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IN THE SUPREME COURT OF FLORIDA

RONALD WAYNE CLARK, JR.,

Appellant,

v.

CASE NO. 77,156

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT,
IN AND FOR NASSAU COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellee accepts Clark's statement of the case with the following additions.

Charlie Calhoun, a sheriff's office detective, testified that he was dispatched to a homicide site near McClean's Swamp Hunting Club Road at approximately 5:30 p.m. (R 249). He testified that he searched the body found in a ditch for identification but found no wallet or other identification. (R 252-253). Through two business **cards** found on the body, he was able to ultimately identify the victim as Charles **McElroy** Carter from North Carolina. (R 255). **Mr.** Carter **had** come to Jacksonville to get a job and was supposed to start work on a shrimp boat called The Bloody Mary. (R 256).

Brian Corbett was with Clark and David Hatch on October 29, 1989 through the early morning hours of October 30, 1989. He drove **around** with Hatch and Clark drinking beer during the course of the day. After having dinner at a Pizza Hut (R 305) and repairing a flat tire on the Camaro they were driving (R 306), the trio returned to the shrimp boat and met with Charles Carter. When they **ran out of beer**, they all **got** into the **Camaro** and drove to Nassau County to buy more beer. (R 309). Clark was driving around and ultimately stopped the car because Clark "needed to go to the bathroom." (R 301). Clark stopped the car at a cable crossing near State Road 17 and State Road 108 and got out of the car to use the bathroom. Corbett got out on the driver's side with Clark and Carter and Hatch got out on the passenger's side. Corbett testified that he turned around and saw Clark push Hatch

out of the way and saw "Ronnie heading **up** towards David and Mr. Carter and he pushed David out of the way and pulled up a shotgun from his side and shot Mr. Carter in the chest." (R 312). Corbett observed that Clark shot from the hip aiming **up**. Corbett said he was shocked and did not know where the shotgun had come from because he had not seen it in the car. He described the gun as a single-barreled sawed-off shotgun with tape over the middle end where the stock should have been. (R 313). At that point, Corbett started back towards the car when he heard a second shot. He waited a minute and David Hatch got into the car. A short time thereafter, Clark got into the car. Corbett told him to take him home and testified that he was scared. (R 314-315). When Clark returned to the car he was carrying the shotgun and put it between the seats where the console was located. He then threw something over the gun to conceal it. (R 315-316). It was Corbett's view that Clark knew what he was doing and was not impaired. Clark told Hatch that Corbett was "freaking out" about Clark shooting the guy and made a statement "about getting the guy's job." (R 317). Clark told Corbett not to say anything or else he would kill Corbett. (R 318).

Approximately one week later, Clark **asked** Corbett if he had heard anything about what happened at which point Corbett showed Clark the newspapers, Clark said the papers were wrong because Mr. Carter was shot with a .12 gauge shotgun that had a slug, not a high-powered rifle as reported in the newspaper. (R 319). Clark told Corbett that the reason he had been driving around that night was so "they would get lost." (R 319). At that

point, Corbett got in touch with the police and informed them about the murder. (R 320-321). On cross-examination, Mr. Corbett testified that although they had been drinking, Clark knew what he was doing and had no difficulty driving that day. (R 328-330). Corbett also observed that when they returned to the boat he did not recall seeing Clark drink at all. (R 331). Corbett testified that the first shot hit the victim in the shoulder and the reason he saw it was because the doors were open and the dome light in the car provided sufficient light. (R 334, 341). Clark told Corbett that if he, Clark, went down, that Hatch knew where Corbett lived. (R 343). It was Corbett's impression that Clark was not drinking at **the boat** and he observed no arguments between either Clark or Hatch and Mr. Carter. (R 343). It was Clark who returned the weapon to the console area after the shooting. (R 345). On redirect, Corbett testified that Clark, Hatch and he knew what was happening that night and they were not in any way impaired. (R 347).

John Hatch testified about his and Clark's drinking on October 29, 1989. He first met Charlie Carter on October 29, 1989, when Hatch was icing the boat. (R 353). Carter came down to the shrimp boat the day he was hired to help. That was the same day that Clark tried to get the job for which Carter was hired, (R 354).

Hatch recalled that after they ate pizza at the Pizza Hut and drove away without paying, and changed a tire on the Camaro, they returned to the shrimp boat arriving at approximately 9:00 or 10:00 p.m. (R 360-361). Hatch and Brian Corbett started

drinking more beer at which point Carter came **up** from the bunk area and joined them. (R 361). It was clear that Carter had been drinking. (R 361). Hatch testified that they stayed on the boat about thirty minutes or a little more and during that period, Clark did not drink while on the boat. (R 362). They ultimately left and drove around buying more beer and gas until they got to the intersection of Highway 17 and State Road 108. At that point, Clark stopped the car because he (Clark) had to go to the bathroom. (R 364-365). Hatch recalled that Clark came up and pushed him out of the way and shot Mr. Carter. (R 366). Clark just pulled out the shotgun, aimed it up and shot Carter. Hatch testified that he had not remembered seeing the shotgun before. (R 367). Carter was about ten feet away from Clark when he first shot; Clark ejected the shell, reloaded by putting another shell in the weapon, closed it, walked over to where Carter was lying on the ground, stood over him and then pulled the trigger again. (R 368-369). Hatch testified that Carter was laying flat on his **back** when Clark walked up and stood over Carter and shot him again. (R 369). Hatch testified that he was not so intoxicated that he did not know what was happening. After the second shot was fired, Clark started laughing and went through Carter's pockets taking out his wallet and money. (R 370). Clark then dragged the body over to the ditch. Clark returned to the car, placing the shotgun between the seats on top of the console. (R 370).

Hatch testified that Clark took \$11.00 from Carter because Clark had one ten and one dollar bill when he returned to the

car. (R 371). He told Hatch and Corbett that if they said anything about it he would kill them. Clark also said that he did it for "Mr. Carter's job." In essence "I guess I got the job now." (R 371). Hatch recalled that Clark probably had approximately ten beers up to that point and he did not recall using any **drugs** nor seeing Clark ingest hard 'liquor. (R 372). It was Hatch's opinion that Clark knew what he **was** doing, he was able to drive the car and had no problem taking Corbett home and returning Hatch to the shrimp boat. (R 372). Hatch stated that the next morning, at the shrimp boat, the captain waited for Carter to show up. (R 372). Hatch testified he said nothing about Carter's whereabouts because Clark was there. Clark asked Hatch to again try to get him hired on the shrimp boat at which point he did. (R 373). Hatch testified that the boat departed on October 31, 1989 and stayed out about six days. When they returned and got off the boat, they first got paid and as they **were** leaving, the law was waiting for them. (R 373). At first, Hatch told the police he **knew** nothing about the murder because Clark was standing nearby. On January 20, 1990, he was arrested "as an accessory after the fact" for failing to come forward with information. At that time he gave a statement. (R 374). He **was** ultimately sentenced to five years for his conviction as an accessory after the fact. It was his unrefuted statement that Clark shot Charlie Carter on October 29 or October 30, 1989. (R 375).

On cross-examination, Hatch testified that he knew Carter had some money because Carter had loaned him \$20 that day. In

fact, that was the money that Hatch used to buy beer during the course of the day. (R 375-376). Hatch also knew that Carter had more money because he saw Carter loan the captain \$20. (R 376). Hatch further recalled that he did not say anything at **the** time of the shooting because it happened so quickly. (R 385). Hatch did not know where Clark had secured the gun nor did he see where the first shot landed. Although Clark had to load the gun for the second shot, Hatch did nothing to assist Caster. (R 386). On redirect examination, Hatch testified that Clark also took Carter's boots after he shot Carter. (R 390).

Gary Eugene Moody testified that he had a conversation with Clark on February 27, 1990, concerning the Nassau murder. (R 397-398). Clark told him that a shotgun was used and that he (Clark) had shot the man more than once. Clark described to him that after the first shot the man went down and then he shot again. The first was shot to the chest and the second to the mouth. (R 399). Mr. Moody was sure Clark told him "Clark shot someone once in the chest and once in the mouth." (TR 400).

The medical examiner, Dr. Peter Lipkovik, autopsied **the** body and found two gunshot wounds. (R 409). The first wound to the chest was fired from approximately ten feet away **and** was not fatal. The doctor testified that although incapacitating, the wound was not immediately life-threatening and that the victim would have been conscious. He found pellets and a wad from a .00 shot around the wound. (R 413-415). The second shot was directly to the mouth involving the lips, the upper and lower **jaw** and exited the back of the head behind the left ear. (R 410).

The wound was caused by a large single projectile fired from a shotgun and there was gun powder residue on the victim's face. It was the doctor's opinion that the shot was fatal having been fired from approximately two feet away or less and that the victim would have become unconscious immediately and death would have followed between one and two minutes thereafter. (R 411-412). Although the victim had a blood-alcohol level of .27, the doctor had no way of discerning the victim's tolerance level and whether he was aware of what happened. (R 419-421). The State rested its case at R 426. Clark's motion for judgment of acquittal was denied (R 428).

The defense first called Clark's stepmother, Ms. Frances Clark, to the stand. Although she testified that she had seen him under the influence of drugs and alcohol a couple of hundred times (R 441), at the time of the murder in October 1989, Clark was not living at home and so she had no real knowledge of how much he was using alcohol or doing drugs. (R 445). On cross-examination, she testified that she saw Clark with a sawed-off shotgun, (R 446), and the last time she saw it, it was in her bedroom closet. (R 447).

Doctor Manuel Chaknis, a psychologist, testified that in 1986 he evaluated Clark at the Arlington Hospital in Jacksonville, Florida. Clark was referred to the doctor by his attorney and Dr. Chaknis was asked to prepare a report due to charges pending at the time. (R 449-450). Dr. Chaknis prepared a history and did interviews concerning Clark's background for the 1986 case. (R 451). He testified that Clark came from a

broken home and that he was continually shuttled between his divorced parents since 1974 and 1975 (R 451); that he described his mother in traumatic terms, sometimes loving her and sometimes thinking her evil (R 453); that he had an unrealistic view of his father, and that his father had mental problems as well as alcohol abuse and medical problems (R 453); Clark had been victimized by his mother's lesbian lovers and had been taunted at school by classmates who knew his mother's sexual orientation (R 454); Clark had quit school at tenth grade level because he tried to attack a student and a vice-principal with a two by four (R 455); that in 1983, Clark was using alcohol more, drinking up to eight beers daily and was smoking marijuana, ingesting LSD, PCP, cocaine, quaaludes, tylenol #3 and tylox. (R 456). Dr. Chaknis testified that although Clark did not suffer from epileptic fits, he sometimes had seizures attributable more likely than not to the many fights Clark had and the blows to his head he suffered from these fights. Dr. Chaknis testified that Clark "derived extreme enjoyment from hurting other people" and Clark admitted that he liked to "watch blood splatter." (R 457). Clark admitted he enjoys the resulting pain received from the fights and hurting himself. (R 457-458). Dr. Chaknis' opinion was that Clark, in 1986, was aware in time and space of his surroundings although Clark did not want to talk about the charges pending in 1986. Clark was articulate and understandable when he spoke and appeared aggressive as well as manipulative. (R 459-460). Clark feared returning to jail, was immature, impulsive and perceived himself to be macho. (R 461). Clark had a low-average range of

intelligence and the doctor believed he could do better. Clark had an aggressive personality and was hostile and self-centered. (R 462). The doctor believed Clark suffered from a possible sexual identity disturbance and that his self-concept was poor. Clark suffered from a psychosexual disorder but he was not criminally insane. He was dangerous. (R 466-467). On cross-examination, Dr. Chaknis admitted that he had not seen Clark in four and a half years since 1986, and that the history had been provided by Clark's statements to him. The doctor had not obtained any collateral information to support the evidence, and accepted Clark's statements on face value. (R 468). He believed Clark was sane and not suffering from any mental disease. (R 469). Clark enjoyed hurting people and it was the doctor's concern that Clark would act out his violence again. (R 469-470).

The defendant, Ronald Clark, testified on his own behalf. He admitted that he drank because he was depressed and to forget his problems. (R 474-475). He admitted using illegal drugs, marijuana, cocaine, acid and pills and that his depression was caused by his drug usage. He stole and used his father's drugs, specifically his father's antidepressants and would drink until he passed out, usually once every week. (R 475-476). He testified that he had blackouts from drinking and lived behind his father's house in a school bus. As evidence of his blackouts, he told of times that he would not remember how he got home. (R 477). Clark was married and admitted that during his marriage he suffered blackouts. (R 478).

He **knew** David Hatch for over twelve years and they were drinking and drug pals. (R 479). He met Brian Corbett approximately a year and a **half** earlier through his girlfriend and they **were** also drinking buddies although Clark testified that Corbett did not drink as much as he. (R 480). Clark admitted that he was sentenced to a drug rehabilitation program but he **did** not stay there and he did not get the needed psychiatric help while he was in prison. (R 480). Although Clark decided that he needed help, he attempted to check himself into a hospital, however, nobody would help him, (R 481).

On October **29, 1989**, Clark recalled that he **got up** around 8:00 or 9:00 a.m. (R 481). At the time he was living behind his father's house. After he got **up**, he went to Hall's County Store where he bought a six-pack. He smoked some sock cocaine, took some pills, Thorazine, and other medication that he had taken from his father, (R 482). He drank the beers with a friend **and** then went to Jackie's Seafood where he met David Hatch. (R 483). While Hatch was icing the shrimp boat down, Clark drank three or four more beers waiting for him. Approximately **10:00** or **11:00** a.m., he joined Charlie Carter, Hatch, Al, the boat captain, and they **went** to a nearby lounge. There, Clark admitted that he drank **two** or three beers and **had** one daiquiri within thirty minutes or so. (R 484-485). After returning Carter to the shrimp boat, Hatch and Clark drove around Nassau and Duval county buying beer and drinking. They eventually met up with Brian Corbett after Clark got the Camaso stuck on a dirt road trying to turn around, (R 488-489), and ended up at a Pizza Hut around 6:00

p.m., where they ate and drank another pitcher of beer. (R 489). Clark specifically testified that nobody had any money as evidenced by the fact that they ran out on their Pizza Hut bill. (R 490). After changing a flat tire, they finally returned to the shrimp boat at Jackie's Seafood and started drinking again. (R 492). **At this point, Clark has no further 'recollections as to what transpired.** He testified that he did not remember Carter joining them and he had no reason why he would dislike Carter. (R 493). He testified that he did not want Carter's job and had no inclination to work on the boat once he found out that he would be out fishing for six or seven days. He clearly did not want the job. (R 493-494). Clark testified that he did not recall anything until the next morning when he woke up in the car, in his father's backyard. (R 494-495). He observed there was a shotgun hole in the floorboard of the car which he could not remember how it got there and did not remember anything. (R 495).

Clark testified that a couple of days later he went to the Corbett's house and asked him about the newspaper. Clark did not remember what happened that evening and did not remember killing the man. He ultimately stated that to his knowledge he did not kill Charlie Carter. (R 496).

On cross-examination, Clark again testified that he could not remember if he killed Carter and he does not know why he, Clark, would have shot Carter, (R 498). In explaining his conversation with his good friend Moody, Clark said that he told Moody he was charged with murder, not that he actually committed

the murder. (R 498). Clark admitted that he kept a shotgun, a single-barrel, which required that you pull the trigger back and had to be broken down to reload. (R 500-501). Clark admitted that he did not remember anything after returning to the boat that night. (R 501). He explained on cross-examination that although he appeared the next morning at the Bloody Mary where David was working, he did not ask for Carter's job. (R 502). He also stated that although he recalled the events of the day while testifying, **he could not remember these events when he talked to Dr. Barnard or Dr. Macaluso.** (R 503).

Dr. Macaluso was next called to the stand and testified that he interviewed Clark on July 10, 1990, for two and a half hours. (R 535). He detailed how he secured information surrounding Clark's background and observed that Clark told him he suffered from alcoholic blackouts. (R 540). Dr. Macaluso observed that persons may appear to be functioning normally although they may have blackouts. (R 540-541). Clark **told** him that his blackouts started at age 19. These blackouts resulted in Clark's drinking a case to a case and a half of beer a day. (R 544, 547). It was his opinion that Clark suffered from chemical dependency, alcoholic and drug addictions specifically substance abuse disorder and Clark had alcoholic amnesia based on the blackouts. (R 550-551). It was Dr. Macaluso's view that Clark's judgment was impaired the night of the murder and he did not have the capacity to premeditate a murder based on the chemical dependency. (R 551). Dr. Macaluso also observed that Clark could not have formulated an intent to rob based on his chemical dependency. (R 553),

On cross-examination, Dr. Macaluso testified that the basis of his determinations resulted from his interview with Clark, collaborating evidence and other reports done by Dr. Chaknis. (R 553). Clark told Dr. Macaluso early on in the interview that on the day of the murder, **Clark suffered a memory blackout after lunch, after he took drugs and drank that morning. Clark told Dr. Macaluso he could not remember anything after lunch.** (R 565). **Clark** did not tell Dr. Macaluso anything with regard to the Pizza Hut incident. (R 566). Dr. Macaluso also testified that he never spoke to Clark's father or his stepmother or his mother and that he relied heavily on what Clark told him **and** Clark's "body-language." (R **569**). Dr. Macaluso testified that Clark was sane and that he had the capacity to know the difference between right and wrong. (R 578).

The defense rested. (R 579). Defense counsels' renewed motion for judgment of acquittal was also denied. (R 579).

On rebuttal, the State called Dr. George Barnard and Dr. Ernest Miller. Dr. Barnard testified that he examined Clark on July 5, 1990, in a two and one half hour interview. Dr. Barnard secured various pieces of information from all parties such as police reports, medical reports, depositions and past medical records. (R **585**). Clark gave him a limited account of the events that day stating that he was unsure what time he got up but thereafter he bought a six **pack** of beer and took some Flexerils to control muscle spasms and some Placedills for sleep. He then went to Jackie's Seafood where he ran into David Hatch. (R 586). They drank some tequila, however Clark could not

remember how long he stayed there. (R 587). His **next memory of anything happening occurs several days later when Clark found himself in** South Georgia. He told Dr. Barnard that he stopped a woman and asked he where he was. (R 587).

Dr. Barnard testified that in his opinion, Clark was competent to stand trial and legally sane at the time of the offense. (R 588). Dr. Barnard acknowledged that traditionally blackouts occur with alcoholism however, even with blackouts, an individual understands exactly what they are doing, they just do not remember what they did. (R 589-590). Dr. Barnard testified there was no objective way to gauge when someone states they have a blackout if indeed a person has blackouts. (R 590-591). It was Dr. Barnard's view that Clark's amnesia was not as severe as he suggested and that he could easily formulate the necessary intent to commit a crime he just might not recall the events. (R 591, 598). **Dr. Barnard observed that a person with blackouts can not later recall those events.** (R 599). On cross-examination, Dr. Barnard testified that an individual was more likely to develop behavioral disturbances if drinking started early. He observed that personality disorders are not major mental health disorders. (R 606). Although it would appear that Clark had a lot of traumatic events in his life, Clark did not lose contact with reality; he knew what he was doing; and he could appreciate the nature and quality and wrongness of his conduct. (R 615). When given a hypothetical similar to the facts and circumstances of the instant case, Dr. Barnard testified the conduct that resulted was not from impulse conduct. (R 616).

Dr. Miller interviewed Clark on **April 25, 1990**, and found that **Clark** suffered from depressive disorder, substance use disorder and character disorder. Clark had an addictive pattern of behavior with regard to drugs and alcohol usage. (R 619). Dr. Miller thought there was a strong possibility that **Clark** suffered from blackouts but observed that one can perform **very** well but just not recall what happened. (R **621**). It was Dr. Miller's opinion that blackouts do not interfere with a persons ability or goal orientation but rather blackouts resulted in an inability to recall what happened. (R **621-622**). Dr. Miller observed there was no absolute means of testing whether blackouts occur however, alcohol blackouts do fall within a pattern of alcohol use. (R 623-624). When asked whether it was significant that someone had requested a **CATSCAN** be **done**, Dr. Miller said no. The record reflects **that** defense counsel had requested the **CATSCAN**, not a doctor. (R **632-633**).

No further evidence was submitted and as a result, the jury returned a verdict of guilty as to murder charged. (R 717).

At the penalty phase held November **20, 1990**, the state introduced a judgment and sentence from a prior felony conviction. (R 730). The defense at the penalty phase called Dr. George Barnard who testified that as a result of his July 5, 1990, three and one half hour interview of Clark, he found Clark to be competent to stand trial and legally sane. (R 734). Dr. Barnard testified that Clark suffered from self-abusive behavior and liked to **hurt** himself. He **was** of **average** intelligence and did well with his space-time orientation. Although he **had** some

memory difficulties due to past blackouts, and could not recall the events surrounding the crime, Clark was not severely depressed. (R 738-739). Clark had a strong hatred towards the women who abused him and was "also influenced by his father's drug usage." (R 739-740). Dr. Barnard found that Clark had a history of drug and alcohol abuse but could not say what degree his capacity to appreciate his acts were impaired but they probably were impaired in some way. (R 742). Dr. Barnard found that there was a lack of any evidence that Clark could not appreciate what he was doing. (R 743).

On cross-examination, Dr. Barnard admitted that he received no information from Clark's mother or father about their drug usage and their problems. (R 745). Dr. Barnard admitted that his resulting diagnosis was based on Clark telling the truth (R 744) however, he admitted that Clark was less than truthful when he was interviewed. (R 745). Dr. Barnard observed that it would be difficult for the jury to know whether to believe Clark, (R 746). Dr. Barnard caught Clark in several lies and observed that Clark **suffered from no thought disorders nor delusions. He had no emotional or mental disturbances and no substantial impairment with regard to his thought processes.** (R 748).

No further evidence was admitted at the penalty phase. In closing, defense counsel argued that the jury's advisory opinion was critical to the penalty process (R 781), and he talked about the defendant's life-style. (R 783). He discussed the inapplicability of the aggravating factors (R 784-785) and observed that a number of mitigating factors existed. (R 785).

He noted that there was evidence that Clark was emotionally disturbed and suffered from emotional problems for years. Although Clark could appreciate the criminality of his acts, he was not functioning normally because "nobody kills just for a job." He observed that Clark's judgment was impaired and that because of Clark's age, 21, he never really had a chance. (R 786). Defense counsel argued that the victim did not suffer torture because his alcohol level was .28 and that it was unfortunate that Clark never received adequate medical attention for his mental or emotional disorders. (R 787). Defense counsel argued that Clark has not had much of a life because he was born to parents with problems. He was a mentally abused child and had a poor childhood environment. (R 788). Changing focus, he noted that Clark's codefendant, Hatch, was involved in the crime and that Hatch knew the victim and had borrowed money from the victim. (R 788). He observed the inequities of the sentence received, Hatch had only received 5 years for his crime **and** asked that the jury impose **a** life sentence. (R **789**, 790).

The record reflects that the jury returned with a 10 to 2 death recommendation after half hour of deliberation. (R 796). The trial court concurred with the jury's recommendation finding four statutory aggravating factors applicable, that the murder was committed while engaged in a robbery; that the murder was for pecuniary gain; that the murder was especially heinous, atrocious and cruel; and that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. With regard to mitigation, the court

reviewed the statutory and nonstatutory mitigating factors and found:

There is no doubt from the record herein that the defendant led a hard and difficult life. His early childhood experiences of being abused by his mother's lesbian lover or having to witness physical abuse and violence between his parents was unfortunate. However, there is nothing in his background that would serve to mitigate the murder herein.

Having considered all of the evidence presented at the trial, the sentencing hearing, and the presentence investigation report, the court concludes that it is clear from a reasoned weighing of the above findings that there exist four (4) statutory aggravating circumstances, and no factors that can be even remotely argued in mitigation.

Wherefore, the Court finds that sufficient compelling aggravating circumstances exist to justify and require under the law the imposition of the death penalty as to the defendant Ronald Wayne Clark, Jr.

(R 939-951)

SUMMARY OF ARGUMENT

The trial court correctly found four statutory aggravating factors proven beyond a reasonable doubt. Even if this court concludes one of the factors is not sufficiently proven - said error is harmless - because the existing aggravation outweigh "any" mitigation. Moreover, the trial court's order concerning mitigation does not violate **Caldwell v. State**, 571 So.2d 415 (Fla.1990) or **Nibert v. State**, 574 So.2d 1059 (Fla.1990). The trial court noted nonstatutory mitigation and concluded it did not rise to the level of mitigation that could be weighed against the statutory aggravation proven.

The death sentence is proportionate, and the jury instructions as the penalty phase regarding heinous, atrocious or cruel are correct. Moreover, no objection was made and therefore Clark's **Caldwell v. Mississippi**, 472 U.S. 320 (1985) is procedurally barred.

ARGUMENT: POINT 1

WHETHER THE TRIAL COURT ERRED IN FINDING FOUR AGGRAVATING CIRCUMSTANCES WHICH IMPROPERLY SKEWED THE SENTENCING DECISION AND RENDERS CLARK'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHT AND FOURTEENTH AMENDMENTS IN ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION.

Clark argues that all four of the statutory aggravating factors found by the trial court were improperly found. The trial court in a rather detailed order (R 939-951 finds that each of the following statutory aggravating factors were proven beyond a reasonable doubt. The court observed:

The recommendation was by a vote of 10 to 2.

The jury advisory opinions entitled to great weight.

The court has deliberated the jury's conclusion, and has weighed the advisory sentence, the evidence, and presentence investigation report to determine the presence of aggravating and mitigating circumstances. Following the jury's recommendation, the court permitted counsel for the state and defense to present additional arguments in support of the aggravating and mitigating circumstances. . .

(R 939)

The Court then details the facts significant to the court which demonstrates why the aggravation outweighs any mitigation.

The Court observed:

At the time of the homicide hearing, the defendant was 21 years old. The evidence shows that the defendant led a troubled childhood. He lived throughout his childhood in either the residence of his father and stepmother, or mother. Both parents were described as active alcoholics, and the father as a drug dealer. As a child, the

defendant witnessed acts of physical abuse and violence between his parents.

The defendant's use of alcohol commenced at twelve years of age, and for the most part continued through the date of the murder herein. The amount of alcohol consumed on the date of the murder is unclear. However, it is clear that the amount was excessive. The evidence also suggests that defendant ingested a controlled substance the morning of the homicide.

The defendant was evaluated by Dr. Ernest Miller, who found the defendant competent to proceed with the litigation herein, and further found that the defendant did not meet the criteria for involuntary hospitalization. Dr. Miller was also of the opinion that at the time of the murder herein, the defendant was able to understand the nature, quality and wrongness of his acts.

At the trial, Dr. Manuel Chaknis, a psychologist, testified in reference to an evaluation conducted on the defendant in 1986. In 1986, the defendant was convicted of the offense of lewd, lascivious or indecent assault on a minor child, and pursuant to the litigation, Dr. Chaknis conducted an evaluation. Noteworthy is the defendant's admission to Dr. Chaknis during that evaluation that he enjoyed hurting people, and derived pleasure from watching blood splatter. As a result of the evaluation, Dr. Chaknis expressed the opinion that the defendant required treatment in a secure inpatient setting. He further voiced a concern, 'that without such treatment, the defendant will again act out, and perhaps in an even more sadistic, brutal, and violent manner.'

On April 30, 1986, the defendant was adjudicated guilty of a violation of Chapter 800.04, Florida Statutes, lewd, lascivious and indecent assault or act upon or in the presence of a minor child, and placed on five (5) years probation. The judgment entered sided the offense as lewd, lascivious act on a child. On October 15, 1986, the probation was revoked and the defendant was sentenced to thirty months in the Department of Corrections.

Approximately a week after the murder, the defendant met Brian Corbitt at his residence and inquired if he had heard any news about what happened. Corbitt showed him a newspaper article about the homicide and the defendant complained that the article is wrong in its reference that the victim was shot with a high powered rifle. The defendant said the victim was shot with a 12 gauge. At the trial, the defendant denied having any memory of the events immediately before the shooting or immediately afterwards. However, based on the testimony of Dr. Miller and Dr. Barnard, the court finds that the defendant's claim of loss of memory is self-serving and false. **The** testimony established that if the defendant had no memory of the events, then he would not have been able to recall the specifics of the homicide a week later.

(R 941-943)

- (A) The capital felony was especially heinous, atrocious or cruel.

The trial court in finding this aggravating factor concluded:

Charles Carter was shot twice by the defendant with a single shot short-barrel shotgun. The first shot had an upward angle to the chest area. This shot was not immediately life threatening, and the victim would have remained conscious. The shot was fired from a distance of approximately ten feet, the force of which threw him to the ground. The defendant approached the victim while on the ground, reloaded the shotgun and fired the fatal shot into the victim's mouth from two to three feet away. The victim died within one or two minutes following the second shot. The court concludes that the murder was especially heinous, atrocious and cruel.

(R 945-946)

Clark argues that when a homicide results in near instantaneous death, this court has found the killing not to

qualify for the heinous, atrocious or cruel aggravating circumstance, **citing** *Brown v. State*, 526 So.2d 903 (Fla.1988), *Lewis v. State*, 377 So.2d 640 (Fla.1979), and *Jackson v. State*, 522 So.2d 802 (Fla.1988) to list a few.

In *Lewis v. State*, 398 So.2d 432, 438 (Fla.1981), this court held:

, , . Early in the history of the capital sentencing law, this court provided an interpretation of this statutory factor '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 consciousness or pitiless crime which is unnecessarily torturous to the victim' *State v. Dixon*, 383 So.2d 1, 9 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. (1950), 40 L.Ed.2d 295 (1974). Under this standard, a murder by shooting, when it is ordinary in the sentence that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious or cruel. Cites omitted. . . 398 So.2d at 438.

While not unmindful that most shootings do not fall within this statutory aggravating factor, there are those rare instances in which the instant case falls, where this aggravating factor is appropriate. Certainly, there must be something more than the shooting itself, No one factor alone, in addition, **may** elevate a shooting to this aggravating factor. For example, in *Jackson v. State*, 502 So.2d 409 (Fla.1986) the court found that one shot to the victim where the victim dies shortly thereafter does not support this finding. In *Lloyd v. State*, 524 So.2d 396 (Fla.1988) the court found two gunshot wounds to the head did not support this aggravating factor or in *Rivera v. State*, 545 So.2d 864 (Fla.1989) three gunshot **wounds** within sixteen seconds of

each where death came shortly thereafter did not support a heinous, atrocious or cruel finding where a law enforcement officer was involved. Or in *Brown v. State*, 526 So.2d at 906, 907, n.11 wherein it is found that the actual shooting was spontaneous and the victim lived only a few moments between the first and second shot.

Sub judice, the victim Charles Carter had been drinking **as** evidenced by his blood alcohol level of .28. He got out of the car as did Clark to go to the bathroom. Within moments, Clark shot him in the chest. The medical examiner's testimony reveals that there was no reason based on the first wound sustained, that the victim would have lost consciousness. Clark had to eject the shell, reload, recock **and** then walked **up** to within two feet of Carter lying on the ground, pointed the gun to his face and shot him in the mouth. While clearly the period of contemplating death and understanding what was going on was not protracted, Mr. Carter in a most vulnerable position, in the dark of night, watched in the shadow of the car's dome light, as Clark reloaded and come towards him as he, Carter, laid helplessly on the ground. The record reflects no evidence of pleading or begging for one's life, However, in the state of confusion and the horror that must have overwhelmed Mr. Carter, after he realized what was happening no vocal confirmation of the terror that existed that evening was required. As observed in *Farinas v. State*, 569 So.2d 425, 431 (Fla.1990):

. . . The fact that the victim jumped from a car and ran from Farinas while screaming for help indicates that the victim was in frenzied fear for her **life**. As noted by the

trial, after Farinas paralyzed the victim from the waist down with a gunshot through her spine, he approached her and fired two shots into the back of her head after unjamming the gun three times. The victim was fully conscious during the time he unjammed the gun and was aware of her impending demise from the defendant. The record amply support this finding. . . .

569 So.2d at 431

See also Harvey v. State, 529 So.2d 1083, 1087 (Fla.1988), wherein this court held:

Both victims in this case were elderly persons who had been accosted in their home. They became aware of their impending deaths when Harvey and Stiteler discussed the necessity of disposing of witnesses. In desperation, the Boyds tried to run away, but Harvey shot both of them. When Harvey later came back into the house and realized that Ms. Boyd was not yet dead, he fired his gun into her head at point blank range. Cite omitted. We find these facts sufficient to support a finding that both murders were especially heinous, atrocious and cruel.

529 So.2d at 1083

Further, this Court's recent decision in Santos v. **State**, So.2d ___ (Fla.1991) 16 F.L.W. **S633** is inapplicable, sub judice. Therein, the court noted that the murder happened "too quickly" and therefore the trial court erred in finding that **the** murder was committed in an heinous, atrocious or cruel manner. Santos was a circumstance where the defendant ran up to his common law wife/girlfriend as she ran from him, put two bullets in her head and then one bullet in her child's head, both died instantaneously.

Based on the foregoing, it is submitted that this aggravating factor has been proven beyond a reasonable doubt.

(B) The homicide was committed in a cold, calculated and premeditated manner.

The trial court found this statutory aggravating factor applicable observing:

Charles Carter and the victim (sic) [the defendant] had met for the first time the day of the homicide. During the course of the day, while together, they never exchanged angry words. They shared several drinks together. The defendant drove Carter and the other passengers around isolated wooded areas of Nassau County for the purposes of getting them lost, so they would not locate the body once the murder occurred. The defendant found the spot he was looking for, a logging road, and under the pretense of having to relieve himself, parked the car. After the passengers left the vehicle, including the victim, he removed the shotgun, and without warning, shot the victim, first time from approximately ten feet away. After reloading and firing the second shot to the victim's mouth, he dragged the body to another locating to conceal it. Upon his return to the car, he announced to Hatch that he had the victim's job. He returned the shotgun to the car and concealed it with some object. The court concludes that the homicide was committed in cold, calculated and premeditated manner, without any pretense of moral or legal justification.

(R 946-947)

In **Rogers** v. State, 511 So.2d 526 (Fla.1987), this court opined that this particular aggravating factor required a heightened degree of premeditation from the norm. Clark argues that 1) there was no plan to kill Carter; 2) that the murder occurred in the presence of "two uninvolved witnesses; this hardly was the product of a preplanned, calculated murder;" 3) Clark was impaired due to alcohol usage that day; and as a result, 4) the murder was really "the spontaneous, misguided act of an alcoholic under the influence of an excessive amount of

alcohol and drugs.'" (Appellant's Brief, p. 25). In **Durocher v. State**, ___ So.2d ___, Case No. 74,442, decided February 13, 1992, this Court upheld the trial court's finding that the murder was committed in a cold, calculated and premeditated manner. The court observed that the sequence of events therein found supported this aggravating factor. The court noted:

, , , Durocher told the detective that he wanted to rob someone and steal a car so that he would have money and transportation for a trip to Louisiana. When he walked by the store where the victim worked, he decided to rob it. He then walked back to his mother's house, packed his clothes, picked **up** a shotgun he had previously purchased, and walked back to the store. At the store the clerk told Durocher that the business operated solely on credit and that there was no money on the premises. Durocher stood there for a few minutes and then shot the clerk and took thirty to forty dollars and his car keys from him. He told the detective: "I was going to rob the man but after thinking about it I decided that it would probably be better to **go** ahead and kill him then that way the police could not pin it to me." Durocher then wiped his fingerprints off things he had touched, locked the store's front and back doors, and drove away in the victim's car. . . (slip opinion, p. 7)

Clark eliminated Charles Carter for his job. At some point and time Clark had put his sawed-off shotgun in his girlfriend's car and on October 29, 1989, when the need and opportunity arose, he secured the weapon and used it to shoot Charles Carter in order to insure that Carter would not show up for the job on the Bloody Mary. The record reflects Clark made a statement after the shooting to Hatch and Corbett that he had the victim's job **and** indeed laughed about it while he rifled through the victim's pockets. He admitted to Corbett that he had driven them around

to get them lost intentionally and warned Hatch and Cosbett that if they said anything to anyone, he would kill them. While not the most brilliant plan, the instant murder is the classic cold, calculated and premeditated murder with no pretense of legal or moral justification. Contrary to Clark's assertion that this was a spontaneous, misguided act of an alcoholic under the influence of an excessive amount of alcohol and drugs, the record bears out that Clark **saw** an opportunity and seized it, He threatened those who witnessed the murder with death and committed the murder in an isolated place and disposed of the body in such fashion that it would not readily be located. Although Clark had been drinking that day, the record reflects that his actions in driving them to an isolated area, in stopping the car under **the** guise that he had to go to the bathroom; his pushing others out of the way in order to fire one shot from the hip and then reload the gun and shooting a second time two feet from the victim as he lie on the ground; his moving of the body into a ditch; his remarks to Hatch and Corbett that he now had the victim's job and his presence of mind to threaten Hatch and Corbett with death if they spoke to anybody does not demonstrate an individual who is under the influence of an excessive amount of alcohol and who had an inability to preplan a calculated murder. See *Cruse v. State*, **533 So.2d** (Fla.1991), 16 F.L.W. S270; *Swafford v. State*, **533 So.2d** 270 (Fla.1988); *Ponticelli v. State*, **533 So.2d** (Fla.1991), 16 F.L.W. S609; *Vallee v. State*, **581 So.2d** 40 (Fla.1991); *Asay v. State*, **586 So.2d** 10 (Fla.1991); and *Koon v. State*, **513 So.2d** 1253 (Fla.1987) wherein the court found that

this factor was proven beyond a reasonable doubt where the victim was lured from her home, the defendant obtained a gun in advance and executed the victim with a single gunshot to the head. See also *Wickham v. State*, §o.2d ____, 16 F.L.W. S777 (Fla.1991) wherein the court observed "While **the** murder of Fleming may **have** begun as a caprice, it clearly escalated into a highly planned, calculated and prearranged effort to commit the crime." The court found that said murder satisfied the standard set out in **Rogers, supra**, that the murder was cold, calculated and premeditated. **See also Banda v. State, 536 §o.2d 221** (Fla.1988) wherein the court found no pretense of moral justification for the murder.

Beyond a doubt, trial court was correct in finding this statutory aggravating factor applicable.

(C) The murder was committed for pecuniary gain.

Trial court found that Clark committed the murder for pecuniary gain, specifically that he wanted to eliminate Carter in order to get his job. The court **held**:

. . . Earlier the day of the homicide, defendant met with Hatch and the captain of the fishing boat on which Hatch was employed. The defendant asked the captain for employment on the boat and was advised that none was available because Charles Carter had been hired. Following the murder, the defendant stated to Hatch, 'I guess I have the job now.' The next day the defendant (sic) to claim the job. The court concludes that the victim was murdered for his job as a 'hand' on a fishing vessel. This aggravating factor is found to exist.

(R 945)

Although there does not appear to be another case wherein a murder was committed to get somebody's job on a fishing boat, the record reflects a prime motive for the murder was to eliminate Carter in order to allow Clark to work with his **buddy** Hatch on the Bloody Mary. Where, as here, the defendant executes a murder in order gain tangible financial benefits from that murder, the aggravating factor that the murder was committed for pecuniary gain exists. For example, in *Byrd v. State*, **481** So.2d **468** (Fla.1985); *Ziegler v. State*, **402** So.2d **365** (Fla.1981) and *Buenoano v. State*, 527 So.2d 194, pecuniary gain was found to be a valid aggravating factor where defendant's were trying to benefit from insurance proceeds as a result of the victim's death. Where a defendant kills his victim who stole money from the defendant, and tortured his victim in order to find out where the money was located, this court has held that the pecuniary gain factor has been established. *Thompson v. State*, **553** So.2d **513** (Fla.1989). Certainly, where a defendant knows that a victim has money in the house and has previously requested to barrow money, pecuniary gain exists. *Harmon v. State*, 527 So.2d **182** (Fla.1988). Or as in *Bates v. State*, **465** So.2d **490** (Fla.1985), the defendant cashes a five hundred dollar check within hours of the murder and then tries to cash another check two days later, pecuniary gain is established.

In the instant case, comparatively contemporaneous to the murder occurring, Clark told Hatch and Corbett "I guess I got the jab." The next day, Clark knowing that Carter was dead, appeared at the Bloody Mary and indeed got Carter's job and went out on

the boat with his friend Hatch fishing. The record reflects that when they returned six days later, they left the boat, got paid, and then were picked up by the police. But for the fact that Corbett went to the police about the murder, Clark would have perfected that which he intended to murder Carter who had gotten the job he wanted. Clearly this statutory aggravating factor has been proved beyond a reasonable doubt.

(D) The homicide was committed during a robbery.

The trial court concluded that the homicide was committed during the **course** of a robbery. The trial court found "after shooting the victim, the defendant removed from him his shoes, wallet **and money**. The court finds this aggravating factor to exist. A robbery did occur." (R 944-945).

Clark argues that there was "no evidence that Clark's motive for the murder was to steal the victim's wallet and shoes." To the contrary, the record reflects that all day Hatch, in the company of Clark, had been paying for beer and in fact, Hatch, Corbett and Clark had skipped out on their food bill at the Pizza Hut. It was Clark who sought money from Hatch for gas and it was Hatch who had borrowed money from Carter in order to go out drinking with Clark. It was Clark who needed a job and it was Clark, during his trial testimony, who stated that "nobody had money that **day**," (R 490). *Hatch* testified that Clark spend no money that day driving around, it was Hatch who had to pay for beer and gas. (R 363). Hatch testified that after Clark shot Carter for the second time he started laughing and went through Carter's pockets taking his wallet and money. Clark then dragged

the body over into a ditch, returned to the car and put the gun between the seat console. Hatch testified Clark took \$11 from Carter because, when he returned to the car, Hatch had one ten dollar and one dollar bill. (R 370-371).

The trial court did not commit error by improperly doubling the aggravating factors that murder was committed during the course of a robbery and for the purpose of pecuniary gain. The instant case is unlike *Jones v. State*, 580 So.2d 143 (Fla.1991) wherein the robbery was only an afterthought (Jones stole the officer's gun after he shot him) rather the murder was committed during the course of a robbery in order to perfect the robbery and secure Carter's property without resistance. See *Stewart v. State*, ___ So.2d ___ (Fla.1991), 16 F.L.W. 5617; *Lloyd v. State*, 524 So.2d 396 (Fla.1988); *Roberts v. State*, 510 So.2d 885 (Fla.1987); and *Bates v. State*, 465 So.2d 490 (Fla.1985).

Where there are different predicates for the pecuniary gain and the commission of the murder during the course of a robbery aggravating factors, both may exist without an improper doubling. **Echols v. State**, 484 So.2d 568 (Fla.1986).

Terminally, even assuming for the moment, one of the aggravating factors is found not to be proven beyond a reasonable doubt, death is the appropriate sentence, sub judice. See *Capehart v. State*, 583 So.2d 1009 (Fla.1991); *Herring v. State*, 580 So.2d 135 (Fla.1991); *Shere v. State*, 579 So.2d 86 (Fla.1991); *Green v. State*, 583 So.2d 647 (Fla.1991); *Holton v. State*, 573 So.2d 284 (Fla.1990) and **Rogers v. State**, 511 So.2d 526 (Fla.1987).

Based on the forgoing, all relief should be denied Clark as to this claim.

ARGUMENT: POINT II

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND NONSTATUTORY MITIGATING CIRCUMSTANCES SINCE EVIDENCE ESTABLISHING THEM WAS UNREFUTED .

The trial court found that none of the statutory mitigating factors existed and as to nonstatutory mitigating factors the court noted:

There is no doubt from the record that the defendant led a hard and difficult life. His early childhood experiences of being abused by his mother's lesbian lover or having to witness physical abuse and violence between his parents was unfortunate. However, there is nothing in this background that would serve to mitigate the murder herein.

. . . The court concludes that is clear from a reasoned weighing of the above findings that there **exist** four (4) statutory aggravating circumstances, and no factors than can be even remotely argued in mitigation.

(R 950)

Clark argues that mitigation was presented in the form of Clark's abusive childhood, alcoholism and drug abuse. He asserts that the state did not refute this evidence and that the trial court erred in not finding this evidence in mitigation. Citing **Campbell v. State**, 571 So.2d 415 (Fla.1990) and **Nibert v. State**, 574 So.2d 1059 (Fla.1990) he contends that "the judge in this case did not properly fulfill the sentencing responsibilities in regard to the finding of mitigating circumstances. His sentencing order is defective and the death sentence was imposed

without weighing the mitigating circumstances present." (Appellant's Brief, p. 31).

As evidenced by the recital of the facts, it is clear the trial court considered evidence in "mitigation" but gave said evidence little weight. This court in *Campbell*, *supra*, and *Nibert*, *supra*, merely found that once "some" mitigation is presented, the court cannot out of hand reject it unless said evidence is specifically refuted by the record. In the instant case, the trial court acknowledged that Clark had an abusive childhood, that he was an alcoholic and a drug abuser. However, the court suggested that those factors did not mitigate against the nature of the crime committed.

For example, the fact that Clark was an alcoholic, was not mitigation as to this crime, because, Clark said he had imbibed extensively the day of the murder yet after drinking countless numbers of beers, he was still able to drive normally and recall everything that happened until he conveniently had an alcoholic blackout. Doctors testified that even though Clark may have suffered an alcoholic blackout, he would have known what he was doing at the time but simply could not recall the events. Clark said he did not think he killed Carter, but if he did he did not remember and he did not know why he did it. Certainly the fact that Clark got drunk every day did not mitigate against conduct the day in question which apparently was like every other day in his life as it related to his imbibing. The record further reflects that Dr. Macaluso, Dr. Miller, Dr. Barnard and Dr. Chaknis all relied on Clark's background based on what Clark told

them. As to each, in particular Dr. Miller and Dr. Barnard, it is quite clear Clark was not truthful with them in that he indicated he had an alcoholic blackout much earlier in the day than what he testified to at trial. All the doctors noted that one does not recover one's memory after an alcoholic blackout. Clark took the stand and testified that he suffered his alcoholic blackout after **he** returned to the shrimp boat sometime after 6:00 p.m. on October 29, 1989 and he did not recall seeing Carter after that. He testified that the next day he did show up at the Bloody Mary and was hired on by the captain to go out on the boat when Carter did not show up. (R 493-495, 501-503). Dr. Macaluso testified that he was confident Clark suffered from alcoholic blackouts based on what Clark told him and the fact that Clark said during their interview that he had a blackout right after lunch. (R 565-566). He told Dr. Barnard that he could not remember anything after he first went to Jackie's Seafood and ran into Hatch and then they went to a lounge and had tequila. (R 586-587). **He** told **Dr.** Barnard that his next memory was several days later when he woke **up** in Georgia and he asked a woman where he was. (R 587). At the penalty phase, Clark called Dr. Barnard as his own witness who testified that although Clark suffers from some memory difficulties due to his "past blackouts, especially that he could not recall the events surrounding crime, Clark was not a severely depressed individual and although he had a history of drug and alcohol abuse, Dr. Barnard could not say what degree, if any, Clark's ability to appreciate his conduct was impaired." (R 739, 742-743). Dr. Barnard admitted that Clark was less than

truthful to him when he was interviewed and it was his view that the jury would have had a hard time knowing what to believe about Clark. (R 745-746). He concluded that Clark had no thought disorders nor delusions nor emotional or mental disturbance. (R 748). There was no substantial impairment of his thought processes and he fully appreciated what he was doing and why. (R 743, 748).

In light of the foregoing, trial court did not err in assigning little weight if any to these factors.

See e.g., **Kokal v. State**, 492 So.2d 1317 (Fla.1986) and **Cooper v. State**, 492 So.2d 1059 (Fla.1986).

Assuming for the moment, this court finds that the trial court erred in not giving "any" weight to the nonstatutory mitigating circumstances, the state would submit that the instant order was rendered the day Campbell, supra became final. If anything, based on the nature of the mitigations herein, any error by the trial court in his order is harmless error. See **Wickham v. State**, supra; **Valle v. State**, 581 So.2d 40 (Fla.1991) and **Cooke v. State**, 581 So.2d 141 (Fla.1991). Based on the foregoing, the state would urge this court to affirm the trial court's order finding that the mitigation **did** not outweigh the aggravation.

ARGUMENT: POINT III

WHETHER THE TRIAL COURT ERRED IN SENTENCING CLARK TO DEATH SINCE THE SENTENCE IS DISPROPORTIONATE.

Clark argues that "a premeditated murder during the commission of another felony, without any additional aggravation, simply does not qualify for a death sentence when compared to similar cases." (Appellant's Brief, p. 32). He argues that because at least three of the statutory aggravating factors were inappropriate and because the trial court failed to properly consider nonstatutory mitigation, death is inappropriate. **Proffitt v. State**, 510 So.2d 896 (Fla.1987); **Caruthers v. State**, 465 So.2d 496 (Fla.1985); **Rembert v. State**, 445 So.2d 337 (Fla.1984) and **Richardson v. State**, 437 So.2d 1091 (Fla.1983). Unfortunately for Clark, the circumstances, sub judice, reflect that all four statutory aggravating factors were validly found. "Any" nonstatutory mitigating evidence did not negate the aggravation presented. The instant case is not like **Menendez v. State**, 419 So.2d 312 (Fla.1982) where only one aggravating circumstance existed or **Holswroth v. State**, 522 So.2d 348 (Fla.1988) a jury override case.

While there **does** not appear to be another case with similar facts that a defendant kills a victim to get his fishing job, this court has held that murders committed during the course for robbery or for pecuniary gain which are cold, calculated and premeditated and likely heinous, atrocious and cruel are death **cases**. See **Hayes v. State**, 581 So.2d 121 (Fla.1990); **Young v. State**, 579 So.2d 721; **Hamblen v. State**, 527 So.2d 800 (Fla.1988);

Hargrave v. State, 366 So.2d 1 (Fla.1978) and **Rogers v. State**, 511 So.2d 526 (Fla.1987). Clearly, the instant case falls into those categories of cases where death is appropriate and thus proportionate to **cases** of like kind.

ARGUMENT: POINT IV

WHETHER FUNDAMENTAL ERROR HAS BEEN
DEMONSTRATED IN REGARD TO THE
PROSECUTOR'S CLOSING ARGUMENT AT
THE PENALTY PHASE OR THE JURY
INSTRUCTION ON THE HEINOUS,
ATROCIOUS OR CRUEL AGGRAVATING
CIRCUMSTANCE.

Clark next claims that his sentence of death must be reversed, due to, inter alia, a portion of the prosecutor's closing argument at the penalty phase and an allegedly unconstitutional jury instruction as to the heinous, atrocious or cruel aggravating circumstance. He also contends that it was error, as a matter of law, for the court to even instruct on this aggravating circumstance, in that the evidence simply did not support it. Appellee has already presented its argument in regard to the applicability of this aggravating circumstance, and will not repeat them at this juncture. See Point I, *supra*. Appellee would point out, however, that such **cases** as **Omelus v. State**, 584 So.2d 563 (Fla.1991)(not the murderer, hired the killer) or **Jones v. State**, 569 So.2d 1234 (Fla.1990)(not heinous, atrocious or cruel to commit sexual battery on corpse), are distinguishable, and that, even should this court disagree as to the factual basis for the finding of this aggravating circumstance, there was sufficient evidence before the jury to present a question for their determination. Cf. **Haliburton v.**

State, 561 So.2d 248, 252 (Fla.1990). As to the other claims raised - in regard to the prosecutor's closing argument and constitutionality of the jury instruction - Appellee respectfully submits that these claims are not preserved for review.

In regard to the prosecutor's closing argument, Clark complains, for the first time, that the prosecutor's reference to the fact that he laughed after killing the victim was an improper reference to Clark's lack of remorse (Initial Brief at 37-39). The record, however, indicates that no contemporaneous objection was interposed in regard to this argument (R 765-780). This court has consistently held that, even in capital cases, a contemporaneous objection is necessary to preserve for review claims involving prosecutorial argument. See **e.g., Teffeteller v. State**, 495 So.2d 744 (Fla.1986); **Hoffman v. State**, 474 So.2d 1178 (Fla.1985); **Burr v. State**, 466 So.2d 1051 (Fla.1985); **Rose v. State**, 461 So.2d 84 (Fla.1984); **Davis v. State**, 461 So.2d 67 (Fla.1984). Accordingly, this claim is waived, and would simply note that Clark's reliance upon **Hill v. State**, 549 So.2d 179 (Fla.1989), is misplaced, inasmuch as, in such case, the claim was preserved for review. To the extent that this court disagrees, Appellee would simply note that error has not been demonstrated. Clark's belief that the prosecutor's remarks referred to **a lack** of remorse on the part of Clark is simply supposition on his part; the state suggest that no reasonable juror, listening to these remarks, would have drawn such conclusion. Further, the prosecutor's reference to the fact that Clark's laughed after he had slain the victim, and as he was

stealing his personal belongings, would not seem to be improper. Cf. **State v. Dixon**, 283 So.2d 1, 9 (Fla.1973) ("cruel" portion of this aggravating circumstance includes a defendant's "enjoyment" of suffering of others, and relates to a "'conscienceless"crime).

In regard to the constitutionality of the jury instruction, Appellee likewise contends that this claim 'has been waived. Prior to trial, Clark filed a boiler-plate motion attacking the constitutionality of both this aggravating circumstance, as well as that involving the homicide having been committed in a cold, calculated and premeditated manner (R 867); the motion made no specific attack upon the jury instructions (R 867). Although the motion **was** called up for a hearing on September 20, 1990, the court deferred ruling upon it, at the request of defense counsel (R 34). It would not appear that motion was ever formally renewed at trial. During the penalty phase, defense counsel did, indeed, object to **the** jury being instructed on this aggravating circumstance (R 759-761). **He** did so, however, **only** due to the fact that he felt that the evidence did not support it, and no contention was ever made that the jury instruction per **se** was unconstitutionally vague (R 759-761).

This court has consistently held that, in order for a claim of error to be presented on appeal, it must be the specific contention asserted in the court below. See **Steinhorst v. State**, 412 So.2d 332, 338 (Fla.1982); **Bertolotti v. State**, 565 So.2d 1343, 1345 (Fla.1990). This principle applies to constitutional challenges as well. See **e.g., Ventura v. State**, 560 So.2d 217, 221 (Fla.1990) (constitutional challenge not presented to the

circuit court, improperly raised on appeal); **Swafford v. State**, 533 So.2d 210 (Fla.1988). Indeed, this court has held that this identical claim - that the jury instructions on heinous, atrocious and cruel violate **Maynard v. Cartwright**, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) - is improperly presented, when raised for the first time on collateral motion, in the absence of contemporaneous objection. See e.g., **Jennings v. State**, 583 So.2d 316, 322 (Fla.1991); **Swafford v. Dugger**, 569 So.2d 1264 (Fla.1990); **Roberts v. State**, 568 So.2d 1255 (Fla.1990). Thus, this claim is waived, because it was never presented to the court below; even if it could be said that Clark's original motion to strike this aggravating circumstance had embraced this argument, he waived this claim by failing to secure ruling upon that motion. See e.g., **State v. Barber**, 301 So.2d 7, 9 (Fla.1974) (appellate court must confine itself to ruling upon questions which were before the trial court and upon which a ruling adverse to the appealing party was made); **Oliva v. State**, 354 So.2d 1264 (Fla. 3rd DCA 1978). To the extent that this court disagrees, Appellee would simply note that this court has previously rejected this argument on the merits. See e.g., **Beltran-Lopez v. State**, 583 So.2d 1030 (Fla.1991); **Espinosa v. State**, 16 F.L.W. S753 (Fla. Nov. 27, 1991); **Smalley v. State**, 546 So.2d 720 (Fla.1989). No relief is warranted as to this procedurally barred claim.

ARGUMENT: POINT V

WHETHER FUNDAMENTAL ERROR HAS BEEN
DEMONSTRATED IN REGARD TO FLORIDA'S
STANDARD JURY INSTRUCTIONS AT THE
PENALTY PHASE.

As his final attack upon his sentence of death, Clark contends that Florida's standard jury instructions at the penalty phase violate *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), in that they allegedly improperly diminished the jury's sense of responsibility at sentencing. Appellee would initially contend that this claim is procedurally barred, in that no contemporaneous objection was interposed in regard to the standard jury instructions, on this basis, in the court below (R 790-796). This court has consistently held that claims of this nature must be preserved through contemporaneous objection, prior to presentation on direct appeal. See e.g., *Sochor v. State*, 580 So.2d 595, 603 (Fla.1991) (claim that standard jury instructions violate *Caldwell* not preserved for review, in absence of contemporaneous objection); *Carter v. State*, 576 So.2d 1291, 1293 (Fla.1989); *Gunsby v. State*, 574 So.2d 1085, 1090 (Fla.1991); *Reed v. State*, 560 So.2d 203, 206 (Fla.1990); *Jackson v. State*, 522 So.2d 802, 809 (Fla.1988). Accordingly, this claim is waived. To the extent that this court disagrees, Appellee would simply note that this court has consistently rejected this claim on the merits. See e.g., *Combs v. State*, 525 So.2d 853 (Fla.1988); *Grossman v. State*, 525 So.2d 833 (Fla.1988). Further, it is particularly unlikely that the jury in this case was misled as to the importance of its sentencing recommendation. During voir dire, both the judge and

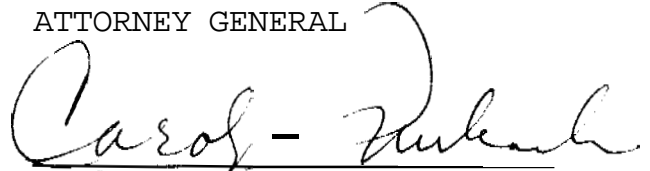
defense counsel assured the prospective jurors that their recommendation would be entitled to great weight (R 92, 189); subsequently, during closing arguments at the penalty phase, both the prosecutor and defense counsel told the jury that their recommendation was critical and entitled to great weight (R 767, 781). Cf. *Harich v. Dugger*, 844 F.2d 1464 (11th Cir.1988). No relief is warranted as to this procedurally barred claim.

CONCLUSION

Based on the foregoing, judgment and sentence of death must be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

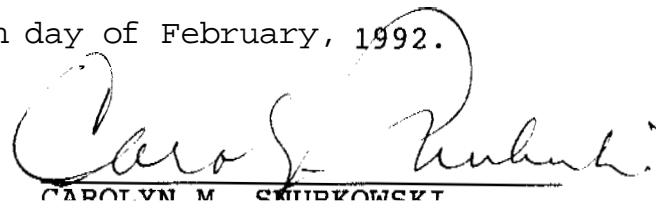


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Nancy A. Daniels, Public Defender and W.C. McLain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301 this 17th day of February, 1992.



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