IN THE SUPREME COURT OF FLORIDA

RUFUS STEVENS,

Appellant,

v. CASE NO. 78,031

STATE OF FLORIDA,

Appellee.

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

APPELLEE'S ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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

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

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND THE FACTS

Mr. Stevens' brief correctly sets forth the basic chronology of the case and is accepted to that extent.

The Appellant won resentencing due to the ineffective assistance of trial counsel during the penalty phase of his trial. **Stevens v. State,** 552 So.2d 1082 .(Fla.1989). The Appellant was once again sentenced to death, although by a different judge (R 962) even though the judge refused to apply an aggravating factor (cold, calculated, premeditated murder) in part due to the lack af confidence in the retroactivity of that factor. (R 677-678).

For the convenience of the Court the State shall set forth the facts as they relate to each argument. The facts relevant to the crime itself are adequately reported in **Stevens v. State,** 419 So.2d 1058 (Fla.1982) **(Stevens** I) and **Stevens v. State, 552** So.2d **1082** (Fla.1989) **(Stevens** 11) as well as in the three opinions in codefendant Engle's case. **Engle v.** State, **438** So.2d **803** (Fla.1983); **Engle v. State, 510** So.2d 881 (Fla.1987); Engle v. **Dugger, 576** So.2d **696** (Fla.1991).

FACTS: POINT I

The trial judge carefully considered seventeen nonstatutory mitigating factors proffered by the defendant but, based upon the record, concluded that the proffered factors were either not established or entitled to very little weight, (R 689-92). The proffered factors included alleged abuse as a child, impoverished living conditions as **a** child, an alleged learning disability, alleged "good" military and work records, psychological problems,

alleged parenting skills, intoxication, alcoholism, residual doubt as to guilt, remorse, a good prison record and "charitable deeds" (R 689-692). Balanced against this proffered mitigation were four clearly established aggravating factors: 1) murder during an enumerated felony; 2) murder to avoid arrest; 3) murder for pecuniary gain; and 4) murder that was heinous, atrocious and cruel. (R 685-689).

PACTS: POINT II

The second point on appeal relates to the proportionality of Stevens' death sentence. The argument is primarily legal in nature and requires no additional factual development.

FACTS: POINT III

Four statutory aggravating factors were applied to this murder. The facts supporting each factor are not in dispute and, in fact, are the same facts relied upon in upholding Stevens' conviction. (Stevens I, supra).

The trial judge found that the murder took place in the course of a robbery, kidnapping and/or sexual battery. This is undisputed. (R 685-689).

The trial judge found that the murder was committed to avoid arrest. Stevens' plan was to rob the store and abduct the clerk to facilitate their escape and overcome the prospect of being identified. This is undisputed. Mr. Stevens' brief takes the inconsistent position that Stevens (a) intended to release Mrs. Tolin, but (b) killed her because she left the car. This will be addressed in the argument.

The trial judge found that the murder took place for pecuniary gain, stemming from the "core" offense of robbery. (R 685-689).

The record of robbery, abduction, sexual abuse, stabbing, strangulation and mutilation led the court to a finding that the murder was heinous, atrocious and cruel. (R 685-689).

FACTS: POINT IV

After careful review, Judge Weatherby found that Mr. Stevens' post arrest statements were freely and voluntarily given. (R 225). The trial court also agreed with earlier determinations that defense counsel tactically allowed statements by codefendant Engle into evidence. (R 225). The attacks upon Dr. Floro's medical opinion went to its weight, not its admissibility. (R 226). The search of Stevens' car was also deemed consensual. (R 226).

FACTS: POINT V

Point Five is an ad hominem attack upon the collateral prosecutor (Mr. Bateh) which will be addressed below.

SUMMARY OF ARGUMENT

The Appellant raises five points on appeal relating to the weight of the mitigating evidence, the sufficiency of the aggravating factors, the court's failure to suppress guilt-phase evidence and an ad hominem attack on the state's attorney.

None of Mr. Stevens' substantive issues warrant relief. His claims go to discretionary rulings that are not subject to review, or they rely upon jury argument rather than appellate principles.

Relief should be denied.

ARGUMENT: POINT I

THE TRIAL COURT DID NOT ERR IN SENTENCING MR. STEVENS TO DEATH.

(A) Introduction

Absent from Mr. Stevens' brief is any realistic statement regarding the truly horrendous nature of this crime.

Kathy Tolin, a young working housewife and mother, was robbed and kidnapped at knife-point from her job by Stevens and his partner, Engle. The robbery and kidnapping were undisputedly Stevens' idea.

Mrs. Tolin was sexually battered by Mr. Stevens and Mr. Engle. She was eventually strangled almost to death, sexually battered again (with either an object or a fist that tore a four inch laceration), stabbed in the back (non-fatally) with a dull knife and then stabbed to death with a sharp knife.

Engle and Stevens, by virtue of severed trials and/or collateral proceedings, have blamed each other for the killing while protesting their own passivity. **See Stevens** v. **State, 419** So.2d **1058 (Fla.1982);** Engle **v. State, 438** So.2d 803 **(Fla.1983); Engle v. State, 510** So.2d **881 (Fla.1987); Stevens v. State, 510** So.2d **1082** (Fla.1989); Engle **v. Dugger, 576** So.2d **696** (Fla.1991);[1] Stevens' trial transcripts (R **1042-1045).**

(B) The Tedder Standard

Mr. Stevens contends that the trial court erred by sentencing him in accordance with **§ 921.141,** Fla. Stat., rather

---

[1] Mr. Engle also has a pending Rule 3.850 proceeding. The state submits that this Court can take notice of its own records regarding Engle.

than the law as proclaimed in **Tedder** v. **State, 322** So.2d **908** (Fla.1975) and **Cheshire** v. **State, 568** So.2d 908 (Fla.1990). We reject Mr. Stevens' interpretations of **Tedder** and of the Florida Constitution.

At the outset, we would note that Stevens' argument regarding the limited power of the sentencing.judge is contrary to this Court's decision in **Zeigler** v. **State, 16** F.L.W. **5257** (Fla.1991). According to Stevens, once a jury suggests a life sentence § 921.141 no longer applies. Thus, instead of weighing "aggravating" and "mitigating" factors and passing sentence, trial judges may only look at the "reasonableness" of the mitigating factors and rubber-stamp the jury. **Zeigler,** however, holds that the relative weight of any mitigating factors can still be considered. Fla.Stat. 921.141 directs the trial judge, as **actual sentencer,** to weigh the aggravating and mitigating evidence and to sentence in accordance with the weight of the evidence **natwithstanding** any advisory sentence returned by the jury. The statute does **not** differentiate between "life" and "death" verdicts, nor does it declare that the weighing process differs with the nature of the verdict, nor does it **place** greater importance upon a "life" recommendation. Indeed, a "life" verdict does not even qualify as a statutory mitigating factor.

Judge Weatherby's duty on remand for resentencing, was to follow the mandatory language of § 921.141(3), Fla. Stat., **and** consider both the (statutory) aggravating factors and all mitigating factors supported by the record "notwithstanding" the advisory verdict.

(C) Judge Weatherby's Order

It is obvious that Judge Weatherby complied with the newly created writing requirements of Campbell v. State, 571 So.2d 415 (Fla.1990). The Court took pains to note each nonstatutory mitigating factor proffered by Mr. Stevens, categorize them and determine their weight.

Campbell v. State, 571 So.2d **415** (Fla.1990) is not organic law and assuredly does not amend **§** 921.141, Fla. Stat. The opinion states that its purpose is to establish guidelines to assist trial courts in evaluating evidence.

It should be noted that Stevens did not offer **a** contemporaneous objection, based upon **Campbell,** to the court's sentencing order when it was read (R 681-693). Absent such an objection, Stevens has no right to raise the issue on appeal. Steinhorst **v. State,** 412 **So.2d** 332 (Fla.1982); **Clark v.** State, 363 So.2d 331 (Fla.1978). Even so, the mere "silence" of Judge Weatherby's order does not indicate that he failed to consider Stevens' evidence. **See Harich** v. **State,** 542 **So.2d 90** (Fla.1989); Robinson v. **State,** 16 F.L.W. **S107** (Fla.1991); **Spaziano** v. **State,** 557 So.2d 1332 (Fla.1990).

It is for the trial judge to discern the establishment of mitigating factors and afford them some weight so lang as it is "greater than zero."

The question of whether the evidence establishes a "mitigating factor" was addressed in **Campbell** v. **State, supra, as** follows:

> "The court must find as a mitigating circumstance each proposed factor that is

> mitigating in nature and has been reasonably established by the greater weight of the evidence,"
>
> (supra, at 419)

The question of whether a given factor is "mitigating" is a question of law, while its establishment is a finding of fact that is presumptively correct. **Campbell, supra, citing Brown v.** Wainwright, 392 So.2d 1327 (Fla.1981). It is important to note than even so-called "unrebutted" evidence can fail to establish a mitigating factor if it is weakened by cross-examination, **Copeland** v. **Dugger, 565** So.2d 1348 (Fla.1990), or is otherwise contrary to the record or of dubious relevance. **See Zeigler** v. **State,** 580 So.2d 127 (Fla.1991); Valle v. State, 581 So.2d 40 (Fla.1991).

(D) **The Lack *of* Mitigating Evidence**

As **noted** before, mitigating evidence will not establish a mitigating factor, or at least a significant factor, if it cannot withstand record scrutiny (including the debilitating effects of cross-examination). Mr. Stevens proffers some seventeen alleged "mitigating factors." Each one will be analyzed in the order presented by the Appellant.

(1) Alleged deprived childhood

Mr. Stevens was one of ten children who allegedly grew **up** in an atmosphere of poverty, alcoholism and guns. Evidence of the alleged deprivation came from several siblings whose loyalty to Rufus cannot be discounted. See Zeigler **v.** State, 580 So.2d 127 (Fla.1991).

The story of Stevens' youth seemed almost plausible as it spilled from the lips of his brother until, an cross, Clifford came to be asked "why" the police, school officials and welfare people never truly intervened against Clifford and Rufus' "abusive" parents. Clifford's response? "Daddy ran the county." (R 551).

Mr. Newt Stevens, the drunken gambler who could not afford a flush toilet, appointed mayors, sheriffs, county commissioners and - yes - even judges. **(R 552).** Imagine the absurdity of such incredible political power in someone with no money and no "base" for such authority. The notion is as absurd an exaggeration as one could imagine.

We suspect that the truth is that Stevens was one of ten children from a low income family. Out of ten siblings, **only Rufus** was ever convicted of a violent felony. Aside from a misdemeanor by another sibling, Rufus' brothers and sisters are successful citizens. Thus, while sophomoric social theorists may muse than all crime is attributable to environment, that clearly does not apply in this case.

An impoverished or tough youth can be a "mitigating" factor," but this factor need not receive significant weight when, as here, it is unrelated to the crime and unverifiable. Stewart **v.** State, 16 F.L.W. S617 (Fla.1991); **Sochor** v. State, 580 So.2d 595 (Fla.1991). Nothing in Stevens' past explains why he, alone out of ten children, embarked on robbery, sexual battery and murder. Mere poverty does not justify the taking of innocent human life.

(2) Abuse as a child

These allegations are redundant, exaggerated and largely unverifiable. This factor (which obviously did not influence the other nine Stevens children) was deemed to carry insufficient weight to justify a life sentence in Stewart v. State, 16 F.L.W. S617 (Fla.1991), Valle v. State, 581 So.2d 40 (Fla.1991) or **Sochor** v. State, 580 So.2d 595 (Fla.1991) and should not apply here.

(3) Learning disabled/lack of education

Stevens was extremely bright, with an abave average IQ (according to his own expert, Dr. Levin) (R 429) and was a quick learner and good worker according to his former employer. (Harper Depo at 419). While Stevens may not have applied himself or learned to read, it certainly is not attributable to any mental deficiency.

(4) Good worker

People associated with Stevens prior to 1972, described him as a goad worker. No witnesses for the 1972-1979 era appeared on his behalf. There is little or no nexus between this "factor" and Stevens' crime unless, of course, one considers the fact that Stevens' ability to hold a job when he felt like it rendered the crimes at bar even more senseless and cruel. This factor is therefore, **not** mitigating. Luckily for Stevens, it was not considered aggravating.

(5) Military record

Stevens served two hitches, the second of which (according to his **PSI)** apparently ended with his incarceration at Fort Knox

stockade for going AWOL and his less than honorable discharge. This is not "mitigation." **Demps** v. **Dugger, 514** So.2d **1092** (Fla.1987). Even trial counsel noted Stevens was dishonorably discharged. (Transcript at R 1281). So Stevens' argument is clearly an erroneous one.

(6) Good parent

It is to be expected that family members would testify for Stevens. Zeigler, supra. Stevens' love of family did not prevent the kidnapping and sexual battery and murder of a young mother. Mr. Stevens, of course, could have remained at one of his "good jobs" and supported his family. Also, given the horrible things Stevens did to Mrs. Tolin, the allegation that he told his son "not to hit women'' (brief, page 30) is of little weight.

(7) Mental problems

Mr. Stevens did not rely upon an insanity defense at trial and, in mitigation, did not link Dr. Levin's post-hoc evaluation to the crime (as a causative factor).

If we assume Dr. Levin told the truth, Stevens is not antisocial, not violent and relies upon his grandiose delusions as a form of escape from stress. (TR 423). Stevens has "above average" social judgment (TR 429) and did not readily reveal his belief he is a radio. (R 420).

If these reports are reliable, they do not relate to his crime or his conduct during the crime. Nonviolent people with superior social judgment do not plan and carry out robbery, sexual battery, torture and murder, yet Stevens did all of these

things. When the theory does not mesh with the record, the trial court is not bound by the bizarre theory of a hired defense expert. **See Francis** v. **State,** 529 So.2d **670** (Fla.1988); Thompson **v.** State, 553 So.2d 153 (Fla.1989); **Johnson** v. **State,** 16 F.L.W. S459 (Fla.1991); see **also Bundy v. Dugger,** 850 F.2d 1402 (11th Cir.1989); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir.1989).

The absence of any nexus between Dr. Levins's post-hoc analysis and the facts of the case is but one factor which militates against reliance upon this putative factor.

Dr. Levin is an opponent of capital punishment who has never testified for the state in a capital case. (R 413, 436). Dr. Levin tainted his entire analysis of Stevens by explaining, during the course of the Stevens interview, that he had been retained by defense counsel to help construct a defense to get Stevens off death row. (R 436-437). Apparently, this was the revelation that prompted Stevens to reveal that he thought he was a radio. There is a presumption that defendants will exaggerate their symptoms to assist their defense. **Mims** v. **United States,** 375 F.2d 135 (5th Cir.1967); **United States v. Makris,** 535 F.2d 849 (5th Cir.1976); **United** States **v. Mota, 598 F.2d 995** (5th Cir.1979). When one considers the fact that prior psychiatric evaluations concluded that Stevens was sane, competent and aware of the criminality of his actions, **see Stevens v. State,** 419 So.2d 1058 (Fla.1982)**these** sudden, self-serving revelations to a non-neutral expert, a **decade** after trial, are dubious indeed. It was disingenuous for Dr. Levin to discount the potential for malingering under the circumstances.

Other factors apply to Dr. Levin's theory which further detract from its reliability. First, as noted above, the exam was untimely. As noted in **Drope** v. Missouri, **420 U.S. 162** (1975), trial courts need not even admit **nunc** pro **tunc** psychiatric evaluations when the passage of time and other intervening factors make said evaluations irrelevant. Second, Levin based his diagnosis on the DSM **III R**, a text which specifically contains the caveat that its contents (axis/diagnoses) are not necessarily relevant to legal determinations. ***See*** Cautionary **Statement, DSM III** R, at **XXVI**. In fact, the "disorders" identified by the DSM **III** R **are** not universally accepted, are clinically unverifiable, are not agreed upon by its editors and - in fact - are "elected" to the text by a panel vote. (See Introduction, **DSM III R**). This confusion is compounded by the potential bias of the witness; to-wit:

> "Some clinicians have over diagnosed incompetency in order to bring about what to them seems a more humane disposition of cases involving "heinous" or "revolting" crimes committed by defendants who were "pitiable" or "puzzling." There may well be a general tendency of clinicians to err on the side of finding marginal defendants incompetent on the basis that some amount of mental health treatment will be helpful.
>
> "**Incompetency to Stand Trial,**" **49** Rutgers L.R. **284** (1987).

Even if Dr. Levin - whose responses were limited to Stevens' "present" and "post 1979" mental state (R 414) - was neutral and detached, his conclusions would be of limited relevance. Given

his bias and his "interview" with his client, Levin's theory is of minimal weight.[2]

(8) Drinking/Alcohol

The use of alcohol that night is not disputed although the quantity of alcohol consumed is not known for certain. Still, Stevens' abilities were not impaired. **Stevens v. State,** 419 So.2d **1058** (Fla.1982). The mere use of alcohol, while "mitigating," will not overcome the aggravating factors at bar. **Tompkins** v. State, 549 So.2d 649 (Fla.1989); **Lambrix** v. **State,** 534 So.2d 1151 (Fla.1988); Robinson **v. State,** 574 So.2d **108** (Fla.1991).

(9) History of alcohol problems

This alleged factor is a mere harmonic variation of (8) (above) and is irrelevant. Again, the psychiatric analyses performed in this case did not find Stevens to have been *so* brain damaged by alcoholism as to have been "insane" or not responsible for his conduct. A high alcohol tolerance could, however, diminish the prospect that Stevens was intoxicated by whatever he drank that night.

(10) Question of who was the "actual killer"

Stevens and his codefendant (Engle) are engaged in the all-too-common tactic of blaming each other for the "actual" killing. **(Compare** Parker **and Groover**[3]**,** Copeland **and Smith**[4]). **The** simple

---

Levin did not find Stevens "insane" or floridly psychotic. Levin's diagnosis was, in sum, more of a personality disorder of dubious relevance. Compare **James** v. State, **489** So.2d **737** (Fla.1986); **Chestnut v. State, 538** So.2d 820 (Fla.1989); Engle **v.** State, **576** So.2d 696 (Fla.1991).

[3] **Parker v. State,** 458 So.2d **750** (Fla.1984)
Groover v. State, 458 So.2d 226 (Fla.1984)

truth is that Engle, Stevens, or both, raped, strangled and stabbed Kathy Tolin to death. The evidence does not exonerate either defendant.

Regardless of any claim of innocence, the law of this case is that Stevens is guilty of first degree murder and - as the one who planned and instigated the events - is at least as guilty as Engle, if not more. **Tison** v. **Arizona, 481 U.S. 137** (1987); **Van Poyck** v. **State,** 564 So.2d 1066 (Fla.1990).

(11) Felony - murder

There is only one crime of first degree murder in the state of Florida and death is an appropriate sentence whether "intent" is proved by "premeditation" or "felony murder." Stevens' self-serving jury argument that "Engle did it spontaneously" is inappropriate on appeal and constitutes nothing more than a variation of his "residual doubt" claim (below).

(12) Residual doubt

Any reasonable doubt regarding Stevens' guilt was removed by the guilt phase verdict. If enough reasonable doubt existed to establish a "mitigating factor," Stevens should not have been convicted. That is why the Florida courts do not recognize this as a "mitigating factor." **King** v. **State,** 514 So.2d 354 (Fla.1987); Aldridge **v. State, 503** So.2d 1257 (Fla.1987); Burr v. **State,** 466 So.2d **1051** (1985); Buford v. **State, 403** So.2d 943 (Fla.1981).

Copeland v. State, 457 So.2d 1012 (Fla.1984)
Smith v. State, 457 So.2d **1380** (Fla.1984)

(13) Remorse

There is no evidence of remorse in this record. Stevens did not testify and any hearsay allegations of "remorse" are more than belied by Stevens' continued denial of guilt. The only "remorse" felt by Stevens was that attending his capture.

(14) Good prison record

There was no evidence of a "good" prison record beyond a hearsay evaluation of Stevens' record by his friendly expert, Dr. Levin, who is not a penologist or even a prison employee. We would also note that Stevens accumulated his five disciplinary reports - including a violent one - while on death row. Thus, it cannot be said that Stevens' record qualifies as mitigating as anticipated by **Skipper** v. South **Carolina, 476** U.S. **1 (1986).**

(15) Potential for rehabilitation

Again, this is a highly-subjective evaluation which is not subject to appellate review. The crimes at bar were not Stevens' first and his conduct in prison (see above) does not reflect rehabilitation. Other than pure speculation, this "factor" enjoyed virtually no record support.

(16) Physical condition

Mr. Stevens' eyes have been damaged to the point that he has 20/400 vision. (R 205-13). Dr. Halpern had no prognosis on Stevens' ability to benefit from medical care and, in fact, Dr. Halpern could not be certain whether Stevens was exaggerating his visual impairment. (R 313).

Stevens was apparently "blinded" during his stay in prison. While this injury may be unfortunate (or it may explain the

improvement in his behavior), it has absolutely no connection to the murder of Kathy Tolin.

(17) Charitable deeds

There was no evidence, beyond some expected hearsay (Zeigler, supra) of this factor. Obviously, Stevens' charitable nature did not operate to save Mrs. Tolin.

(E) Conclusion

The only logical conclusion to be drawn from this record is that little or no viable "mitigating evidence" has been offered to refute the four valid aggravating factors at bar. Claims related to Stevens' childhood are untrustworthy and fail to relate to the crime. Mental health claims are based upon dubious, procured, "expert" testimony that was predicated upon a questionable exam. Claims of mitigation based upon residual doubt about guilt are improper, while claims of "remorse" are simply unproven.

Mr. Stevens planned and instigated the horrible crimes at bar. Like his codefendant Engle, Stevens was properly sentenced to death.

ARGUMENT: POINT 11

THE SENTENCE OF DEATH IS NOT DISPROPORTIONAI;

Stevens' second main point on appeal begs the existence of his so-called mitigating evidence and suggests that he should not receive the appropriate sentence for robbing, kidnaping, raping, choking, mutilating and stabbing Mrs. Tolin, The controlling fact, on appeal, is that Stevens committed the crimes at bar.

Although, on appeal, all facts and inferences must be taken in favor of the sentence, **Spinkellink** v. **State, 313** So.2d **666** (Fla.1975), even the most charitable view of this record shows Stevens as the one who instigated these horrible events and who willingly participated in robbery, kidnapping, sexual battery and murder.

As ringleader, Stevens' case compares favorably with **Copeland** v. **State, supra.** The robbery, kidnapping, sexual battery and murder at bar compares with such capital cases **as Stewart** v. **State, 16** F.L.W. 617 (Fla.1991)(hitchhiker robs and kills motorist); **Bundy** v. **State,** 471 So.2d **9** (Fla.1985)(victim kidnapped, sexually assaulted, killed. We would note that **Bundy** cites Stevens as an example of a proportional murder, so the reverse would also be true); **Steinhorst** v. **State, 412** So.2d **332** (Fla.1982)(victims abducted and murdered); Alford v. State, 307 So.2d **433** (Fla.1975)(victim raped and killed); and **Martin** v. **State, 420** So.2d **583** (Fla.1982)(convenience store clerk abducted, raped and killed).

There is nothing disproportional about Stevens' sentence.

ARGUMENT: POINT III

THE AGGRAVATING FACTORS WERE PROVEN AS REQUIRED BY STATUTE.

This Honorable Court has already reviewed and upheld the four statutory aggravating factors established by the record in this case. **Stevens** v. **State, supra.**

(1) Avoiding Arrest

Witness elimination was the avowed purpose of this entire series of crimes after the threshold robbery. From the very

outset, Engle and Stevens knew that the prospect of identification would compel elimination of the store clerk. This fact is evident from Stevens' own statements and the admissible portion of Nathan Hamilton's story.[5]

Even assuming Kathy Tolin did try to run for her life (brief, page 41), she was pursued and killed to eliminate her as a witness. (Why not let her *go* off into the woods otherwise?)

Witness elimination was clearly a dominant motive. **Menendez** v. State, **368** So.2d 1278 (Fla.1979) and was correctly applied. **Adams v.** State, 412 So.2d 850 (Fla.1982); **Stevens** v. **State, supra.**

(2) **Pecuniary Gain**

Mrs. Tolin **was** eliminated a3 a witness to facilitate the successfu completion of a robbery. This factor is analogous to the "pecuniary gain" finding **in Johnson** v. **State,** 438 So.2d 774 (Fla.1983); **Menendez** v. **State,** 419 So.2d **312** (Fla.1982) and **Stewart** v. **State, supra.** The **mere** presence of additional acts such as kidnapping and sexual battery do not reduce the applicability of this factor. **Johnson, supra.**

Stevens' **brief** suggests that if "pecuniary gain" is a "dominant" motive then "witness elimination" cannot apply (or vice versa). This is clearly not true. **Parker** v. **State,** 458 So.2d **750** (Fla.1984)(dope dealer kidnaps and murders victim to eliminate a witness and to enhance his drug business); **Henry** v.

---

[5] We do not rely upon Hamilton's improper "additional" statement, regarding alleged comments by Stevens, that was disallowed an resentencing.

State, 16 F.L.W. S593 (Fla.1991)(store employee robs store and kills co-workers far pecuniary gain and to eliminate witnesses).

(3) Heinous-Atrocious-Cruel ("HAC")

The HAC factor was upheld by this Court in Stevens v. **State, supra,** and Stevens has not offered one shred of evidence to alter that finding. In fact, Stevens' entire argument consists of nothing more than his own theory of the facts, supplemented by authorities whose relevance is entirely contingent upon those facts.

As noted before, this Court has already rejected the "noninvolvement" defense, and there is no longer a viable "reasonable doubt" issue before this Court given the presence of a valid conviction.

The abduction, cape, mutilation, strangulation and stabbing of young Kathy Tolin inflicted such terror, pain and needless suffering as to clearly satisfy this factor. **Quince v. State,** 414 So.2d 185 (Fla.1982); Smith v. State, **424** So.2d 726 (Fla.1982); Randolph v. **State,** 562 So.2d **331** (Fla.1990). Indeed, we would suggest that this one factor more than outweighs any of the "mitigation" proffered by Stevens.

(4) Murder During Felony

Mr. Stevens did not challenge this factor.

Mr. Stevens alleges that the state, by not arguing "pecuniary gain" **and** "witness elimination" to the advisory jury at the original trial[6], was estopped from arguing those factors

---

At (TR 1249) Mr. Austin, in addressing the jury, was running through the statutory aggravating factors and opined that "avoid arrest" only applies when "shooting at policeman" during an

at his original sentencing and on resentencing. Stevens calls this the "law of the case."

First and foremost, it should be noted that the prosecutor's argument did not prejudice Mr. Stevens. Stevens knew that the jury was still advised of these factors by the trial judge, and Stevens - courtesy of resentencing - had the 'ability to prepare any response to these factors he could. (Stevens also knew that these factors were upheld on appeal).

The only possible effect of this error by the prosecutor was to prevent the advisory jury from considering two perfectly valid statutory aggravating factors, Had these factors been added to the jury's equation, it is possible that a death recommendation would have resulted rather than the totally unreasonable (Stevens v. State, supra) life sentence it suggested.

In Hoffman v. State, 474 So.2d 1178 (Fla.1985) the trial court failed to instruct the advisory jury to consider a statutory aggravating factor which the court later relied upon at sentencing. There, as here, the defendant stated that this error precluded finding this aggravating factor. This Court rejected the claim stating that the judge's error did not in any way prejudice the defense.

Second, a prosecutor is not a judge and does not render judgments that bind the parties. Thus, "law of the case" cannot apply to a situatian such as this. The real issue is whether the

---

escape. Mr. Austin disavowed the "pecuniary gain'' factor because he thought it doubled with the "robbery," not because it did not exist (TR 1250). The advisory jury was instructed to consider both factors anyway.

prosecutor's conduct induced the defendant to act, or not act, in reliance of same, to his actual prejudice. Again, as in Hoffman, there is no sign of prejudice in this case given the remand for resentencing.

We would also compare this case to Spaziano v. **State, 433** So.2d **508** (Fla.1983), in which this Court found no error in the consideration of an "additional" aggravating factor in a remand (resentencing) proceeding when, in the first sentencing proceeding, the defendant had notice of the underlying facts. Additional aggravating factors were also permitted under the same or similar circumstances (facts in record) in **Ferguson** v. **State,** 474 So.2d 208 (1985) and in Mann **v. State,** 453 So.2d 784 (1984).

In Echols v. State, 484 So.2d 568 (Fla.1986) this Court considered an aggravating factor established by the record although not found by the trial judge, while in Dobbert v. **Florida, 432 U.S. 282 (1977)** the court held that a defendant could be subjected to a statutory aggravating factor that did not even exist at the time of his crime, though it was on the books by the time of his trial.

Given these authorities, a mere error by the prosecutor in arguing his case to the jury - which resulted in a **life** recommendation - clearly cannot preclude consideration of two valid aggravating factors during a defense-requested remand.

Mr. Stevens' brief raises two apparently unresearched claims. First, he alleges that Florida's HAC factor is unconstitutional under **Maynard** v. **Cartwright, 486** U.S. **356** (1988). **Maynard** does not apply to Florida because we do not

utilize jury sentencing. Porter v. Dugger, 559 So.2d 201 (Fla.1990); Clark v. Dugger, 559 So.2d 192 (Fla.1990); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir.1989).

His second argument, challenging the felony murder concept for failing to "narrow" the class of death eligible persons, is facially baseless. His citation to Gregg v. Georgia, 428 U.S. 153 (1976) is misplaced since Gregg refers to Proffitt v. Florida, 428 U.S. 242 (1976) and approves of Florida's statute. Proffitt, of course, repudiates Stevens' arguments in full.

(5) Conclusion

The aggravating factors upheld by this Court in Stevens' first appeal are still valid.

ARGUMENT: POINT IV

THE APPELLANT WAS NOT ENTITLED TO SUPPRESSION OF THE EVIDENCE ADDUCED AT TRIAL.

Mr. Stevens suggests that even if various items of evidence were admissible in his original trial, subsequent (and selected) changes in constitutional law precluded their admission at his resentencing. In this way, Stevens hopes to avoid any "law of the case" problem arising out of Stevens v. State, 552 So.2d 1082 (Fla.1989) and sidestep the 1983 revision of Article I § 12 of the Florida Constitution, linking said Article to the Fourth Amendment to the Constitution of the United States.

We will dispose of Stevens' claims in order, but in doing so we do not agree that this issue is properly before the Court. A sentencing is qualitatively different from a trial even if similar in format. Spaziano v. State, supra. Stevens was

remanded for resentencing, not retrial. The operative facts, therefore, should be the facts gleaned from the trial record at the time, with Stevens' guilt presumed and established.

Stevens is guilty. Issues relating to his arrest or the voluntariness of his confession do not relate to any aggravating factor. If Stevens wanted to contest these factors as some sort of "mitigation," he possibly could have done so, but he did not. We submit, therefore, that the suppression issue was closed.

(1) Stevens' Voluntary Post-Arrest Statements

The State does not agree with the "operative facts" as egregiously restated by Mr. Stevens. This is an appeal, and all facts must be taken in favor of the judgment.

Lanny Isreal was arrested for DUI on March 19, 1979. Mr. Hamilton, also drunk, was a passenger in Isreal's car. Isreal told the police that Hamilton had information regarding Kathy Tolin's murder. (R 59-61).

Detective Parmenter attempted to interview Hamilton but Hamilton refused to talk out of fear for his family. (R 64). This fear was justified when the police went to Hamilton's trailer to rescue his family and found Rufus Stevens (known then only as "B") at her home. (R 66). To avoid trouble, the police lied to Stevens about a drug bust as an excuse to get the family out. (R 66). Hamilton was motivated to talk by the prospect of a reward, but no deals or threats were ever made. (R 486-487).

Based upon his investigation, Parmenter decided to arrest Engle and Stevens (who had now seen the police or could have been tipped off) before they could flee. The police went to Mr. Stevens' home where they were let in by a Mr. Custer. (R 72).

Stevens was arrested, given "Miranda" warnings, taken to police headquarters and given his rights again.

No matter the length of the form used, it is undisputed that Stevens was given his rights, understood them, signed the form and gave a free and voluntary statement. It is also undisputed that no portion of the so-called "Miranda" warning was absent from the "short form."

Mr. Stevens' argument constitutes much ado about nothing. Nonsense arguments about Hamilton's intoxication and the length of the Miranda form are a smokescreen designed to obfuscate the only relevant issue: whether Stevens was aware of and waived his "Miranda" rights, The answer to that question has not changed throughout all of Stevens' appeals. The answer is yes.

(A) The arrest was legal

Stevens was arrested in March 1979, a year before Payton v. **New York, 455** U.S. 573 (1980) and in a manner that did not violate the "**knock** and announce" law. (**§ 901.19**, Fla. Stat.) The police did not kick in Stevens' door or force their way into his home. Custer let the police in. Since the police had consent to enter from a person with apparent authority, the "knock and announce" rule did not apply, essentially mooting this issue. Lewis v. State, **320** So.2d **435 (Fla.1975).** If Parmenter **did** not have consent, it has never been shown that he knew it. Under both Florida and federal law as it existed at the time, Parmenter's good faith reliance upon Custer's consent precludes suppression. **Moreno v.** State, **277** So.2d **81 (Fla.1973); Rodriguez v. State, 189** So.2d **656 (1966);** Jones **v. State, 440** So.2d **570**

(Fla.1983); Michigan v. De Fillippo, 443 U.S. 31 (1979); Massachusetts v. Sheppard, 468 U.S. 981 (1984).

Although Stevens was asleep, the police did not know that. All they knew was that Hamilton felt Stevens knew he would "snitch" and harm his family, a fact corroborated earlier that evening when Stevens was found at the Hamilton home when the police rescued the family. The police acted on what they knew. Even if they had no consent, their entry would have been reasonable. Moreno, supra; Jones, supra. (In Jones, the police got the defendant out of bed after entering his home in search of a sniper).[7]

Mr. Stevens alleges that our pre-1983 exclusionary rule was absolute and inflexible, As we already know, this is an incorrect assumption. His cited cases of Grubbs v. State, 373 So.2d 905 (Fla.1979) and State v. Dodd, 419 So.2d 333 (Fla.1982) (applying the exclusionary rule to parole and probation proceedings) define Article I § 12 as "stronger" than its federal counterpart only by noting that our constitution actually spelled out an exclusionary rule while the federal constitution did not.

In terms of interpreting Article 1 § 12, however, Florida tracked federal law when interpreting our constitution even before the 1983 Amendment made such conduct mandatory. See generally Fla. Canner's Assoc. v. Dept. of Citrus, 371 So.2d 503 (Fla.2nd DCA 1978; Assoc. General Contractors v. Dade County, 723

---

[7] As Judge Weatherby noted below, State v. Santamaria, 385 So.2d 1130 (Fla.1st DCA 1980) did not set a uniform two (2) hour limit on Jacksonville warrants. The two hour finding was the trial judge's assessment of the facts of that case.

F.2d 846 (11th Cir.1984); F.R.E.C. v. McGregor, 336 So.2d 1156 (Fla.1976). The decision in Odum v. State, 403 So.2d 936 (Fla.1981), like Sarmiento[8] based its exception to the Fourth Amendment on specific provisions of Art. 1 § 12 relating to "communications" appearing in our constitution but not the federal constitution.

Again, however, this entire issue is moot. The police had **consent** to enter Stevens' home, and the nature of the arrest had no causal connection to Stevens' eventual, voluntary, post-Miranda statements.

Stevens also chooses this late date to question the probable cause for his arrest, citing "impeachment" evidence relating to Mr. Hamilton. (Brief, 74-76). "Probable Cause" does not mean "proof." Hamilton, for whatever reason, still gave Parmenter information that meshed with facts known to the investigator. Under the totality of the circumstances, the police had probable cause. Illinois v. **Gates,** 462 U.S. 213 (1983).

Judge Weatherby's decision not to reopen the case just because other "short forms" were located is of no consequence. Parmenter testified during the hearing that short forms were used in other cases and were going to replace the old "long" forms. (R 138-149). None of this smokescreen has anything to do with the fact that Stevens waived his Miranda rights and signed the form provided. Miranda v. Arizona, 384 U.S. 436 (1966) does not dictate the use of any particular form.

---

[8] **State v. Sarmiento**, 379 So.2d 643 (Fla.1981)

(2) Dr. Floro's testimony

If the state was so desperate as to suborn perjury it would:

> (1) Not have deviated from the autopsy report (4 cc's of blood) it handed counsel, and
>
> (2) It would not have had Dr. Floro testify to different amounts of blood in the Engle and Stevens cases.

If Dr. Floro was willing to risk prison and loss of his license by committing perjury, it is hoped that his "price" was greater than a nice "thank you" letter from Mr. Austin after the trial.

The simple truth is that either Dr. Floro erred in his testimony or the court reporters misunderstood his Filipino accent.[9] Be that as it may, Dr. Floro's opinion remains unchanged even when only 4 cc's of blood are considered. (R 231-33, 288).

Judge Weatherby noted correctly that Dr. Flora's testimony was subject to possible impeachment (as inconsistent) but that did not subject the evidence to suppression.

That correct legal opinion forces Mr. Stevens back into the corner of accusing the state of suborning perjury. Again, however, Stevens scurrilous allegations are unsupported and essentially unresearched. Never did Stevens establish improper inducements by the prosecutor. Never did Stevens establish a motive for either the prosecutor to suborn perjury or Floro to accept the offer. Not once did Stevens offer evidence of

---

[9] Oddly, if Dr. Floro did use the wrong amounts in two trials, facing two lawyers, no one ever cross-examined him about the discrepancy.

coaching. Nowhere was there proof of payment or consideration. Finally, as noted above, the state gave defense counsel the autopsy reports prior to trial. This Court has already determined that no one suborned perjury, and Stevens has failed to offer any new evidence.

The entire contention is just a desperate attempt to create an issue out of a perceived error in the transcripts.

(3) Statements of Engle

It is undisputed that defense counsel let these statements in as a matter of trial strategy. Defense counsel has no right to let evidence in for one strategic purpose and then, if he loses, demand suppression and a new trial. **Stevens v.** State, **552** So.2d 1082 (Fla.1982).

Finally, Stevens attacks Judge Weatherby, accusing him of not reading the entire record before ruling on the suppression issue. Nothing in this record indicates a **lack** of familiarity with any **relevant** portions of the transcripts which eventually were read in their entirety. There is no basis in fact or this record to show that the trial judge did not properly perform his role.

ARGUMENT: POINT V

IT IS SUGGESTED THAT MR. STEVENS' ATTACK UPON THE ASSISTANT STATE ATTORNEY IS NOT PROPERLY BEFORE THE COURT.

Any difficulty between Mr. Root and Mr. Bateh should be resolved in another forum. No further response will be tendered by the State.

CONCLUSION

The sentence of death should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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

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

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Patrick M. Wall, a Professional Corporation, 36 West 44th Street, New York, New York, 10036 this 10th day of February, 1992.

MARK C. MENSER
Assistant Attorney General