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IN THE SUPREME COURT OF FLORIDA

EMANUEL JOHNSON,

Appellant,

v. Case No. 78,337

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

PAGE NO.

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

ISSUE I 5

WHETHER THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW MITIGATING EVIDENCE AND ARGUMENTS AND REFUSED TO ALLOW EVIDENCE THAT WOULD ALLEGEDLY REBUT NONSTATUTORY AGGRAVATORS.

ISSUE II 17

WHETHER THE LOWER COURT USED AN INCORRECT LEGAL STANDARD IN REJECTING THE MENTAL DISTURBANCE MITIGATOR.

ISSUE III 22

WHETHER APPELLANT'S CASE WAS SUBMITTED TO THE JURY UPON INCOMPLETE AND MISLEADING INSTRUCTIONS.

ISSUE IV 27

WHETHER THE FELONY-MURDER AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONAL AS IT ALLEGEDLY FAILS TO NARROW THE CLASS OF INDIVIDUALS WHO MAY BE SENTENCED TO DEATH AND ALLEGEDLY WAS NOT SUPPORTED BY THE FACTS.

ISSUE V 29

WHETHER THE HAC AGGRAVATING FACTOR IS VAGUE, APPLIED ARBITRARILY AND CAPRICIOUSLY, FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND WHETHER AN IMPROPER AND INADEQUATE INSTRUCTION WAS GIVEN TO THE JURY.

CONCLUSION 32

CERTIFICATE OF SERVICE 32

TABLE OF CITATIONS

PAGE NO.

Arango v. State,
411 So. 2d 172 (Fla. 1982) 24

Atwater v. State,
626 So. 2d 1325 (Fla. 1993) 31

Bertolotti v. State,
534 So. 2d 386 (Fla. 1988) 27

Bolender v. State,
422 So. 2d 833 (Fla. 1982) 16

Brown v. State,
473 So. 2d 1260 (Fla. 1985) 27

Brown v. State,
565 So. 2d 304 (Fla. 1990) 24

Collins v. Lockhart,
754 F.2d 258 (8th Cir. 1985) 27

Combs v. State,
525 So. 2d 853 (Fla. 1988) 26

Engle v. Dugger,
576 So. 2d 696 (Fla. 1991) 18

Espinosa v. Florida,
505 U.S. ___, 120 L.Ed.2d 854 (1992) 30

Espinosa v. State,
589 So. 2d 887, 894 (Fla. 1991) 9

Floyd v. State,
497 So. 2d 1211 (Fla. 1986) 30

Floyd v. State,
569 So. 2d 1225 (Fla. 1990) 31

Ford v. Strickland,
6796 F.2d 804, 817 - 818 (11th Cir. 1983) 24

Garcia v. State,
492 So. 2d 360, 367 (Fla. 1986) 9

Gunsby v. State,
574 So. 2d 1085 (Fla. 1991) 18

Haliburton v. State,
561 So. 2d 248 (Fla. 1990)....................................31

Hall v. State,
614 So. 2d 473 (Fla. 1993)............................4, 9, 30-31

Hansbrough v. State,
509 So. 2d 1081 (Fla. 1987)...................................30

Hardwick v. State,
521 So. 2d 1071 (Fla. 1988)...................................31

Harich v. Wainwright,
844 F.2d 1464, 1473 - 75 (11th Cir. 1988)......................26

Jackson v. State,
498 So. 2d 406 (Fla. 1986)....................................14

Jackson v. State,
575 So. 2d 181, 193 (Fla. 1993).................................5

Johnston v. State,
497 So. 2d 863 (Fla. 1986)....................................30

Jones v. State,
580 So. 2d 143 (Fla. 1991)....................................19

Lucas v. State,
376 So. 2d 1149, 1152 (Fla. 1979)..............................12

M. Davis v. State,
620 So. 2d 153 (Fla. 1993)....................................31

Muehleman v. State,
503 So. 2d 310, 316 (Fla. 1987).................................9

Nibert v. State,
508 So. 2d 1 (Fla. 1987)......................................30

Nixon v. State,
572 So. 2d 1336 (Fla. 1990)...................................18

Parker v. Dugger,
537 So. 2d 969 (Fla. 1989)....................................27

Pettit v. State,
591 So. 2d 618 (1992)...19

Ponticelli v. State,
593 So. 2d 483 (Fla. 1991)....................................19

Porter v. State,
429 So. 2d 293 (Fla. 1983)....................................16

Preston v. State,
531 So. 2d 154, 160 (Fla. 1988)...............................24

Preston v. State,
607 So. 2d 404 (Fla. 1992)....................................30

Robinson v. State,
574 So. 2d 108 (Fla. 1991)................................18, 24

Rogers v. State,
511 So. 2d 526 (Fla. 1987) (R 1802 - 03).....................14

Sanchez-Velasco v. State
570 So. 2d 908 (Fla. 1990)....................................18

Shell v. Mississippi,
498 U.S. 1, 112 L.Ed.2d 1 (1990)..............................31

Sireci v. State,
587 So. 2d 450 (Fla. 1991)....................................19

Sochor v. State,
580 So. 2d 595 (Fla. 1991)....................................18

Stewart v. State,
549 So. 2d 171, 174 (Fla. 1989)...............................24

Stewart v. State,
558 So. 2d 416 (Fla. 1990)....................................23

Taylor v. State,
630 So. 2d 1038 (Fla. 1993)...................................30

Taylor v. State,
638 So. 2d 30 (Fla. 1994)..................................4, 27

Thomas v. State,
618 So. 2d 155 (Fla. 1993)....................................16

Walls v. State,
___ So. 2d ___, 19 Fla. Law Weekly S 377 (1994)...............22

Walls v. State,
___ So. 2d ___, 19 Fla. Law Weekly S 377 (Fla. 1994)..........19

Wickham v. State,
593 So. 2d 191 (Fla. 1991)....................................21

Zant v. Stephens,
462 U.S. 862, 77 L.Ed.2d 235, 249, n. 13 (1983)................24

Zeigler v. State,
580 So. 2d 127 (Fla. 1991)....................................18

STATEMENT OF THE CASE AND FACTS

At the penalty phase the state called Lawanda Giddens who testified that on May 28, 1988, appellant knocked on her door (the light outside the door was out), grabbed her by the neck when she opened the door, choked her, dragged her to the kitchen and told her, "Shut up bitch, or I'll kill you". He wanted her money (R 5865 - 66). He took the money, took her outside, and when she fought him, he left (R 5867). The judgments of conviction for robbery and burglary of an occupied structure were introduced (R 5868).

Kate Cornell testified that on January 17, 1988, at about midnight, while sitting in a living room reading a script she heard scratching noises around the window (R 5871 - 72). She didn't see anything and went to the bathroom to get ready for bed. Appellant appeared, grabbed her arm and held a knife to her throat demanding her money (R 5872). She gave him about a hundred dollars; he said that wasn't enough, pushed her on the bed and punched her in the face (R 5874). Then he stabbed her in the hand, arm and chest. Ms. Cornell had to have open heart surgery to repair the left ventricle punctured by Johnson's knife (R 5875). The judgments for attempted murder, burglary of a dwelling while armed with a dangerous weapon, and robbery while armed with a deadly weapon were introduced (R 5876).

Dr. William Pearson Clack, medical examiner, testified that he responded to the scene of the homicide involving victim Iris White on October 4, 1988; she was an elderly Caucasian female

lying on her back on a bed with her legs slightly spread (R 5879). The victim had sustained numerous stab wounds to the chest area, an autopsy revealed twenty-four stab wounds. There were scratches and abrasions to the vagina and anus (R 5883).

Detective B.J. Sullivan testified regarding the details of appellant's confession to the White homicide. The judgments of convictions for first degree murder and burglary were introduced (R 5889 - 91). Johnson told Sullivan he had known Iris White for about five years and did yard work for her (R 5893 - 94).

The defense called Evelyn and Jim Syprett who employed appellant for yard work (R 5905 - 14). While Jim Syprett stated he never had reason for concern about appellant working for his mother, he admitted he was not aware of the attacks on Lawanda Giddens and Kate Cornell (R 5912 - 14) or that Johnson killed White and McCahon (R 5914 - 15). A number of relatives testified about appellant's background, including Kenneth Johnson (whose prior testimony was read) (R 5917 - 36); Henry Ben Johnson III (R 5940 - 44), Lee Arthur Johnson (R 5945 - 5950), Marvin Johnson (R 5951 - 59), George Johnson (R 5960 - 65), appellant's girlfriend Bridget Chapman (R 5966 - 77), Angela Johnson (R 5981 - 86), and Charlene Johnson (R 5986 - 92). The prior testimony of Wendy Fiatta was read to the jury (R 5995 - 6010).

The jury recommended a sentence of death by a vote of ten to two (R 6077). The trial court concurred finding three aggravators (prior violent felony convictions, homicide while engaged in commission of a burglary and for financial gain and

HAC), several mitigators, and found each of the aggravators outweighed all of the mitigating circumstances (R 8790 - 94).

SUMMARY OF THE ARGUMENT

I. The lower court did not err in refusing to permit introduction of Exhibits LL since it was incomplete and merely cumulative to the evidence presented. Exhibit MM was properly excluded since only a partial record and no one could testify to their accuracy or even their meaning. The purported exhibits are not relevant to demonstrate remorse. The court also correctly ruled prior to trial that evidence of deterrence and expense were not relevant.

II. The lower court did not use an incorrect legal standard in rejecting the mental disturbance mitigator; it merely failed to accord the same weight as appellant desires.

III. Appellant did not preserve his argument concerning the mental mitigation instruction, and it is meritless. The argument on the standard of proof is procedurally barred, and meritless. Appellant did not submit a proposed written instruction on the alleged burden shifting instruction and appellant concedes this court has rejected his argument. The claim that the jury's role was improperly denigrated is meritless.

IV. Appellant's attack on the felony-murder aggravator has been rejected. Taylor v. State, 638 So. 2d (Fla. 1994). The evidence supports a finding of the factor.

V. The instruction on the HAC factor was proper. Hall v. State, 614 So. 2d 473 (Fla. 1993). This factor has been consistently applied by this Court.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW MITIGATING EVIDENCE AND ARGUMENTS AND REFUSED TO ALLOW EVIDENCE THAT WOULD ALLEGEDLY REBUT NONSTATUTORY AGGRAVATORS.

Appellant spends the first three pages of his argument discussing irrelevant material concerning whether error was committed in the penalty phase trial of the homicide of Iris White. The instant appeal, Case No. 78,337 deals with the sentence of death imposed for the murder of Jackie McCahon. Appellee does not concede any error committed in the other case, but likewise will not address any complaints about the White case. Those will have to be addressed in Appeal No. 78,336 if properly urged there. See Jackson v. State, 575 So. 2d 181, 193 (Fla. 1993), (" . . . This Court decides cases solely based on the record under review. We must blind ourselves to facts not presented in this record.")

(A) The refusal to allow introduction of Exhibits LL and MM (also denoted as NN) --

(1) Exhibit LL -- Appellant characterized Exhibit LL as evidence of a suicide attempt in 1977 in Mississippi. Exhibit LL at R 8780 - 81 is a two page discharge summary regarding Johnson's consumption of an amount of Etrafon when he was thirteen years old.

When the defense attempted to introduce this exhibit, the prosecutor objected, noting that he would rely on his arguments

offered in the prior (Iris White) trial. The defense announced it would attempt to move for admission through the next witness Charlene Johnson, appellant's mother (R 5980). She testified in front of the jury:

> "Q. Charlene, do you remember when Mannie was about thirteen years old when he had to go to the hospital?
>
> A. Yes, I do.
>
> Q. Why was that? What had happened to him?
>
> A. He had got, he had to go to the hospital because he had taken an overdose of medicine, pills.
>
> Q. What kind of medicine or pills was this?
>
> A. These were some pills for, some nerve pills for myself, and sinus.
>
> Q. These were your pills for sinus and nerves?
>
> A. Uh-huh.
>
> Q. And Mannie took an overdose of that?
>
> A. Yes, he did.
>
> Q. How did that affect him, or what condition was he in when you took him to the hospital?
>
> He was, at the time he was, he was just out of it. He was, he couldn't stand up, he was just, he was just out like he was, like he was asleep."

(R 5989 - 90)

Since both appellant and the trial court and parties below relied on the ruling of the lower court in the earlier White trial, appellee will do likewise. At pages 5985 - 88 of the

record in Appeal No. 78,336 pending before this Court, this colloquy is reported:

THE COURT: All right, sir.

Than I have a Exhibit LL, which is a discharge summary which relates to Emanuel Johnson, April 9th, 1977, treated in the emergency room, for a reason which I don't really know.

MR. DENNY: Judge, my objection to those, obviously, they came from the medical records, and only part of a medical record, that does not fully explain what it was.

Under the circumstances, by allowing those documents in through this witness, who obviously cannot establish that she's custodian of those records, there is the possibility of misleading this jury, because we don't know whether those drugs were something which was prescribed to him, a doctor did something improper or whether he did something improper.

We don't know what that drug is, and the jury would not know what that drug is, because she's not qualified to testify what this drug is.

My concern is that we will mislead the jury, so I object to those documents.

THE COURT: Mr. Tebrugge?

MR. TEBRUGGE: Your Honor, we had the defendant sign a medical release, which we sent to the hospital in Mississippi, and in return, we received what's been marked as Defense Exhibit LL.

MR. TEBRUGGE: We also received the following letter:

Dear sir:

Emanual Johnson's chart has been microfilmed, so we could not send you copies of his chart.

We took what was on the microfilm and retyped it. This is the only time the patient had been in our hospital. If we can be of more help, please feel free to contact us.

Sincerely,

Eugene Keith,

Medical Records Clerk.

So, that's the evidence that's available.

MR. DENNEY: What's the date on that letter?

MR. TEBRUGGE: November 3rd, 1988.

MR. DENNEY: See, that's my problem, Judge. They have now had almost three years to bring this custodian of records down here to bring the entire records down, and clearly, there was plenty of time to get the microfilm and have it produced.

What they gives us is a partial record, which this jury cannot decipher as far as what it means, because, obviously, this witness here will not be able to lay a foundation, so, it's up to the jury to guess or conjure up some sort of reasoning for this incident to occur.

So, for that reason, I'm going to object.

THE COURT: I have no idea what etrafon is. I'm not sure that's the way you pronounce it.

Do you know what it is?

MR. TEBRUGGE, Judge, it is my understanding, based on speaking with the mother, it's some sort of sleeping medication.

The medical records tend to confirm that, indicating that when the patient was brought to the hospital, he was unconscious and responded only to painful stimuli, and after a period of time he woke up.

Mrs. Johnson would testify as to the circumstances of this event.

> The medical records are offered to corroborate her testimony and show the incident was serious enough to require medical treatment for the defendant.
>
> THE COURT: I would exclude those records. I don't know what she's going to testify to, but if she does so testify, she may testify about his life and all, but I don't think the medical records would add any significant value or in any way assist in explaining her testimony.

The lower court did not err. Neither Exhibit LL nor the testimony of Charlene Johnson establish a suicide attempt in 1977; for whatever reason he took too many pills and had his stomach pumped. Moreover, the prosecutor did not contest Ms. Johnson's testimony on this score, asking no cross-examination questions (R 5993) and making no reference to it in closing argument (R 6038 - 6056). At best, Exhibit LL constituted merely cumulative evidence to an undisputed point. See Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986), Espinosa v. State, 589 So. 2d 887, 894 (Fla. 1991), vacated on other grounds, 120 L.Ed.2d 854, on remand 626 So. 2d 165 (Fla. 1993); Muehleman v. State, 503 So. 2d 310, 316 (Fla. 1987); Hall v. State, 614 So. 2d 473, 477 (Fla. 1993).

(A)(2) Exhibit MM -- As mentioned previously, the state objected (in the McCahon case) to the introduction of Exhibit MM, noting that they were only partial records and that no one from the jail could testify to their accuracy and the circumstances surrounding the documents. The prosecutor and court relied on the earlier argument and ruling (R 5979).

In the earlier (White trial) proceeding this colloquy occurred at R 6011 - 6013 of appeal case no. 78,336:

> MR. DENNEY: I don't now how this witness will introduce the medical records from the jail, which are part of this.
>
> MR. TEBRUGGE: She's aware of Mr. Johnson's experience in the jail.
>
> I was going to seek to introduce medical records and have her describe to the Court briefly my effort to introduce other medical records about another incident.
>
> MR. DENNEY: This woman is not the custodian of the records. She cannot verify the record.
>
> THE COURT: I agree she's not the person who handled the medical reports.
>
> You don't want it in?
>
> MR. DENNEY: I don't want it in, because they are not a complete and accurate description of what took place. This woman obviously can't verify these records or explain what they mean or thinks.
>
> THE COURT: I don't think she can, so I would deny the introduction of the medical records.
>
> I offer them just on their own merits, Judge. I believe the documents themselves are authenticated. I believe they are relevant. That's all I possess about the incident, and I think at this time to be considered in mitigation, I offer them just on their own.
>
> MR. DENNEY: I just don't think they speak for themselves. It has vague references that the jury is supposed to take quantum leaps on as to what they mean.
>
> THE COURT: I will deny admission of Defendant's Exhibit MM, the Sarasota County Sheriff's Department.
>
> MR. TEBRUGGE: I would proffer those.

THE COURT: That's fine.

MR. DENNEY: For the record, I would state if he wanted to bring over the custodian or whatever, possibly the record would be admissible, but at this point, he has not offered to do that or saying to the Court that he would do it.

THE COURT: If you want to do that, you can have them bring them over.

MR. TEBRUGGE: Judge, I don't really think that's the basis for an objection myself.

In the Rules of Evidence, in this case hearsay is not admissible in this phase.

If the Court says that this will overcome the objection, then that's what we'll do.

MR. DENNEY: Judge, my objection is not that they are hearsay. There's no way of explaining what the documents mean or how they interpret the documents, so by themselves, they mean nothing.

THE COURT: I think the record custodian doesn't even have to be a nurse.

MR. DENNEY: I would agree they would have to have the total records if shown to the jury to possibly explain what went on.

All we know is that there was a slashing of his wrists. We don't know if he did it or someone attacked him and who did it. We don't know anything.

So, it would mislead the jury into guessing what happened.

THE COURT: All right.

Exhibit MM (R 8782 - 8789) is a composite exhibit consisting on the first two pages of memoranda from one Diana Ready and one Cathy Toundas. The remaining seven pages are purported medical

records, much of it illegible and unintelligible. While appellant in his brief refers to the Ready-Toundas memoranda in the exhibit, he does not address the concerns in the prosecutor's objection, that the medical record section of the exhibit could not be introduced from the witness on the stand (Wendy Fiati) who was not a custodian of the record and there's no way of explaining what the documents mean (quite apart from hearsay).

The defense indicated that if it could cure the problem by producing the custodian "then that's what we'll do." (R 6013) But it never did. If the complaint now is that the two memoranda should have been separated from the medical records, appellant made no such request below and we should not presume error on the lower court for an argument not advanced. See Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979).

Finally, appellant suggests that a suicide attempt may help to establish the defendant was mentally unbalanced or remorseful. There is no evidence of appellant's remorse in the record and the defense did not even suggest that, either in closing argument to the jury (R 6057 - 6068) or in the post-verdict sentencing memorandum (R 8571 - 8596) and having a wrist slashed per se does not demonstrate remorse, only mild depression at his present circumstances. Additionally, since the defense in the post-verdict sentencing memo was suggesting residual doubt about the identity of the killer (R 8581) it is difficult to envision remorse as a consistent mitigator. With regard to his being mentally unbalanced, the court did find he was suffering from

mental problems which did not rise to the level of extreme mental or emotional disturbance.

B. <u>The pretrial requests to allow evidence of deterrence and expense</u> --

Months before the trial, defense counsel presented to the trial court the following:

> MR. TEBRUGGE: Judge, here's the situation.
>
> I specify three different types of evidence where I have a question as to its relevancy before the Court, and, really, I'm looking for a little guidance from the Court before I go out and seek such evidence to present it.
>
> What I specifically mentioned in the motion is the potentiality of putting on testimony of religious leaders, eyewitness testimony regarding electrocution, sociological and statistical studies demonstrating that the death penalty is not a deterrent.
>
> One other thing that I thought of that I didn't put in the motion, Judge, is economic testimony regarding the cost of life imprisonment versus that of the death penalty.

(R 1799)

* * *

The defense argued that it cost eighty thousand dollars a year to incarcerate somebody, that Ted Bundy "cost" almost six and a half million dollars.

The prosecutor responded that the proceeding was limited to matters "relevant to the nature of the crime, the character of the defendant and . . . matters relating to any of the aggravating or mitigating circumstances enumerated . . . " (R

1801). None of the factors the defense listed were proper, he argued. The prosecutor cited Jackson v. State, 498 So. 2d 406 (Fla. 1986) and Rogers v. State, 511 So. 2d 526 (Fla. 1987) (R 1802 - 03).

The Court ruled:

> THE COURT: At this time I would note the factors, the three that are enumerated, and the fourth factor, being economic considerations, I feel it would all be appropriate factors in determining whether or not it's appropriate to have a death penalty.
>
> I think that's a matter that should be taken up by the legislative body, and they speak the conscience of the electorate who place them in office, and these are matters that would probably be considered by them and not by a jury once the legislature has elected to enact a substantive law pertaining to the death penalty.
>
> So, at this point, I would deny the request to include the evidence cited. I don't feel that it would appropriately relate to the mitigating factors, but would more appropriately relate to whether or not the State should have a death penalty.

(R 1804)

The trial court was eminently correct.

Appellant complains that juror Hanaway had an incorrect view of the death penalty as a deterrent to others; but juror Hanaway was peremptorily excused by the defense and did not sit (R 4168).[1] Whether capital punishment is a deterrent, to what

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[1] Without debating the point of whether Hanaway's view was "incorrect" in the eyes of appellant, that prospective juror's view at voir dire was "If used more often it would be more of a deterrent." (R 3638) Cf. Castro v. State, ___ So. 2d ___, 19

extent it is a deterrent are legislative matters for the elected representatives to determine in establishing state policy. And deterrence is only one aspect in their consideration of the issue.

We turn now to appellant's "cost" argument. Appellant argues that many jurors believe that the death penalty should be imposed because it is cheaper than a life sentence and that if they realized the truth of the matter, they would be more likely to be in favor of life. While it may be true that some citizens are understandably concerned about the rising costs of all government services, including incarceration for life or electrocution, the "cost" argument is unavailing because it introduces an arbitrary and irrational factor into the sentencing scheme. Rather than focusing on the individual's culpability versus his redemptive qualities and the circumstances of the criminal episode, appellant's request turns into an economic inquiry, an irrelevant factor. Almost certainly this Court would greet with displeasure a prosecutorial argument that a defendant upon the jury's guilty verdict should be immediately hanged to avoid expensive appeals or costly post-conviction proceedings, or

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Fla. Law Weekly S 435 (Fla. 1994) (Not surprisingly, the prospective jurors had no grounding in the intricacies of capital sentencing.)

that taxpayers' money should not be spent for constitutionally-unnecessary collateral representation.[2]

Appellant alludes to juror Revels and juror Tigges. Juror Tigges was removed for cause (R 3727 - 28) and Revels was peremptorily excused by the defense (R 4255). In short, voir dire remains a proper and effective way of selecting those appropriate for jury duty and culling out the inappropriate ones. There simply is no record support for the notion that a juror used the cost of incarceration as a nonstatutory aggravating factor to impose a sentence of death.

While it is true that the sentencer may not be precluded from considering relevant mitigating evidence pertaining to the character of the accused or the circumstances of the crime, not everything a defense attorney desires to urge constitutes relevant evidence. Porter v. State, 429 So. 2d 293 (Fla. 1983) (vivid, lurid description of an electrocution is improper argument); Thomas v. State, 618 So. 2d 155 (Fla. 1993) (victim's efforts to purchase cocaine not mitigating since not relevant to defendant's culpability); Bolender v. State, 422 So. 2d 833 (Fla. 1982) (victims only cocaine dealers not mitigating). Similarly appellant's "economic" and "deterrent" ideas are not proper, relevant mitigation.

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[2] See Murray v. Giarrantino, 492 U.S. 1, 106 L.Ed.2d 1 (1989).

ISSUE II

WHETHER THE LOWER COURT USED AN INCORRECT LEGAL STANDARD IN REJECTING THE MENTAL DISTURBANCE MITIGATOR.

The trial court below found:

> "15. The Defendant suffered from mental pressure which did not reach the level of statutory mitigating factors.
>
> The Court finds that the evidence did not establish the existence of the mitigating circumstance that the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. At no time was any evidence presented to the Court that Defendant had ever discussed any emotional pressures with his family members as alleged in his confession. Additionally, the Defendant was examined by numerous psycholigical experts but no psychological testimony from any experts was presented to the Court. The Court did consider the statements in the Defendant's confession that he was suffering from a great deal of pressure and further, his treatment with an antipsychotropic medication during his initial incarcaration. These factors convinced the Court to consider that the Defendant was suffering mental problems that did not rise to the level of extreme mental or emotional disturbance."

(R 8793 - 94)

Appellant contends that the trial court employed the wrong legal standard, relying on negative evidence and the failure of the defense to corroborate its assertions. The Court did not employ the wrong legal standard; the court did not fail to find mental mitigation. It did decline to attribute as much weight to it as appellant desired.

> "These factors convinced the court to consider that the defendant was suffering

> mental problmes that did not rise to the level of extreme mental or emotional disturbance."

(R 8794)

This Court has repeatedly held that the <u>weight</u> to be accorded a witness' testimony is for the trial court. See <u>Nixon v. State</u>, 572 So. 2d 1336 (Fla. 1990) (clear that trial cour considered and rejected all mitigating evidence offered); <u>Robinson v. State</u>, 574 So. 2d 108 (Fla. 1991) (no error in failing to find additional mitigating factors; trial court's comprehensive order discussed all mitigating presented and reflected it considered and weighed it); <u>Gunsby v. State</u>, 574 So. 2d 1085 (Fla. 1991) (trial judge considered conflicting testimony of mental health professionals and as an appellate court we have no authority to reweigh that evidence); <u>Engle v. Dugger</u>, 576 So. 2d 696 (Fla. 1991) (mental health experts often reach different conclusions); <u>Sanchez-Velasco v. State</u> 570 So. 2d 908 (Fla. 1990) (failure to find extreme mental or emotional distress and inability to appreciate the criminality of conduct not error; judge could appropriately reject it since the evidence was not without equivocation and reservation); <u>Zeigler v. State</u>, 580 So. 2d 127 (Fla. 1991) (judge explained why he was giving little or no weight to the mitigating evidence); <u>Sochor v. State</u>, 580 So. 2d 595 (Fla. 1991) (OK for trial judge to reject mitigating factors; although several doctors testified as to defendant's mental instability, one testified he had not been truthful and another that he had selective amnesia and deciding about the

family history as mitigation is within the trial court's discretion); Jones v. State, 580 So. 2d 143 (Fla. 1991) (while a poor home environment in some cases may be mitigating, sentencing is an individualized process and the trial court may find it insufficient); Ponticelli v. State, 593 So. 2d 483 (Fla. 1991), vacated 121 L.Ed.2d 5, on remand 618 So. 2d 154 (rejecting defense argument that court failed to consider unrebutted mitigating evidence; trial court found doctor's testimony "speculation" and there was competent, substantial evidence to support rejection of the mitigating evidence); Sireci v. State, 587 So. 2d 450 (Fla. 1991) (the decision as to whether a particular mitigating circumstance is established lies with the trial judge; reversal is not warranted simply because an appellant draws a different conclusion; since it is the trial court's duty to resolve conflicts in the evidence, that determination should be final if supported by competent, substantial evidence); Pettit v. State, 591 So. 2d 618 (1992).[3]

Appellant cites Walls v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 377 (Fla. 1994), wherein this Court held that there had

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[3] Appellant is not aided by Cook v. State, 542 So. 2d 964 (Fla. 1989) where this Court approved the lower court's failure to find mental mitigation. Cook's ingestion of cocaine, alcohol and marijuana did not severely diminish his mental capacity on the night of the killings. Id. at 971. Here, the trial court did find some mitigation whose weight was diminished by other corroborative evidence.

been no error in the trial court's rejection of expert opinion testimony. The court reasoned in part:

> "Certain kinds of opinion testimony clearly are admissible -- and especially qualified expert opinion testimony -- but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the fact at hand and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve. See Hardwick, 521 So. 2d at 1076. We cannot conclude that the evidence here was anything more than debatable.

(19 F.L.W. at S 380)

In footnote 8 of Walls, the Court added that reasonable persons could conclude that the facts of the murder are inconsistent with the presence of the two mental mitigators and that "the facts are consistent with the conclusion that any impairment Walls suffered was nonstatutory in nature and, in any event, was of far slighter weight than the aggravator factors found to exist.[4]

Finally, even if it were true that the lower court failed to consider as mitigating that which now appellant urges, any error would be harmless beyond a reasonable doubt with three strong

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[4] It would be an odd jurisprudence to require that enormous weight be accorded when there is unanimous, uncontroverted expert mental health supporting the existence of a mental mitigator -- Nibert v. State, 547 So. 2d 1059, 1061 (Fla. 1990) -- and yet also to require that similar great weight be accorded when not supported by any mental health expert testimony.

valid aggravators and the weak mitigation presented. See Wickham v. State, 593 So. 2d 191 (Fla. 1991).

ISSUE III

WHETHER APPELLANT'S CASE WAS SUBMITTED TO THE JURY UPON INCOMPLETE AND MISLEADING INSTRUCTIONS.

Under this point appellant complains that the lower court gave improper jury instructions on four particular matters. His argument is without merit.

A. Instruction on mental mitigation --

Although appellant submitted a number of proposed written jury instructions (R 8498 - 8527) none of these proposed instructions were concerned with mental mitigation. The trial court gave the following pertinent instruction (R 6071; 8529):

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.
>
> Among the mitigating circumstances you may consider, if established by the evidence are:
>
> (1) The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> (2) The age of the defendant at the time of the crime.
>
> (3) Mitigating circumstances are not limited to the foregoing listed circumstances and may include any other aspect of the defendant's character or record of any other circumstance of the offense.

Because appellant did not object to the given instruction or request more appropriate instructions on this point any complaint now is procedurally barred. See, e.g., Walls v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 377 (1994).

Even if the claim had been preserved, it is meritless. In Stewart v. State, 558 So. 2d 416 (Fla. 1990), this Court ruled that the trial court had properly refused to give requested modified instructions deleting "extreme" and "substantially" from the statutory mitigating factors. Appellee additionally notes that Johnson received the benefit of the catchall instruction regarding any aspect of the defendant's character.

B. The failure to instruct on the standard of proof by which the jury should weigh aggravation and mitigation --

Again, appellant Johnson is procedurally barred from urging this argument now since he did not submit a proposed written instruction explaining his proposed standard of proof for the jury's consideration.

The trial court gave the standard instruction that:

> "Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances . . .
>
> * * *
>
> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established you should consider all the evidence tending to establish one or more mitigating circumstances and give the evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed."

(R 6071 - 72)

Johnson's claim is meritless. See Arango v. State, 411 So. 2d 172 (Fla. 1982); Brown v. State, 565 So. 2d 304 (Fla. 1990); Preston v. State, 531 So. 2d 154, 160 (Fla. 1988); Stewart v. State, 549 So. 2d 171, 174 (Fla. 1989); Robinson v. State, 574 So. 2d 171, 174 (Fla. 1989); Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991); see also Ford v. Strickland, 6796 F.2d 804, 817 - 818 (11th Cir. 1983) (en banc) (the process of weighing circumstances is a matter for judge and jury and, unlike facts, is not susceptible to proof by either party) Zant v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235, 249, n. 13 (1983) (specific standards for balancing aggravating against mitigating circumstances are not constitutionally required).

C. Shifting the burden of proof to the defense to establish that mitigation outweighed aggravation.

Appellant's counsel orally objected that the instructions impermissibly shifted the burden of proof to the defense (R 5783) but did not include a proposed written instruction on this point among the proposed instructions submitted (R 8501 - 27)

In any event Johnson concedes that his contention was rejected in Arango, supra; see other authorities cited in section B, supra.[5]

D. Improper denigration of jurors' role in sentencing --

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[5] The instant case does not suffer from the same infirmity as in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988) where the jury was told that death was presumed to be the proper sentence if an aggravator were found.

Appellant next complains that the trial court failed to provide relief for his objection below that the jury instruction made reference to the advisory sentence and the final decision by the judge (R 5779 - 85). While the trial court did decline to give the defense requested instructions that the jury recommendation was entitled to great weight (R 8514, 8522), the trial court satisfactorily explained to the jury:

> "As you have been told, the final decision as to what punishment shall be imposed is the responsibility of myself. However, it is your duty to follow the law that will now be given you by this Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and to evidence that has been presented to you in these proceedings.

(R 6069)

* * *

> The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations.

(R 6072)

* * *

> The fact that the determination of whether you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

(emphasis supplied
(R 6072)

> One last aspect, and that is that it's important for you to understand that any actions that I may have taken during this trial, anything that I may have said, if I fussed at the attorneys, if I overruled or sustained an objection, you should take none of that to in any way make you feel that I recommend or prefer one penalty over another. This is a decision that you make free from anything that I may have said or done throughout this trail that would make you think that I preferred one penalty over another.

(R 6074

These instructions, taken as a whole, hardly denigrate the important role of the jury and conform to the requirements of this Court and the federal courts. Combs v. State, 525 So. 2d 853 (Fla. 1988); Harich v. Wainwright, 844 F.2d 1464, 1473 - 75 (11th Cir. 1988).

ISSUE IV

WHETHER THE FELONY-MURDER AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONAL AS IT ALLEGEDLY FAILS TO NARROW THE CLASS OF INDIVIDUALS WHO MAY BE SENTENCED TO DEATH AND ALLEGEDLY WAS NOT SUPPORTED BY THE FACTS.

Appellant contends that he urged below that F.S. 921.141(5)(d) was unconstitutional because it duplicates an element of the crime and failed to narrow the class of death-eligible defendants (R 5788, 6547). Appellant cited Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), in support of his position (R 5789).[6]

This Court has repeatedly and consistently rejected this contention. In Taylor v. State, 638 So. 2d 30 (Fla. 1994), the Court ruled:

> "As his first issue on appeal, Taylor argues that the jury should not have been allowed to consider sexual battery as an aggravating circumstance because it unconstitutionally repeats an element of first degree murder. We have considered and rejected arguments substantially the same as this in Stewart v. State, 588 So. 2d 972 (Fla. 1991) and Clark v. State, 443 So. 2d 973 (Fla. 1983), cert. denied, 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984). Taylor's claim is without merit."

(Id. at 32)

See also Brown v. State, 473 So. 2d 1260 (Fla. 1985); Bertolotti v. State, 534 So. 2d 386 (Fla. 1988); Parker v. Dugger, 537 So. 2d 969 (Fla. 1989).

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[6] Collins was subsequently overruled in Perry v. Lockhart, 871 F.2d 1384 (8th Cir. 1988).

Appellant's claim with respect to the sufficiency of the finding of this aggravator is meritless. There was, in effect, one continuous episode in which he attacked and stabbed the victim, taking sixty dollars from her and moments later returning to finish her off when she staggered for help to the sidewalk (R 8791).

ISSUE V

WHETHER THE HAC AGGRAVATING FACTOR IS VAGUE, APPLIED ARBITRARILY AND CAPRICIOUSLY, FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND WHETHER AN IMPROPER AND INADEQUATE INSTRUCTION WAS GIVEN TO THE JURY.

With respect to the HAC instruction to be given to the jury, the defense argued:

> MR. TEBRUGGE: Judge, I would state to the Court that in our opinion, the evidence has failed to establish that this crime was heinous, atrocious and/or cruel.
>
> Secondly, Your Honor, I would state to the Court that in 1989, the United States Supreme Court took up the case of Meynard versus Cartwright, and in that case they judged the Oklahoma capital sentencing scheme, in which an aggravating factor was heinous, atrocious or cruel, and the United States Supreme Court found that that factor was unconstitutionally vague and failed to provide a proper notice to the defense and failed to limit the class of offenders to which the death penalty would be applied.
>
> I would suggest to the Court that Florida's capital sentencing scheme, particularly this factor, fall pray to the same objections that the United States Supreme Court had to the Oklahoma scheme, and thus would object to this under Meynard versus Cartwright.

(R 5791)

The trial court gave the instruction as follows:[7]

> (2) The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

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[7] A similar instruction was requested by the defense (R 8521).

> "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show the crime was consciousless or pitiless or was unnecessarily torturous to the victim.

(R 6070)

The given instruction comports with that approved by this Court. Hall v. State, 614 So. 2d 473 (Fla. 1993); Preston v. State, 607 So. 2d 404 (Fla. 1992); Taylor v. State, 630 So. 2d 1038 (Fla. 1993). The instruction in the instant case is not the one condemned in Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992).

With respect to appellant's contention, that this Honorable Court has engaged in inconsistent application of this aggravating factor, appellee disagrees. The Court has consistently upheld such a finding in homicides like the present one involving death by multiple stab wounds. See, e.g., Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987) (thirty stab wounds); Nibert v. State, 508 So. 2d 1 (Fla. 1987) (seventeen stab wounds); Floyd v. State, 497 So. 2d 1211 (Fla. 1986)[8] (twelve stab wounds); Johnston v. State, 497 So. 2d 863 (Fla. 1986) (stabbed three times completely

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8 On resentencing the HAC finding was reconfirmed. Floyd v. State, 569 So. 2d 1225 (Fla. 1990).

through neck and twice in the upper chest); Hardwick v. State, 521 So. 2d 1071 (Fla. 1988) (repeatedly stabbed); Haliburton v. State, 561 So. 2d 248 (Fla. 1990) (thirty-one stab wounds); see also M. Davis v. State, 620 So. 2d 153 (Fla. 1993) (twenty-five stab wounds); Floyd v. State, 569 So. 2d 1225 (Fla. 1990).; Atwater v. State, 626 So. 2d 1325 (Fla. 1993).

In the case sub judice, victim Jackie McCahon was stabbed nineteen times in the face, neck and chest with enough force to break the knife (R 8792).

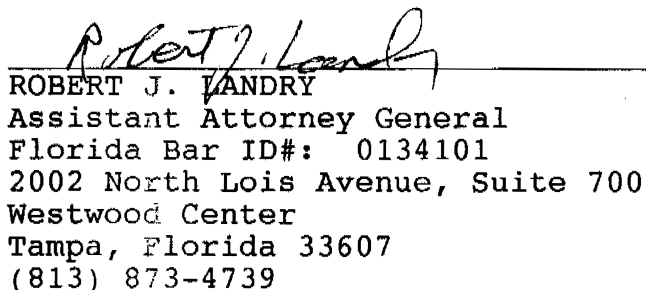
Appellant cites Atwater, supra, for the proposition that an inadequate instruction was given. The instruction in that case was the one condemned in Shell v. Mississippi, 498 U.S. 1, 112 L.Ed.2d 1 (1990) not the one, as here, approved in Hall, supra. And even in Atwater the error was deemed harmless because the jury could not have been misled by the instruction.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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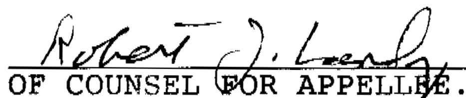
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Stephen Krosschell, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 30th day of September, 1994.



OF COUNSEL FOR APPELLEE.