fla. 4th DCA 1992), the District Court held that the harmless error rule applies where defense counsel and the defendant has notice of a jury question, even when the trial judge fails to give defense counsel the opportunity to be heard as to the appropriate response. In Mills, the trial judge notified both counsels that the jury had a question and in the defendant's presence, defense counsel asked what the question was so that it could be discussed. The trial court refused to tell defense counsel the question and told him there was no need to talk about it. The jury was then brought into the courtroom. The jury requested that the court clarify or provide a copy of the law on armed trafficking. The trial judge told the jury that he could not do that, but that he would reread the instruction on trafficking. Defense counsel then objected to the instruction. Nevertheless, the court held that the court's failure to tell him the question before responding was subject to the harmless error rule.

After conducting a harmless error analysis, the appellate court in Mills held that there was no error in the reinstructions given and that the scope of reinstruction of a jury is within the discretion of the trial court. Id. citing Garcia v. State, 492 So.2d 360 (Fla.), cert. denied, 479 U.S. 1022 (1986).

In the instant case the question was clearly in the presence of defense counsel and even though he had every opportunity to object, no objection was rendered. Further, the instruction given by the trial court was entirely proper and was a matter within the trial court's discretion. Kirkland v. State, 557 So.2d 130 (Fla. 3d DCA 1990) (no error where the trial court told the jury to reread the written jury instruction on robbery included in the packet of jury instructions previously given to the jury.) See also Chapel v. State, 423 So.2d 984 (Fla. 3d DCA 1982) Payne v. State, 395 So.2d 284 (Fla. 3d DCA 1981); Falk v. State, 296 So.2d 614 (Fla. 1st DCA 1974). The instruction in no way implied that the trial court would not answer further questions and in fact to the contrary, the court made it clear that if after retiring, the jury had further questions that they were allowed to ask them and they would be answered by the court. Accordingly, as counsel did not object to the instruction given and as the instruction was entirely proper, appellant has failed to show harmful error.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY ALLOWING EVIDENCE OF DEFENDANT'S LACK OF REMORSE AND WHETHER THE LACK OF REMORSE WAS CONSIDERED IN THE SENTENCING ORDER.

Appellant contends that the state was allowed to present evidence and argument on the defendant's lack of remorse and that the court relied on the evidence in sentencing appellant to death. It is the state's contention that evidence of lack of remorse as an aggravating factor was not presented by the state or relied on by the court. Further, the state contends that appellant is once again attempting to raise an issue that was not presented to the court below.

The only remotely arguable objection that was made on the issue of remorse was during the prosecutor's cross-examination of defense witness Dr. Sidney Merin. On direct examination, Dr. Merin had discussed Jeffrey Atwater's antisocial personality disorder and the effect that it had on him and his actions. On cross-examination the prosecutor asked:

> "Q. And generally these types of people with antisocial personality disorder, they would have no remorse about their effects on other people.
>
> MR. SCHWARTZBERG: Objection, Your Honor.
>
> THE COURT: Overruled. You can answer that question, sir."

This objection was neither specific nor did it provide the trial court with a basis for an understanding of the nature of the objection. Accordingly, it was insufficient to preserve any

alleged error for appeal. In order to preserve an issue for appellate review, the specific legal argument or ground upon which the objection is based must be presented to the trial court. Bertolotti v. Dugger, supra; Tillman v. State, 471 So.2d 32 (Fla. 1985). Even though this was the only reference to remorse and the only objection to such evidence, appellant contends that since the trial court denied this objection with regard to the questioning of Dr. Merin it was not incumbent upon counsel to object to any further comments by the prosecutor. To support this position, he relies on Colina v. State, 570 So.2d 929 (Fla. 1990). In Colina, this Court reiterated the position that lack of remorse should have no place in the consideration of aggravating factors. This Court also rejected the state's argument that Colina's counsel failed to object and that errors if any were harmless. The Court found that defense counsel did object to the introduction of the evidence. This court further noted, that the prosecutor clearly and expressly indicated its intent to present lack of remorse evidence to the jury. Colina, is readily distinguishable.

In the instant case, lack of remorse evidence was not presented to the jury. This question of Dr. Merin is the only evidence that remotely has to do with remorse and it was not argued with regard to any aggravating factor. The comments that the prosecutor made in closing argument referring to the statement made by the defendant that he killed the victim, that he enjoyed it and that if the victim was alive he would do it

again, was not only not objected to, it was clearly relevant to the factor of cold, calculated and premeditated. It was the defense's position that the defendant killed Kenny Smith in a fit of rage and anger out of some feeling of justification in protecting his aunt. Therefore, it was incumbent on the state to rebut this claim. Cf. Cheshire v. State, 568 So.2d 908 (Fla. 1990). (Since the evidence at hand is entirely consistent with a quick murder committed in the heat of passion, we believe the state has failed to prove beyond a reasonable doubt that the factor of heinous, atrocious or cruel existed.) These statements by the defendant were relevant to refute this claim. The fact that the defendant stated that he enjoyed killing Kenny and that he would do it again if he was alive shows that the crime was indeed cold and calculated and rebutted his claim that it was committed in the heat of passion.

Atwater also challenges for the first time the prosecutor's statement in the sentencing memorandum with reference to the existence of remorse. A review of the memorandum shows that the prosecutor was specifically referring to nonstatutory mitigating factors 'such as the existence of remorse.' At no time did the prosecutor argue to the court that it should find lack of remorse as an aggravating factor.

Atwater also challenges the trial court's finding that the defendant's statements immediately after the homicide clearly illustrate the cruel, pitiless, consciousless nature of this killing. (R 17) The statement is relevant to the finding of

heinous, atrocious and cruel, but even if this honorable court should find that it is not, the reference is harmless. In Rutherford v. State, 545 So.2d 853 (Fla. 1989), the trial court's order stated:

> "The Court finds that this crime was especially heinous, atrocious and cruel. The evidence in this case showed that the victim had a dislocated arm, leading the Court to the conclusion that the defendant dislocated the victim's arm in the course of the robbery. Additionally, the victim had a number of gashes on her head where she had obviously had her head struck by an object or had her head bashed against an object causing severe injuries to the victim. Additionally, the victim was placed in the bathtub where she was submerged under water. Her death was attributed to asphyxiation, but the pathologist could not rule out the effects of the blows as a cause of death.
>
> While the Court cannot use the attitude of the defendant and his lack of remorse as an aggravating circumstance, the Court does find that the defendant's lack of remorse adds weight to the Court's determination that the crime was especially heinous, atrocious and cruel. *Sireci v. State*, 399 So.2d 964 (Fla. 1981).

This Court held that where a sentencing order made clear that the judge knew the defendant's lack of remorse could not be considered as an aggravating circumstance, that the comment was merely a gratuitous statement which did not affect the finding already made by the judge that the crime was especially heinous, atrocious and cruel.

In the instant case, the trial judge made no such reference to remorse, but rather made a reference to the statement as it supported that portion of the definition for heinous, atrocious,

or cruel as set forth in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), wherein this Court stated:

> "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree or pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the consciousless or pitiless crime which is unnecessarily torturous to the victim." Id. at 9 (emphasis added)

The defendant's statement that he enjoyed the killing so much that he wished he could do it again clearly exhibits an enjoyment of the suffering of others and the consciousless or pitiless crime which was unnecessarily torturous to the victim.

Appellant argues that this Court has held in Pope v. State, 441 So.2d 1073 (Fla. 1983), that events occurring after death, no matter how revealing of depravity and cruelty, are not relevant to the atrocity of the homicide. Clearly these statements, even though made after the murder, are relevant to establish the nature of the murder, not to establish events occurring after the death. The evidence was not considered by the court in support of an improper aggravating circumstance of lack of remorse, but rather as evidence of the defendant's intent and his actions in the course of the murder.

Accordingly, the state urges this Court to find that evidence of lack of remorse was neither objected to nor was it

considered by the court. The statements by the defendant were otherwise relevant and admissible and properly considered in reviewing the circumstances of the crime. Furthermore, even if this statement by the defendant was erroneously considered, it is clearly harmless in the instant case. It is beyond a reasonable doubt that death would have been imposed even absent this statement by the defendant and therefore, the admission of the evidence was harmless.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S REQUEST TO CALL MICHAEL PAINTER AS A COURT WITNESS.

The appellant also challenges the denial of his request to call Michael Painter as a court witness during Painter's testimony at the penalty phase of the trial. Following Painter's testimony, defense counsel asked the court to call Painter as a court witness so that defense counsel could impeach Painter with one question from his pretrial deposition (R 1621). The court reviewed the deposition and ruled that the trial testimony had not been contradictory to the statements in the deposition, and denied the request to call Painter as a court witness (R. 1622). A review of the record supports this ruling by the court, and therefore it should not be disturbed on appeal.

The appellant challenges the trial court's ruling on four separate grounds. Interestingly, none of the four grounds address the reason that the trial court denied the request to call Painter as a court witness -- that the testimony did not contradict the deposition (R. 1622). Instead, the appellant focuses on four new arguments which not only assume that the in-court testimony was in fact contradictory to the deposition, but also were never argued to the trial court, and therefore have not been preserved for appellate review. Steinhorst, supra. In addition, defense counsel's failure to proffer any attempted impeachment of Painter precludes this Court from review, since it is not clear from the record that defense counsel would have been

able to lay the proper predicate to impeach Painter by the statements in his deposition. §90.104(1)(b), Fla. Stat.; Ketrow v. State, 414 So.2d 298 (Fla. 2d DCA 1982); Nava v. State, 450 So.2d 606 (Fla. 4th DCA 1984), cause dismissed, 508 So.2d 14 (Fla. 1987).

During the penalty phase, defense counsel called Painter to describe the appellant's demeanor and relationship with Adele and Smith (R. 1608-1614). On redirect, defense counsel asked if Painter was in a position to see the relationships between Smith, Adele and the appellant, and Painter responded that he really was not, but that he had observed Adele and Kenny because he visited them (R. 1619). Defense counsel then asked if Painter didn't sense "these relationships" starting to boil, to which Painter responded "Oh, no. There was -- you know, they got along good just like they always did. You know, just the little spats between Kenny and Adele." (R. 1620). It is apparent that this response pertained to the relationship between Kenny and Adele and not the appellant, since Painter testified consistently that Kenny and the appellant never got along (R. 1316-1319, 1326, 1609, 1620-1621). Defense counsel even recognized that Painter understood the question to pertain to the relationship between Kenny and Adele, because he immediately clarified, "I mean, between everybody, the whole group of them." (R. 1619). Thus, the appellant's assertion that Painter's response was that the *three* of them were getting along well is misleading and not supported by the record (Appellant's Initial Brief, p. 81, 82).

The appellant's brief is simply attempting to create conflict which did not exist in the original testimony. When asked about the whole group, Painter responded that the relationships were "Always about the same thing" which, according to Painter's prior statements, was that Kenny and the appellant did not get along (R. 1316-1319, 1326, 1609, 1619-1621).

It is clear that when Painter's testimony is reviewed in context, Painter did not contradict his earlier deposition and therefore his deposition statements would not be admissible to impeach him, regardless of whether he was called as a court witness or the attempted impeachment was by the party that called him as a witness. Of course, defense counsel never requested the opportunity to impeach his own witness, he merely requested that the court call Painter as a court witness. The calling of a witness as a court witness is a severe sanction, which is only available when a party is unable to vouch for its witness's credibility, yet the witness's testimony is so important that the interests of justice demand a vehicle to present the evidence to the jury. §90.615, Fla. Stat.; Shere v. State, 579 So.2d 86 (Fla. 1991); State v. Smith, 573 So.2d 306 (Fla. 1990). It is a very narrow exception to the rules generally governing witness interrogation, and this Court has previously held that it should only be applied to witnesses that were actually eyewitnesses to the crime being tried. Shere, 579 So.2d at 92; Jackson v. State, 498 So.2d 906, 909 (Fla. 1986). Of course, Painter was not an eyewitness to the murder in this case.

The appellant has failed to demonstrate any error in the trial court's denial of his request to call Painter as a court witness. Therefore, he is not entitled to be resentenced on this issue.

ISSUE VII

WHETHER THE COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE APPELLATE DEFINITION OF THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

Prior to the penalty phase, defense counsel requested a special instruction on heinous, atrocious, or cruel. The instruction requested by counsel was the complete definition as set forth by this Court in State v. Dixon, 283 So.2d 1 (Fla. 1973). The court below did give part of the requested instruction telling the jury:

> "Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile, and cruel means design [sic] to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others."
>
> (R1814)

Now appellant contends that even this expanded instruction is insufficient to fully apprise the jury of the nature of the heinous, atrocious or cruel factor. This Court has consistently rejected challenges to the propriety of the heinous, atrocious, or cruel instruction. Smalley v. State, 546 So.2d 720 (Fla. 1989); Freeman v. State, 563 So.2d 73 (Fla. 1990); Brown v. State, 565 So.2d 304 (Fla. 1990).

Nevertheless, appellant argues that since this Court has subsequently approved a change to the standard jury instructions, that somehow retroactively, this Court has now decided that this instruction was erroneous. This position has no support in the law. In fact, the law is quite clear that the standard

instruction was correct and that the trial court should be able to rely on same. Smalley, supra; Perkins v. State, 463 So.2d 48 (Fla. 2d DCA 1985). Accordingly, the instruction as given was not error.

ISSUE VIII

WHETHER THE TRIAL COURT CORRECTLY FOUND THE MURDER TO BE HEINOUS, ATROCIOUS, OR CRUEL.

Appellant contends that the trial court erred in finding the aggravating factor of heinous, atrocious, or cruel, contending that there was a reasonable hypothesis that the victim died instantly and that the forty-plus stab wounds occurred after death. It is the state's contention that this hypothesis is not reasonably supported by the evidence and that the trial court's finding is correct.

The trial court's order states:

> "The jury was informed that 'heinous means extremely wicked or shockingly evil, that atrocious means outrageously wicked and vile, and that cruel means designed to inflict a huge degree of pain with utter indifference to, or even enjoyment of, the suffering of others', which definitions were set forth in Dixon v. State, 283 So.2d 1 (Fla. 1973). It was argued to the jury and the court by the prosecution that this factor existed. The court has carefully reviewed the evidence and finds, in fact, that this factor does exist beyond a reasonable doubt. In reaching that conclusion, the court has considered evidence that the defendant killed his sixty-four (64) year old victim by inflicting nine (9) stab wounds to the back, eleven (11) incised wounds to the face, six (6) incised wounds to the neck, one (1) incised wounds to the left ear, one (1) incised wound to the right shoulder, one (1) incised wound to the right thumb, nine (9) stab wounds to the chest area including heart and lungs, two (2) superficial puncture wounds to the abdomen, a scalp laceration on the back of the head as a result of blunt trauma, multiple abrasions and contusions about the body, blunt trauma resulting from fractured thyroid cartilage, and blunt trauma to the chest causing multiple rib fractures. The medical

> examiner, Dr. Corcoran, testified that these injuries occurred while Kenny Smith was alive, and that death or unconsciousness would not have occurred until one to two minutes after the most serious, life threatening wounds to the heart were inflicted. It was also Dr. Corcoran's opinion that the order of infliction of these injuries would have been from the less severe to the more severe. The defendant's statements immediately after the homicide clearly illustrate the cruel, pitiless, consciousless nature of this killing when he told Janet Corderre that he wished Kenny Smith was alive again so he could kill him again because he enjoyed it so much." (R 709 - 710)

This Court has consistently upheld findings of heinous, atrocious, or cruel where the evidence shows the victim was repeatedly stabbed. See Haliburton v. State, 561 So.2d 248 (Fla. 1990); Nibert v. State, 508 So.2d 1 (Fla. 1987); Johnson v. State, 497 So.2d 863 (Fla. 1896); Wright v. State, 473 So.2d 1277 (Fla. 1985); Lusk v. State, 446 So.2d 1038 (Fla. 1984). The facts of this case are particularly close to those in Floyd v. State, 569 So.2d 1225 (Fla. 1990) where this Court upheld the finding of heinous, atrocious, or cruel based upon the following evidence:

> "To the support the contention that this murder was heinous, atrocious, or cruel, the state presented the medical examiner's testimony describing the twelve stab wounds Anderson received to the abdomen, the chest, and to her left wrist. Although the medical examiner could not establish a sequence of those wounds, the wound to the chest was fatal 'within a matter of minutes at the most,' whereas the other wounds to her abdomen were 'potentially fatal, [from which she] would take a longer time to die'. The jury also heard that Anderson received a

bruise to her nose that was consistent with a fight or struggle." Id. at 1232.

Similarly, in the instant case, the evidence shows that the victim was beaten first and as he laid huddled, he was stabbed in the back. (R 1239, 1255) He was then rolled over and stabbed repeatedly in the chest. (R 1248, 1256, 1272, 1293, 1296) Dr. Corcoran testified that the stab wounds were most likely inflicted in the order of increasing severity and that the fatal wounds to the heart were probably inflicted last. (R 1249, 50, 1259) He based this conclusion on the direction of the stab wounds, the fact that all of the wounds were inflicted while the victim was alive and his experience. (R 1247, 1249 - 50, 1259) Further, even if the wounds were not inflicted in the order of increasing severity, the testimony of the expert that the stab wounds to the heart would not have killed the victim for one or two minutes, when coupled with the evidence of the beating prior to the stabbing, is sufficient to support this factor. Accordingly, the trial court did not err in its finding.

ISSUE IX

WHETHER THE TRIAL COURT (1) ERRONEOUSLY INSTRUCTED THE JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED DURING A ROBBERY AND (2) PROPERLY FOUND THIS CIRCUMSTANCE TO EXIST.

As discussed in Issue I of this brief, appellant alleged that the state failed to present sufficient evidence of a robbery. Based on this contention, appellant now contends that the trial court should not have instructed the jury on the aggravating circumstance of "committed during the course of a robbery". He also contends that the trial court erroneously found the aggravating factor to exist. As the state contended in Issue I, the evidence to support the robbery was clearly sufficient and therefore, the trial court properly instructed the jury on this aggravating circumstance and properly found the existence of this factor.

ISSUE X

WHETHER THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING FACTOR OF COLD, CALCULATED AND PREMEDITATED.

Appellant contends that the killing was done in anger and passion in response to the victim's treatment of Atwater's aunt and therefore was done with a pretense of justification and was not cold, calculated and premeditated. It is the state's contention that the evidence clearly supports a finding of cold, calculated and premeditated without any pretense of legal or moral justification. In support of this finding, the trial court stated

> "The evidence is clear that there was preplanning, reflection or calculation by the defendant in this killing in that there were repeated statements of his intent to kill the victim ('not going to be too long before it happens') to Mike Painter observations of the defendant attempting to locate the victim on each of the three (3) days before and including the day of the murder; by the calculated and deceptive plan of the defendant to gain entrance into the victim's apartment building without any advance warning to the victim; by the defendant leaving the apartment in a calm and deliberate manner following the murder, as testified to by Mary Sheraton; and evidence that would reasonably infer that the defendant brought the murder weapon with him into the apartment.
>
> The defendant's statements to his own family immediately after the killing emphasized the cold and calculated nature of the killing. The defendant stated that 'he made sure that the bastard was dead' by cutting his throat, with the defendant moving his forefinger across his throat for effect. The defendant went so far as to say that wished the victim was alive again so he could kill him again because the enjoyment the act gave him.

> Mitigating against the finding of this factor is the assertion of the defense through its cross examination that the defendant may have held some pretense of moral justification in that he may have perceived that the victim was abusive towards the defendant's aunt. However, there was no testimony by anyone which could have reasonably resulted in any such belief, and in fact there was direct testimony that no such abuse ever existed."

This is a factual finding by the trial court that is well supported by the evidence of this case.

This Court has consistently upheld the finding of cold, calculated and premeditated where the evidence shows preplanning. Hamblen v. State, 527 So.2d 800 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Koon v. State, 513 So.2d 1253 (Fla. 1987), cert. denied, 485 U.S. 943 (1988). In Porter v. State, 564 So.2d 1060 (Fla. 1990), the Court upheld the finding of cold, calculated and premeditated under circumstances similar to those established in the instant case. Upon reviewing the finding, this Court stated:

> "This is not a case involving a sudden fit of rage. Porter previously had threatened to kill Williams and her daughter. He watched Williams' house for two days just before the murders. Apparently he stole a gun from a friend to kill Williams. Then he told another friend that she would be reading about him in the newspaper. While Porter's motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance. Id. at 164.

Similarly, in the instant case , as the trial court found, Atwater had previously threatened to kill Kenny Smith, he watched Kenny Smith's house for three days prior to the murder, and he

brought a weapon with him to Kenny Smith's. And, finally, his statements to his family after the murder to the effect that he enjoyed the killing and that he "slit the bastard's throat " to make sure that he was dead demonstrates the cold and calculated nature of the killing. Based on the foregoing, the trial court correctly found the factor of cold, calculated and premeditated to exist.

Appellant contends nevertheless, that there was some pretense of justification, in that he felt like he was defending his aunt against her abusive boyfriend. There was no evidence to support this claim. To the contrary the evidence clearly refuted this claim. Both Adele and Janet Corderre, as well as Michael Painter, testified that Smith was not abusive towards Adele. (R 1324, 1325, 1345, 1351, 1362, 1373, 1614) Adele also testified that a few days before the murder she told Atwater that she and Smith had made up and that Atwater told her he was glad because he knew Kenny made her happy. (R 1363)

Further, the defense urges that Atwater was upset about Adele falling when Smith was trying to get "romantic." (R 1316 - 17, 1325) This conflicts with Atwater's own version of the murder. The defendant's own expert, Dr. Sidney Merin, testified that the defendant told him that he had found out his aunt had been lying to him about his own mother and other relatives and that this put a strain on his trusting his aunt. Atwater told Dr. Merin that on August 11, 1989, while walking past the John Knox Apartments, he began to feel guilty about having mistreated

Ken on their prior contact at Adele's home. Atwater told him he wanted to see Ken and he wanted to find out Ken's side of the story, so he could develop his own opinion as to what had actually gone on. Atwater also told Dr. Merin that he had always gotten along with Ken before.

Atwater said he entered the apartment, signed the guest register, and talked to the desk clerk. He identified Ken as being his grandfather and that he wished to see his grandfather. Atwater told Dr. Merin that while Ken lived with his aunt, Atwater would refer to Ken as his grandfather. The woman at the desk asked Atwater if he wished for her to call Ken upstairs and let him know he was on his way, but Mr. Atwater said no he didn't want that, he wanted to surprise his grandfather. He said he went up the elevator and when he got to the sixth floor, knocked on the door and there was no response. He said when he opened the door he observed Ken lying on the living room floor. He walked in, closed the door and saw blood all around Ken's head and chest. He then squatted down beside Ken and placed his hand on the juggler vein in order to feel for a pulse. Atwater told Dr. Merin that that is when he got blood on his hands and wiped it off on his pants. (R 164 - 165) Atwater said that because he was intoxicated and because this was the first dead body he had ever seen, he left. At no time did he tell Dr. Merin that he had gone up there to defend his aunt, but rather he had gone up there because he felt like his aunt was misleading him and he wanted to know the truth.

As the defendant's own evidence refuted any claim of justification, the trial court correctly found that it did not exist. The finding of cold, calculated and premeditated was well supported by the evidence and should be upheld by this Court.

It is the state's position, however, that should this Honorable Court find any of the aggravating factors to be insufficient, such a striking of an aggravating factor is harmless in the instant case as the sentence of death was properly imposed. Sochor v. Florida, 6 F.L.W. Fed. S323 (1992).

ISSUE XI

WHETHER THE SENTENCING ORDER SUFFICIENTLY ADDRESSED NONSTATUTORY MITIGATING FACTORS.

Appellant contends that the order filed by the trial court failed to comply with the dictates of this Court in Campbell v. State, 571 So.2d 415 (Fla. 1990) in that the trial court failed to say what nonstatutory mitigating circumstances were found or how much weight they had. It is the state's contention that Campbell v. State, supra, does not apply to the instant case in that Campbell did not become final until rehearing was denied in December of 1990. Gilliam v. State, 582 So.2d 610 (Fla. 1991).

Furthermore, a review of the order as set forth by the trial court clearly demonstrates what mitigating factors were found and was sufficient to comply with the dictates of Campbell, supra. The Court's Order reflects that all of the court considered the evidence presented even though it did not rise to the level of a statutory mitigating factor. For example, the court stated in reference to the mitigating factor of "extreme emotional or mental disturbance":

> "The court, however, carefully considered the testimony of Dr. Merin to see if the defendant's mental condition contributed to his behavior so as to qualify as a nonstatutory mitigating factor. There was evidence presented through Dr. Merin tending to show antisocial character of the defendant, and the court has considered that testimony. The court has also specifically considered the testimony relating to alcohol consumption by the defendant on the day of the murder, and though considering same, does not find the defendant to have been intoxicated or significantly impaired

> therefrom according to the totality of the testimony. Nonetheless, the court has considered and weighed all of the aforementioned evidence." (R 713) (emphasis added)

Additionally, the court noted with regard to the mitigating factor of "conforming conduct to the requirements of the law", that though not reaching the level of a statutory mitigating factor, the court did consider the testimony of Dr. Merin as it related to the defendant's impaired capacity and considered Dr. Merin's opinion that the defendant's style of life and actions contravening the laws and rules of civilized society were consciously chosen by the defendant and not the result of an inability to conform. (R 714) And, finally, in reference to nonstatutory mitigating evidence , the court reiterated all of the evidence it had considered with regard to nonstatutory mitigating and in its findings thereon. The court concluded with an analysis of the weighing and found that the aggravating circumstances greatly outweighed the mitigating circumstances. Based on the foregoing, it is clear that when read in its entirety, the trial court's order clearly reviewed all of the mitigating evidence presented and made appropriate findings thereon. Accordingly, no error was committed and the sentence of death should be upheld.

ISSUE XII

WHETHER THE DEATH SENTENCE WAS PROPORTIONATE.

Atwater argues that death was not the appropriate sentence because he had two mitigating circumstances and balanced against three aggravating circumstances of which he is challenging the sufficiency of each. Appellant recognizes that the number of aggravating and mitigating circumstances does not dispose of this case. He contends nevertheless that since this case involved fear that a man was taking the defendant's surrogate mother away and anger over his mistreatment of her, it is tantamount to a domestic dispute where this Court has frequently held that death is not the appropriate sentence.

This Court has consistently held that because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. As this Court found in Porter v. State, supra, the sentence of death may be appropriate even where a love triangle is concerned. In the instant case, however, there is no evidence to support any argument that this was a domestic situation. To the contrary the evidence shows that this was a cold, calculated, premeditated murder that was committed in the most heinous fashion.-

This is the type of defendant for which the death sentence was instituted and the sentence was properly imposed in the instant case. State v. Dixon, 283 So.2d 1 (Fla. 1973).

CROSS APPEAL

WHETHER THE TRIAL COURT ERRED IN AMENDING THE STANDARD JURY INSTRUCTION BY DELETING THAT PORTION OF THE INSTRUCTION CONCERNING THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES.

During the charge conference at the close of the penalty phase, the court *sua sponte* announced that he intended to strike the reference to the mitigating circumstances outweighing the aggravating circumstances. (R 1753) This decision was based in part upon a memorandum written by Circuit Judge Schaeffer wherein she stated that:

> "There has been a rash of recent litigation over 'mandatory' death instructions and 'weighing' of aggravating and mitigating jury instructions. See Sumner v. Shoeman, 483 U.S. 66 (1987); Penry v. Lynaugh, 109 S.Ct. 2934 (1989); Blystone v. Pennsylvania, 110 S.Ct. 1078 (1990); Boyde v. California, 110 S.Ct. 1190 (1990). None of these United States Supreme Court cases has addressed the exact language of Florida's jury instructions that says in part the jury should determine if the mitigating factors outweigh the aggravating factors. Shifting the burden of proof to the defendant is dangerous. Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988). The Eleventh Circuit Court of Appeals recently addressed this language and found that in the totality the instruction was not offensive. Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989). A certiorari petition is pending before the United States Supreme Court. Until this is finally resolved be aware of the problem both in your instructions and the arguments of counsel." (R 669 - state's exhibit #2, page 15) (emphasis added).

Based on the foregoing, the trial court, in addition to deleting the language that the jury must find sufficient

mitigating circumstances exist to outweigh the aggravating circumstances, also deleted any reference to the jury's weighing the aggravating and mitigating evidence. The court instructed the jury as follows;

> "Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the jury. However, it is your duty to follow the law that you will now be given by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and what mitigating circumstances exist to justify the imposition of a life sentence.
>
> Although you only recommend to the Court which sentence should be imposed, the Court is required by law to give that recommendation great weight and consideration in imposing the sentence.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings. (R 1813)

The court also instructed the jury that:

> "Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist. Among the mitigating circumstances you may consider, if established by the evidence, are:..."
> (R 1814)

In giving the foregoing instruction, the trial court deleted the language from the standard jury instruction that explains the jury's duty to determine whether mitigating circumstances exist

that outweigh the aggravating circumstances. *Florida Standard Jury Instruction in Criminal Case, F.S. 921.141.*

After instructing the jury on the aggravating and mitigating circumstances they could find, the court then instructed them that the sentence that they recommend to the court must be based upon the facts as they find them from the evidence and the law, deleting the language in the standard jury instruction that instructs the jury to weigh the aggravating circumstances against the mitigating circumstances and base their advisory sentence upon these considerations. (R 1815)

It is the state's position that the trial court erred in failing to give the standard jury instruction as approved by this Honorable Court. In order to prevent any future confusion or misapprehension on the part of our trial courts, the state urges this Honorable Court to instruct the trial courts of this state that the standard jury instructions language with regard to the weighing of aggravating and mitigating circumstances is not only a constitutionally valid instruction, but also is required to properly instruct jurors on their responsibilities.

In support of this position, the state would note that in Judge Schaeffer's memo to the trial court, she urged caution until such time as the petition for writ of certiorari on Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989), had been ruled upon. The United States Supreme Court has denied certiorari in Bertolotti, 110 S.Ct. 396. Therefore, any concern the circuit judges have had about the United States Supreme

Court's reversing sentences based upon this language should be alleviated.

Even more importantly, this Court has consistently rejected defense arguments that the standard jury instruction shifts the burden to the defendant to prove that the mitigating factors outweigh the aggravating factors. See Bush v. Dugger, 579 So.2d 725 (Fla. 1991); Kennedy v. State, 455 So.2d 351 (Fla. 1984); Jackson v. State, 502 So.2d 409 (Fla. 1986). Additionally, the Florida standard jury instructions as amended through June 21, 1990, again adopted this identical language, thereby reconfirming the validity of this instruction. *Florida Standard Jury Instructions in Criminal Cases F.S.A. 921.141*. Neither set of instructions shifts the burden to the defendant to prove that death is not the appropriate penalty. Cf. Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc)(Arizona capital statute unconstitutional because it required the defendant to establish the existence of a mitigating circumstance once an aggravating circumstance has been established and defendant bore risk of nonpersuasion that mitigating circumstances outweighed aggravating circumstances); Jackson v. Dugger, 837 F.2d 1469 (11th Cir.), reh. en banc denied, 842 F.2d 339 (11th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988) (jury instructed that death is presumed to be the proper sentence unless aggravating factors are overridden by mitigating factors.) Rather, our standard jury instructions correctly instruct the jury that it must find an aggravating circumstance beyond a reasonable doubt before it need

consider mitigating circumstances, and even then it need not look for mitigating circumstances if it found that the aggravating circumstances do not justify the death penalty:

> "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years." *Florida Standard Jury Instructions in Criminal Cases-Penalty Proceedings-Capital Cases F.S. 921-141 (6).*

This Court and the district courts of this state have consistently held that trial courts should be able to rely on the *Standard Jury Instructions* and should not amend these instructions where it results in confusion or giving contradictory instructions. See Kennedy v. State, supra at 354 (the trial court acted properly by reading the standard jury instructions); Jackson v. State, 502 So.2d 409 (Fla. 1986) (the standard instructions given accurately informed the jury of the law); Perkins v. State, 463 So.2d 481 (Fla. 2d DCA 1985) (standard jury instructions are designed to cover all aspects and elements of the statutory offense and to avoid unnecessary comment on the evidence and are preferred over requested charges which are specialized and require comment on the evidence); King v. Dugger, 555 So.2d 355 (Fla. 1990) (We have previously found Caldwell inapplicable in this state and have upheld the standard instructions on the jury's role in sentencing).

Once again, the state urges this Honorable Court to instruct the trial courts of this state that this Court's standard jury instructions properly set forth the standard to be used by a

sentencing jury in weighing aggravating and mitigating circumstances. Furthermore, although it seems it should be unnecessary at this point, to reiterate to these courts that this Court has previously upheld the validity of this instruction and the trial courts should rely on this Court's ruling.

CONCLUSION

Based on the foregoing argument and citations to authority, the state urges this court to affirm the judgment and sentence of the trial court. The State also urges this Court to reconfirm the validity of the standard jury instructions on the weighing of aggravating and mitigating evidence.

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 Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 22 day of June, 1992.

OF COUNSEL FOR APPELLEE.