IN THE SUPREME COURT OF FLORIDA

STEVEN EDWARD STEIN,

Appellant,

v. CASE NO. 78,460

STATE OF FLORIDA,

Appellee.
_____/

**ON APPEAL FROM THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY**

ANSWER BRIEF OF APPELLEE

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ..... ii-xi

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 2

I. DENIAL OF APPELLANT'S MOTION TO SUPPRESS STATEMENTS WAS NOT REVERSIBLE ERROR. 5

II. APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO THE TEMPORARY ABSENCE OF DEFENSE COUNSEL AT A PRETRIAL HEARING. 17

III. APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO TWO INADVERTENT STATEMENTS BY STATE WITNESSES. 24

IV. APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO HIS SENTENCES OF DEATH, IN THAT THE SENTENCES ARE SUPPORTED BY VALID AGGRAVATING CIRCUMSTANCES AND THE SENTENCER'S REJECTION OF THE PROFFERED MITIGATION WAS NOT ERROR. 33

V. FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE ADMISSION OF TESTIMONY AT THE PENALTY PHASE CONCERNING STEIN'S CARRYING OF A CONCEALED WEAPON. 48

VI. DENIAL OF APPELLANT'S MOTION FOR MISTRIAL, DURING THE PROSECUTOR'S CLOSING ARGUMENT AT THE PENALTY PHASE, WAS NOT ERROR. 51

VII. APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO HIS MULTIFACETED ATTACK UPON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR. 55

CONCLUSION 65

CERTIFICATE OF SERVICE 65

TABLE OF AUTHORITIES

CASE	PAGE
Agan v. State, 445 So.2d 326, 328 (Fla.1983)	62
Alvord v. Dugger, 541 So.2d 598 (Fla.1989)	15
Amoros v. State, 531 So.2d 1256 (Fla.1988)	35, 36
Bassett v. State, 449 So.2d 803 (Fla.1984)	13, 45
Beltran-Lopez v. State, 583 So.2d 1030, 1032 (Fla.1991)	22, 23, 64
Bertolotti v. Dugger, 883 F.2d 1503, 1524, n.19 (11th Cir.1989)	53
Bertolotti v. State, 476 So.2d 130 (Fla.1985)	51
Bertolotti v. State, 565 So.2d 1343 (Fla.1990)	28, 49, 53
Booth v. Maryland, 482 U.S. 496 (1987)	52, 53, 54
Bowden v. State, 588 So.2d 225, 231 (Fla.1991)	56, 57
Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)	10
Brown v. State, 526 So.2d 903 (Fla.1988)	35, 36
Bryan v. State, 533 So.2d 744, 745-8 (Fla.1988)	29
Buenoano v. State, 527 So.2d 194 (Fla.1988)	30, 32
Bush v. State, 461 So.2d 936, 941-2 (Fla.1984)	54

TABLE OF AUTHORITIES
(Continued)

CASE **PAGE**

Campbell v. State,
571 So.2d 415 (Fla.1990).....42, 45

Capehart v. State,
583 So.2d 1009 (Fla.1991).....38

Colina v. State,
570 So.2d 929, 932-3 (Fla.1990).....60

Cook v. State,
581 So.2d 141, 144 (Fla.1991).....47, 48

Cooper v. State,
492 So.2d 1059, 1062 (Fla.1986).....41

Correll v. State,
523 So.2d 562, 566 (Fla.1988).....29, 40

Craig v. State,
510 So.2d 857, 864 (Fla.1987).....52

Dailey v. State,
594 So.2d 254 (Fla.1991).....30

Darden v. State,
329 So.2d 287 (Fla.1976).....54

Dawson v. Delaware,
___ U.S. ___, 117 L.Ed.2d 309 (1992).....33

Delap v. State,
440 So.2d 1242, 1250-3 (Fla.1983).....24

Dougan v. State,
470 So.2d 697, 699-700 (Fla.1985).....56, 63

Dougan v. State,
595 So.2d 1, 5 (Fla.1992).....45

Downs v. State,
572 So.2d 895, 901 (Fla.1990).....47

Duest v. State,
462 So.2d 446 (Fla.1985).....32

TABLE OF AUTHORITIES
(Continued)

CASE **PAGE**

Echols v. State,
484 So.2d 568, 575 (Fla.1985).....41

Edwards v. Arizona,
451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).....11

Elledge v. State,
346 So.2d 998, 1001 (Fla.1977).....39, 49

Eutzy v. State,
458 So.2d 755, 759 (Fla.1984).....46

Faretta v. California,
422 U.S. 806 (1975).....17

Farinas v. State,
569 So.2d 425 (Fla.1990).....24

Ferguson v. State,
417 So.2d 639, 641 (Fla.1982).....32

Forrester v. State,
565 So.2d 391, 393 (Fla. 1st DCA 1990).....53

Francois v. State,
407 So.2d 885, 890 (Fla.1981).....36, 38

Freeman v. State,
563 So.2d 73, 75-6 (Fla.1990).....54

Garcia v. State,
492 So.2d 360, 367 (Fla.1986).....36, 38, 57

Gilliam v. State,
582 So.2d 610, 612 (Fla.1991).....37

Gilvin v. State,
418 So.2d 998 (Fla.1982).....9

Glendening v. State,
536 So.2d 212 (Fla.1988).....29

Gore v. State,
17 FLW S247 (Fla. April 16, 1992).....38

TABLE OF AUTHORITIES
(Continued)

CASE	PAGE
Grossman v. State, 525 So.2d 833 (Fla.1989)	54
Haliburton v. State, 561 So.2d 248 (Fla.1990)	30
Hall v. State, 420 So.2d 872, 874 (Fla.1982)	45
Hargrave v. State, 366 So.2d 1, 5 (Fla.1978)	40, 57
Harmon v. State, 527 So.2d 182 (Fla.1988)	30
Heiney v. State, 447 So.2d 210 (Fla.1984)	29
Henderson v. State, 463 So.2d 196 (Fla.1985)	13, 31, 36, 38
Henry v. State, 574 So.2d 66, 70-71 (Fla.1991)	29
Hildwin v. State, 531 So.2d 124 (Fla.1988)	49
Hill v. State, 549 So.2d 179 (Fla.1989)	59
Hodges v. State, 595 So.2d 929, 934 (Fla.1992)	41, 46, 49, 54, 55
Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)	21
Holton v. State, 573 So.2d 284 (Fla.1990)	32
Hudson v. State, 538 So.2d 829 (Fla.1989)	10, 55
Huff v. State, 495 So.2d 145, 153 (Fla.1986)	60

TABLE OF AUTHORITIES
(Continued)

CASE **PAGE**

Jackson v. State,
451 So.2d 458 (Fla.1984).....28

Jackson v. State,
498 So.2d 406, 411 (Fla.1986).....40

Jackson v. State,
522 So.2d 802 (Fla.1988).....29, 51, 55

Jackson v. State,
575 So.2d 181 (Fla.1991).....34, 44

Jacobs v. State,
396 So.2d 1113, 1116-7 (Fla.1981).....46

Jennings v. State,
453 So.2d 1109 (Fla.1984).....54

Johnson v. State,
438 So.2d 774 (Fla.1983).....9, 57

Johnson v. State,
442 So.2d 185, 187-8 (Fla.1983).....54

Johnston v. State,
497 So.2d 863, 869 (Fla.1986).....30

Jones v. State,
411 So.2d 165 (Fla.1982).....48, 57

Jones v. State,
569 So.2d 1234 (Fla.1990).....58, 60

Kyser v. State,
533 So.2d 285 (Fla.1988).....11

Long v. State,
517 So.2d 664 (Fla.1987).....11

Lucas v. State,
376 So.2d 1149 (Fla.1979).....32

Lucas v. State,
568 So.2d 18 (Fla.1990).....42, 46

TABLE OF AUTHORITIES
(Continued)

CASE **PAGE**

Maharaj v. State,
17 FLW S201 (Fla. March 26, 1992).....38

Martin v. Singletary,
17 FLW S282 (Fla. May 5, 1992).....64

Maynard v. Cartwright,
486 U.S. 356 (1988).....55, 63, 64

McCampbell v. State,
421 So.2d 1072 (Fla.1982).....59, 62

Medina v. State,
466 So.2d 1046 (Fla.1985).....9

Meeks v. State,
339 So.2d 186 (Fla.1976).....48

Minnick v. Mississippi,
___ U.S. ___, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990).....13, 14

Miranda v. Arizona,
384 U.S. 436 (1966).....6, 11, 15

Muehlman v. State,
503 So.2d 310, 315 (Fla.1987).....22

Nash v. Estelle,
597 F.2d 513 (5th Cir. 1979).....12

Nibert v. State,
574 So.2d 1059, 1062 (Fla.1990).....44

Nixon v. State,
572 So.2d 1336, 1340-1 (Fla.1990).....52, 53

Oats v. State,
446 So.2d 90, 93 (Fla.1984).....10

Occhicone v. State,
570 So.2d 902, 906 (Fla.1990).....28

Omelus v. State,
584 So.2d 563 (Fla.1991).....30, 58

TABLE OF AUTHORITIES
(Continued)

CASE **PAGE**

Owen v. State,
17 FLW S71 (Fla. Jan. 23, 1992).....53

Pace v. State,
17 FLW S205 (Fla. March 26, 1992).....47

Pardo v. State,
563 So.2d 77, 80 (Fla.1990).....39

Patterson v. State,
513 So.2d 1263 (Fla.1987).....59, 62

Payne v. Tennessee,
___ U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).....53

Pope v. State,
441 So.2d 1073 (Fla.1983).....59, 60, 61, 62

Randolph v. State,
562 So.2d 331 (Fla.1990).....30

Remeta v. State,
522 So.2d 825 (Fla.1988).....41

Rhode Island v. Innis,
446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).....10

Richardson v. State,
437 So.2d 1091, 1094 (Fla.1983).....32

Robinson v. State,
520 So.2d 1, 6 (Fla.1988).....60

Rogers v. State,
511 So.2d 526 (Fla.1987).....38, 42

Roman v. State,
475 So.2d 1228 (Fla.1985).....10

Rose v. State,
461 So.2d 84, 86 (Fla.1984).....52

Ruffin v. State,
397 So.2d 277, 282-3 (Fla.1981).....39

TABLE OF AUTHORITIES
(Continued)

CASE **PAGE**

Rutherford v. State,
545 So.2d 853, 856 (Fla.1989).....62

Santos v. State,
591 So.2d 160 (Fla.1991).....42

Shere v. State,
579 So.2d 86, 96 (Fla.1991).....4, 38

Sireci v. State,
587 So.2d 450 (Fla.1991).....30, 62

Smalley v. State,
546 So.2d 720, 722 (Fla.1989).....63, 64

Smith v. State,
365 So.2d 704 (Fla.1978).....29

Smith v. State,
492 So.2d 1063 (Fla.1986).....11

Sochor v. Florida,
___ U.S. ___ (June 8, 1992).....56, 58, 63

Sochor v. State,
580 So.2d 595, 602 (Fla.1991).....49

State v. Barnes,
595 So.2d 22 (Fla.1992).....39

State v. DiGuilio,
491 So.2d 1129 (Fla.1986).....14, 24, 33, 38, 50, 54

State v. Dixon,
283 So.2d 1 (Fla.1973).....64

Steinhorst v. State,
412 So.2d 332 (Fla.1982).....28, 36, 38, 49, 57

Stewart v. State,
558 So.2d 416, 420-1 (Fla.1990).....56

Stone v. State,
378 So.2d 765, 769-770 (Fla.1979).....9

TABLE OF AUTHORITIES
(Continued)

CASE **PAGE**

Suarez v. State,
481 So.2d 1201, 1209 (Fla.1985).....56

Sullivan v. State,
303 So.2d 632, 635 (Fla.1974).....23

Swafford v. State,
533 So.2d 270, 277 (Fla.1988).....41

Taylor v. State,
583 So.2d 323 (Fla.1991).....51

Teffeteller v. State,
495 So.2d 744, 747 (Fla.1986).....52

Traylor v. State,
17 FLW S42 (Fla. Jan. 16, 1992).....14

Valle v. State,
581 So.2d 40, 48 (Fla.1991).....54, 62

Vaught v. State,
410 So.2d 147, 150 (Fla.1982).....56, 63

Vileener v. State,
500 So.2d 713 (Fla. 4th DCA 1987).....22

Walton v. State,
547 So.2d 622, 625 (Fla.1989).....50, 62

Washington v. State,
362 So.2d 658, 666-7 (Fla.1978).....50

Waterhouse v. State,
429 So.2d 301 (Fla.1983).....12

Watts v. State,
593 So.2d 198 (Fla.1992).....38, 54

White v. State,
403 So.2d 331, 339 (Fla.1981).....45

Wickham v. State,
593 So.2d 191 (Fla.1991).....40

OTHER AUTHORITIES

Authority	Page
§ 90.402(2), Fla. Stat. (1989)	25
§ 921.141(5)(b), Fla. Stat. (1989)	33
§ 921.141(5)(d), Fla. Stat. (1989)	34
§ 921.141(5)(e), Fla. Stat. (1989)	34, 40, 41
§ 921.141(5)(h), Fla. Stat. (1989)	34, 55
§ 921.141(5)(i), Fla. Stat. (1989)	34, 40, 41
§ 921.141(6)(a), Fla. Stat. (1989)	34, 43, 49
§ 921.141(6)(d), Fla. Stat. (1981)	43
§ 921.141(6)(e), Fla. Stat. (1989)	43
Fla.R.Crim.P. 3.180	22
Fla.R.Crim.P. 3.390(d)	56

STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's Statement of the Case and Facts, subject to the following additions and clarifications:

As to the fact pertaining to Stein's suppression issue, the state disputes the following representation, "At that point, Baxter said, 'That the good thing about a God, he would forgive people for what they have done.' (TR 85)" (Initial Brief at 12). Rather, the transcript indicates the following response by Detective Baxter, "I talked to him about this. **He** said that the good thing about God he would forgive people for what they have done." (TR 85) (Emphasis Supplied)[1] The state does recognize, however, that, on cross-examination, Baxter seemed to suggest that he had in fact made this statement (TR 94).

As to the facts and circumstances of Stein's death sentences, it is the state's contention that the heinous, atrocious or cruel aggravating circumstance was only found as to the sentence imposed for the murder of Dennis Saunders, and not as to both sentences, as represented by Appellant (Initial Brief at 1). The state also disagrees with the contention in the Initial Brief that the prosecutor argued "lack of remorse" at the penalty phase (Initial Brief at 17).

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[1] As in the Initial Brief, (TR ___) represents a citation to the transcript in this case, whereas (R ___) represents a citation to the formal record on appeal, containing the pleadings.

SUMMARY OF ARGUMENT

In the instant appeal, Stein presents three challenges to his convictions and four to his sentences of death. The primary attack on Appellant's convictions relates to the denial of his motion to suppress his statements. Appellee suggests that reversible error has not been demonstrated, and that the trial court's finding, after hearing, that Stein reinitiated contact with the authorities, after initially invoking his right to counsel, is supported by the record, as is the court's conclusion that the statements were voluntarily made. Additionally, any error would be harmless, in that the statements were largely exculpatory and cumulative to the other evidence presented linking Stein to this offense.

Stein's second claim, relating to the absence of defense counsel from a portion of a suppression hearing, is clearly without merit. The record indicates that this hearing was held on the motion to suppress filed by the codefendant, and that Stein's counsel simply left it to his colleague to litigate this matter. Further, counsel was only absent during the state's cross-examination of one witness, and was present when the hearing resumed, when counsel was afforded a full opportunity to present any argument or evidence, prior to the court's ruling. Stein has failed to demonstrate prejudice in this regard, inasmuch as a suppression hearing is not a critical stage, and, further, any erroneous ruling upon the motion to suppress itself (a point **not** presented on appeal) would be harmless, in that only one item of physical evidence was admitted at trial, and such item was largely insignificant.

Stein's final point relates to two largely inadvertent statements by state witnesses. The first, a reference to an alleged "hit list," was subsequently clarified, such that a mistrial was not required; Appellant has preserved no claim of error in regard to the allegedly erroneous admission of any collateral crime evidence. The second matter, usage by witness of the term "skin head," is not preserved for review, and, in any event, represented harmless error at worst; there is no showing that the jury below drew the same sinister connotation from this term, as does appellate counsel.

As to his sentences of death, Stein presents a number of varied challenges. There was no impermissible doubling of aggravating circumstances, and, even if there were, any such double "counting" would be harmless; Appellant's attack upon the use of contemporaneous convictions, in cases involving multiple homicides, has repeatedly been rejected. Assuming that any error occurred in regard to the heinous, atrocious and cruel aggravating circumstance, such did not taint the proceedings below. It is the state's contention that this aggravating factor was only found as to the sentence imposed for the murder of one of the victims, and that such finding was entirely justified, given the evidence of mental anguish which this individual suffered as he watched the execution of his coworker; submission of this aggravating factor to the jury was not error. The prosecutor did not present impermissible argument in regard to this aggravating factor, and Appellant's attacks upon the constitutionality of the jury instruction are not preserved.

The judge properly rejected Stein's contention that the codefendant had greater culpability, and the court's rejection of the minimal nonstatutory mitigation presented was likewise not reversible error, especially given the fact that defense counsel failed to sufficiently identify such for the court. Appellant's claim in regard to the alleged admission of nonstatutory aggravation is not preserved for review, and meritless, in light of the fact that the matter was presented to rebut mitigation; any brief "humanization" of the victims by the prosecutor did not taint the sentencing proceeding below. The instant convictions and sentences of death should be affirmed in all respects.

ARGUMENT: POINT I

DENIAL OF APPELLANT'S MOTION TO SUPPRESS STATEMENTS WAS NOT REVERSIBLE ERROR.

As his first point on appeal, Appellant contends that the trial court erred in denying his motion to suppress statements. Prior to trial, Stein moved to suppress the statements which he made to the authorities following his arrest, on the grounds that such statements had allegedly been elicited in violation of, **inter alia**, his rights under the Fifth Amendment to the Constitution of the United States and under Article I, Section 9 of the Florida Constitution (R 178-180). The motion was called up for a hearing on May 23, 1991, at which two witnesses - Deputy Baxter and Stein himself - testified (TR 79-115). At the close of the evidence, defense counsel argued that the statements should be suppressed because the state had not scrupulously honored Stein's request for an attorney, and because one of the officers had subsequently sought to induce Stein to speak by playing upon his religious beliefs (TR 115); counsel noted, however, "It's a factual issue, and we will leave that up to your opinion." (TR 115). Judge Wiggins then held,

> The Court at this time finds that the -- having the benefit of viewing the witnesses the Court at this time finds that the statements that were attributable to Mr. Steven Stein were freely and voluntarily made, that the statements that the state wishes to introduce were initiated by the defendant Steven Stein to the police officers of his own volition, and the Court finds that the statement about being a Christian was not to raise any response or to make any type of inducement, and the Court finds that these statements will be -- the Court will deny the motion to suppress at this time. (TR 116).

The state subsequently presented some of Stein's statements during trial, and defense counsel preserved his objections (TR 705-6). On appeal, Appellant contends that admission of these statements constitutes reversible error. The state disagrees.

In resolving this claim, it is, of course, necessary to view the evidence presented at the suppression hearing. Detective Baxter testified that he assisted another officer, Detective Thorwart, in interviewing Stein following his arrest on January 23, 1991 (TR 81). Baxter testified that he was present when Thorwart had advised Stein of his rights under **Miranda v. Arizona**, 384 U.S. 436 (1966)(TR 81). The witness stated that Stein had appeared to understand his rights, and that Appellant had signed a rights form (TR 81-82). The form, which was introduced into evidence, indicates that this advisement occurred at 11:25 p.m.; the form also specifically advised Stein that any thing that he said could be used against him (State's Exhibit #1). Detective Thorwart then advised Stein that he was under arrest for the two murders in this case, and, according to Baxter, Appellant said, "I got to talk to a lawyer. I am in a lot of trouble. I am in real bad trouble here, I think I need to consult with a lawyer." (TR 84). Thorwart then responded that this was Stein's right, whereupon Appellant immediately stated that he did, in fact, wish to talk, noting that he was a "new Christian" (TR 84-5). Baxter testified that he, in turn, remarked that he was a Christian, and stated, "He said that the good thing about God he would forgive people for what they have done." (TR 85). On cross-examination, however, Baxter seemed to state that he, not Stein, had made this latter statement (TR 94).

Detective Thorwart, however, advised Stein that the officers could not talk to him unless such was his desire, and that he had invoked his rights (TR 85). Accordingly, both Thorwart and Baxter left the interview room, and subsequently began performing other tasks, such as filling out the paperwork in this and other cases (TR 85-6). Baxter testified that, at approximately 11:55 p.m., Appellant knocked on the door of their office, and stated that he did wish to talk to them (TR 86); Baxter stated that no police officer had sought to speak with Stein in the interim (TR 89). Appellant was then readvised of his rights, and signed another rights form (TR 86-7); this form, introduced as State's Exhibit #2, indicates its time of execution as 11:55 p.m., and also includes a notation by Detective Thorwart, "Asked to talk to us" (TR 88-89; State's Exhibit #2). At this point, Stein gave the authorities a relatively exculpatory version of the offense, claiming that the robbery had "gone bad", and not admitting to participation in either murder (TR 89-90). Appellant then stated that he wished to speak with an attorney, and the interview terminated (TR 90). Detective Baxter specifically testified that no threats or promises were made to Stein (TR 90), and, on cross-examination, denied ever telling the defendant that no lawyer could held him or that the state had enough evidence to put him away for life (TR 92).

During his testimony, Stein stated that he had asked for an attorney "at least three times" (TR 99); he also claimed that the officers had told him that they had enough evidence to put him away in Raiford (TR 99). Stein testified that, several times

during the interview, he had told the officers that he could not tell him what he did not know (TR 101). Appellant stated that he had told Baxter that he was a born again Christian, and that Baxter had asked him how long he had been; Baxter then allegedly said that the good thing about God "is that he will forgive you." (TR 103). The following exchange then took place:

> **Q.** Okay. Specifically though you said he did not say he will forgive you if you talk to me, correct?
>
> **A.** No, sir. He didn't say that.
>
> **Q.** Okay. And you didn't have any conversation with him because of any conversation about God, did you?
>
> **A.** No, sir.
>
> **Q.** That didn't effect your decision to talk to him or not to talk to him?
>
> **A.** No, sir.
>
> (TR 103).

Likewise, the following exchange took place later in cross-examination:

> **Q.** Now just so we are clear on this, you were not promised anything by the detectives in order for you to talk to them, correct?
>
> **A.** No, sir.
>
> **Q.** And they didn't threaten you in any way, did they?
>
> **A.** No, sir.
>
> (TR 113).

As noted, the circuit court, in denying Stein's motion, expressly found that Appellant had initiated the exchange with the police officers which led to his statements "of his own

volition" (TR 116); the court also found that Appellant's statements were freely and voluntarily made and that any statement by Detective Baxter concerning "being a Christian" was not made to "raise any response" or "to make any kind of inducement" (TR 116). Appellant has failed to demonstrate that these findings are erroneous or unsupported by the record. It is, of course, well recognized that a trial court's ruling on a motion to suppress comes to this Court with a presumption of correctness, and that this Court should interpret the evidence and reasonable inferences and deductions therefrom in a manner most favorable to sustaining the trial court's ruling. **See, e.g., Stone v. State**, 378 So.2d 765, 769-770 (Fla.1979); **Gilvin v. State**, 418 So.2d 998 (Fla.1982); **Johnson v. State**, 438 So.2d 774 (Fla.1983); **Medina v. State**, 466 So.2d 1046 (Fla.1985). It does not appear that Appellant is attacking the circuit court's finding that the statements were freely and voluntarily made **per se**, but rather that he continues to argue that admission of his statements constitutes error, in that the authorities failed to scrupulously honor his request for counsel.

Appellee suggest that Appellant's subsidiary point, regarding any reference to religion by Deputy Baxter, does not merit extended discussion. Although Appellant contends in his brief that Baxter's statement constituted an "inducement" to Stein to talk (Initial Brief at 26-7), the record, of course, indicates otherwise. Stein himself testified, on cross-examination, that the statement had had no effect upon his decision to talk, or not to talk, to the officers (TR 103).

Accordingly, Stein's reliance upon such precedents as **Rhode Island v. Innis**, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) and **Brewer v. Williams**, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) would seem misplaced. **See Oats v. State**, 446 So.2d 90, 93 (Fla.1984)(defendant's testimony at suppression hearing, to the effect that officers did not promise him anything, "vitiated" argument on appeal that confession involuntary). There is conflict in the record as far as whether Baxter or Stein made the reference to "God's forgiveness" (TR 85, 94), but Appellee would suggest that any reference to religion at this juncture was not the equivalent of the "Christian burial" technique condemned in **Williams. Cf. Roman v. State**, 475 So.2d 1228 (Fla.1985)(use of Christian burial technique by investigating officers did not render confession inadmissible); **Hudson v. State**, 538 So.2d 829 (Fla.1989)(same). Here, it was Stein, and not the police, who introduced the subject of religion, and, significantly, the subject was not raised until **after** Appellant himself had indicated that he wished to speak to the authorities, despite his prior statement that he wanted to talk to an attorney. Baxter's "off hand" remark (TR 85) did not render Stein's later statement involuntary nor did it constitute an impermissible continuation of interrogation after an invocation of rights. **See, e.g., Innis** (police officer's statement to defendant, "God forbid one of them [a handicapped child in the neighborhood] might find a weapon with shells [and] hurt themselves" **not** functional equivalent of interrogation, in that no showing officer should have known that statement reasonably likely to elicit incriminating response).

Appellant's contention that the police did not, in accordance with such precedents as **Edwards v. Arizona**, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) scrupulously honored his request for counsel is similarly not well taken. To the contrary, the record indicates that Stein's request for counsel was honored not once, but twice. After Stein initially stated that he "thought" that he needed to talk to an attorney, the officers responded that "that was his right" and terminated the interview, going so far as to leave the room. Although Appellant suggests on appeal that only "a few minutes later," he knocked on the door and told the officers that he wanted to talk, the record clearly indicates that more than "a few minutes" passed. The first rights form was executed at 11:25 p.m., whereas the second was executed at 11:55 p.m. (State's Exhibits #1 & 2). In order for Stein to have reinitiated contact with the officers, it was necessary for him to go and find them, something which he clearly did of his own volition. Prior to interviewing Appellant, the officers again advised him of his rights under **Miranda**. When, at the conclusion of this interview, Stein again stated that he wished to talk to an attorney, the interview was terminated (TR 90).

This case is clearly distinguishable from those relied upon by Appellant, such as **Kyser v. State**, 533 So.2d 285 (Fla.1988), **Long v. State**, 517 So.2d 664 (Fla.1987) or **Smith v. State**, 492 So.2d 1063 (Fla.1986). In all three cases, the defendant, upon advisement of his rights, stated, alternatively, "I think I need to talk to an attorney (**Kyser**), "I think I might need an

attorney" (**Long**) and/or "I'm in a lot of trouble and I want to talk to a lawyer." (**Smith**). In all three cases, the authorities, instead of honoring these requests or seeking to clarify any equivocation, plunged on with their interrogation. **Kyser** (after invocation, questioning continued by another officer); **Long** (after defendant said that he wished an attorney, officer told him not to try to fool himself and continued questioning); **Smith** (after defendant indicated that he did not want to talk, officer interrogated him as to reason why). In the case **sub judice**, the officers informed Smith that it was his right to have an attorney if he wished, terminated the interview and left the room; given the fact that Stein simultaneously announced an intent to talk at that time, Appellee respectfully suggests that the officers would have been justified in seeking immediate clarification of his contradictory positions, although, of course, they did not. **See, e.g., Nash v. Estelle**, 597 F.2d 513 (5th Cir. 1979); **Waterhouse v. State**, 429 So.2d 301 (Fla.1983).

Although, on appeal, Stein seeks to minimize it, the fact remains that it **is** of constitutional significance that, after Appellant's invocation of his rights to counsel, all interrogation **did** cease, and, as the trial court correctly found, it was Stein himself who reinitiated contact with the authorities; after the officers left the room, it was Stein who went to find them, and a period of thirty minutes elapsed between the execution of the two rights forms. In contrast to the cases relied upon by Appellant, Appellee would respectfully suggest that this case bears great similarity to those in which this

Court has held that admission of the defendant's confession was proper, in that, following any invocation of right to counsel, the defendant subsequently reinitiated contact with the authorities. **See, e.g., Bassett v. State**, 449 So.2d 803 (Fla.1984)(defendant's confession properly admitted under **Edwards**; while defendant initially asked for counsel, his statement to police officers, as they got up to leave the room, "Well, what do you want anyway?", sufficient initiation"); **Henderson v. State**, 463 U.S. 196 (Fla.1985)(defendant's confession properly admitted under **Edwards**; while defendant initially requested counsel, he subsequently changed his mind and volunteered further information).

Appellant contends in his brief that "once a defendant asserts his right to counsel, there can be no valid waiver of his rights without the actual presence of counsel." (Initial Brief at 25). This is an incomplete statement of the law. **Edwards** specifically provides that an accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, "**unless the accused himself initiates further communication, exchanges, or conversations with the police.**" **Edwards**, 451 U.S. at 485-6. The recent precedent upon which Stein relies, **Minnick v. Mississippi**, ___ U.S. ___, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), simply reaffirms this principle, "**Edwards** does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, providing the accused has initiated the conversation or discussions with

the authorities." **Minnick**, 112 L.Ed.2d at 499. Thus, it is clear, as a matter of federal constitutional law, that a defendant, such as Stein, can waive his previously-invoked right to counsel, under the Fifth Amendment, by reinitiating contact with the authorities, such as occurred **sub judice**; the order below makes it clear that Stein's waiver of counsel, as well as his statements **in toto**, were freely and voluntarily made. Although Stein also relies upon Article I, Section 9 of the Florida Constitution and the recent decision, **Traylor v. State**, 17 FLW S42 (Fla. Jan. 16, 1992), it is clear that no different result obtains, in that **Traylor** similarly recognizes that a defendant can reinitiate contact with the authorities and waive his rights to counsel, despite any prior invocation thereof. It is clear that Stein's rights, under both the state and federal constitution, were scrupulously honored, in that, upon his invocation of the right to counsel, the authorities immediately terminated their interview with Stein; it was Stein himself who reinitiated contact with the authorities, and his subsequent statement was properly admitted. Denial of Appellant's motion to suppress was not error.

Assuming, however, that this Court disagrees, Appellee would respectfully contend that admission of Stein's statements was harmless error, beyond a reasonable doubt, under **State v. DiGuilio**, 491 So.2d 1129 (Fla.1986). Stein's statements told the jury little, if anything, that they did not already know, and were, in large part, exculpatory; indeed, defense counsel, in his closing argument, placed much reliance upon Stein's statement

that the incident represented a "robbery gone bad," and argued that, in accordance therewith, the jury should return a lesser verdict (TR 798-9). The truncated version of Stein's statements which was introduced at trial advised the jury of the following: (1) That Appellant and Christmas had planned to rob the Pizza Hut and that they knew that one of the employees could identify Christmas (TR 718-719); (2) that they obtained approximately nine hundred dollars ($900) from the robbery; (3) that they bought a motorcycle and things for the trailer with the money; (4) that Appellant, Christmas and the two victims were the only persons in the Pizza Hut after closing time and (5) that the reason that so many shots were fired was that "the robbery went bad" (TR 719-720). These statements, thus, contained virtually no admission of culpability by Stein, and was only mentioned twice by the prosecutor in closing argument, primarily in reference to Stein's culpability for robbery or felony murder, as opposed to premeditated murder, the primary charge (TR 762-3, 780). In any event, admission of these statements was harmless error at best, in that the statements were cumulative to other evidence properly presented, and there is no reasonable possibility that the admission of these statements, if error, effected the verdict. **Cf. Alvord v. Dugger**, 541 So.2d 598 (Fla.1989)(admission of defendant's confession, *in violation of* ***Miranda***, harmless error where, **inter alia**, the defendant's statements not focus of trial and cumulative to other evidence.

In this case, the jury heard, in chilling detail, the testimony of Kyle White, who was present when Appellant and

Christmas planned this crime (TR 609-639). Thus, White testified that Christmas and Stein discussed which Pizza Hut to rob, and decided to rob the instant one due to the fact that the security system was not as sophisticated as others (TR 609-616). The witness stated that both Christmas and Stein indicated that they intended to leave no witnesses (TR 617). White likewise testified that he saw Stein leave the trailer on the night of the murder, carrying a rifle (TR 618-620); although the rifle was never recovered, the shells which were recovered from the scene and the victims' bodies matched conclusively those found on the front porch of the trailer, which had been fired by Stein on New Year's Eve when he was test firing the gun (TR 699, 702). Appellant's girlfriend likewise testified that she saw Stein leave the trailer with a rifle, and later return without it (TR 586-588). Ronald Burroughs, a Pizza Hut employee, testified that when he left the store on the night of the murder, Appellant, Christmas and the two victims were the only persons left in the building (TR 429-438). Indeed, Christmas locked the door after Burroughs left, although the witness also saw Stein remove an object from their parked vehicle (TR 439). Christmas' fingerprint was found on an unpaid guest ticket, and a Pizza Hut employee testified that nine hundred eight dollars ($908) had been removed from the safe (TR 517). Additionally, testimony was presented that, the following morning, Appellant and Christmas purchased a motorcycle, with Stein personally handing over five hundred dollars ($500) in cash (TR 644-6). Accordingly, reversible error has not been demonstrated in regard to the

admission of Stein's statements, and the instant convictions should be affirmed in all respects.

ARGUMENT: POINT II

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO THE TEMPORARY ABSENCE OF DEFENSE COUNSEL AT A PRETRIAL HEARING.

In his next point on appeal, Stein contends that he is entitled to a new trial because his trial attorney, Jefferson Morrow, Esq., was absent during a portion of a pretrial hearing held on a motion to suppress. Appellant contends that the requirements for waiving counsel under **Faretta v. California**, 422 U.S. 806 (1975) were not met, and states that the judge should have continued the hearing in the absence of counsel. Appellee disagrees, and would note that defense counsel not only waived his own appearance for the remainder of the hearing, but also Stein's (TR 151-2), although Appellant was in fact present for the duration of the hearing. Even if a procedural irregularity has been demonstrated, an irregularity which troubled neither Stein nor his counsel below, Appellant is not entitled to the relief which he now seeks, **i.e.**, a new trial. The instant convictions should be affirmed in all respects.

The record indicates that a hearing was held on all pending motions on May 23, 1989. At this hearing, the judge heard argument from attorney Chipperfield, representing codefendant Marc Christmas, as to his motions (TR 24-51), attorney Morrow, representing Stein, as to his motions (TR 51-55) and from the prosecutors, as to the state's motions (TR 55-73). During this

hearing, Morrow stated that he wished to join in similar motions which had been filed by Chipperfield on behalf of Christmas (TR 25); at the time of this proceeding, the state had filed a motion to consolidate the trials of the two codefendants (R 194). After the presentation of the state's motions, attorney Morrow presented testimony and argument in support of his motion to suppress Stein's statements (TR 74-116). Following the judge's ruling on this motion, the following exchange took place:

> **Mr. Campion (prosecutor):** Judge, we do have a motion to suppress physical evidence that was filed by both Mr. Chipperfield and Jeff Morrow. I believe the language, the grounds raised are similar if not identical in both motions.
>
> **The Court:** Does that have to do with the items in the box?
>
> **Mr. Campion:** Yes, sir. The items that are here, the execution of the search warrant.
>
> **Mr. Chipperfield:** I am ready to go on that, too, Your Honor
>
> (TR 116).

Chipperfield then called Detective Thorwart to the stand, and proceeded to examine him as to the preparation and execution of the search warrant upon the trailer occupied by Appellant and Christmas (TR 118-151).

At the conclusion of Chipperfield's questions, the following exchange took place:

> **The Court:** Mr. Morrow, did you want to ask any questions?
>
> **Mr. Morrow:** No, sir.
>
> **The Court:** All right. Gentlemen, let's take about five minutes then come back and we will resume at that time. Gentlemen, before we recess Mr. Morrow wanted to state something.

> **Mr. Morrow:** There is nothing further that I was going to add on the motion to suppress **that Mr. Chipperfield has**, and so I waive my appearance.
>
> **The Court:** You want to take Mr. Stein back at this time?
>
> **Mr. Morrow:** Yes.
>
> **Mr. Campion:** I am not -- I didn't have an opportunity to cross-examine the witness, Judge. You want him present for that or what?
>
> **Mr. Morrow:** There is no need for that. We can waive that, Judge.
>
> (TR 151-2). (Emphasis added)

A recess was then taken, during which attorney Morrow left, apparently because he had received a call that his daughter was ill (TR 152-3). The judge then made sure that Morrow had discussed this situation with his client:

> **The Court:** Let's bring Mr. Stein out. Mr. Stein, if you will -- Mr. Stein, I was going to take a break because we had been going for the last hour and a half or so and so I just took a break and when we -- I took the break Mr. Morrow came up to the bench here and he showed me a -- somebody had called him that his daughter had been taken ill and somebody had called him. I don't know who it was, but he needed to go and tend to her. Did he discuss this with you?
>
> **The defendant:** Yes, he did. That's pretty much what he told me, too.
>
> **The Court:** Okay. This motion that we have here -- Mr. Chipperfield, I was looking at your motion that you filed. Does Mr. Morrow have a motion on this?

> **Mr. Chipperfield:** Yes, sir. He filed one, too. I think it's similar or more identical to mine. I don't know if there are any differences. It looks like it's the same as mine.
>
> (TR 153).

At this point, the judge asked Stein if he wished to remain for the state's cross, and Appellant indicated that he did. (TR 153-4). Accordingly, with Stein present, the prosecutor cross-examined Detective Thorwart, and attorney Chipperfield offered brief redirect (TR 154-174). Attorney Chipperfield indicated that he wished to call another witness, who was not then available, and, accordingly, the matter was recessed (TR 175). Proceedings reconvened on May 29, 1991, with attorney Morrow present (TR 183). Attorney Chipperfield then called Detective Scott to the stand (TR 185-196), and attorney Morrow indicated that he had nothing to add (TR 196-197). Attorney Morrow indicated that he did not wish to call any witnesses (TR 205), and attorney Chipperfield then presented argument on the motion (TR 205-220); attorney Morrow indicated that he had nothing to add to this argument (TR 220-1), and, following argument by the state, the court denied the motion (TR 236).

Although Appellant contends on appeal that error of constitutional dimension has somehow occurred in the events set forth above, it is difficult to follow his reasoning. First of all, it would seem that the suppression hearing held on May 23, 1991 involved a motion to suppress filed by attorney Chipperfield, on behalf of codefendant Christmas, and not any filed by attorney Morrow, on behalf of Stein. This would

certainly explain why attorney Morrow was comfortable waiving his own presence as well as that of his client, at this hearing, and would further demonstrate that Morrow's absence from a portion of this hearing would be of little consequence. Another reasonable construction of the record would be that, seeing as both defense counsel had filed identical motions to suppress, attorney Morrow simply left it to attorney Chipperfield to litigate this matter; certainly, when present, it is clear that attorney Morrow had literally nothing to add to Chipperfield's questioning or argument, despite repeated opportunities for input. Contrary to the suggestion in the Initial Brief (Initial Brief at 32), it would not be violative of **Holloway v. Arkansas**, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), to regard Chipperfield as, to the extent necessary, representing Stein, during Morrow's brief absence from a portion of the suppression hearing. Even if it could be said that the defendants later manifested inconsistent and antagonistic defenses at their **separate** trials, there was certainly, at this point and time, a mutuality of interest in regard to the suppression motions; both defendants asserted that the search warrant had been improperly prepared and executed and that, accordingly, the evidence seized from their trailer should have been suppressed.[2] There simply was no error **sub judice**.

Further, while Appellant suggests that Stein was somehow left alone at the mercy of the Government, it should be noted that a suppression hearing is not a "critical stage" at which the

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[2] The suppression motions are indeed identical, as noted by the prosecutor and attorney Chipperfield (TR 116, 153); these motions are included in the appendix to this brief (See Appendix).

presence of the defendant is even required, **see Fla.R.Crim.P. 3.180; Muehlman v. State**, 503 So.2d 310, 315 (Fla.1987), and that, accordingly, Appellant's reliance on **Faretta** is misplaced. Secondly, even if the hearing could be regarded as a critical stage or somehow the equivalent of a trial, it is clear that not every temporary absence of defense counsel therein results in the reversal of the conviction at bar. **See, e.g., Beltran-Lopez v. State**, 583 So.2d 1030, 1032 (Fla.1991)(defense counsel's absence form portion of charge conference, in joint trial, not reversible error, where, **inter alia**, counsel later adopted other attorney's arguments and was afforded opportunity to add his own); **Vileener v. State**, 500 So.2d 713 (Fla. 4th DCA 1987)(defense counsel's absence during portion of charge to jury not reversible error, where defendant present and where attorney afforded opportunity to object).

Here, attorney Morrow was not absent during the entire suppression hearing. Rather, he simply waived his presence during the state's cross-examination of one witness and a brief redirect by attorney Chipperfield (TR 154-174). No adverse ruling was made on the motion at this time, and, indeed, the hearing was recessed for several days. When matters reconvened on May 29, 1991, attorney Chipperfield presented further evidence and argument, and attorney Morrow was offered the opportunity to do so, although he declined (TR 205, 220-1). It was apparently Morrow's strategy all along to essentially adopt the arguments presented by attorney Chipperfield and it is entirely speculative that Morrow's temporary absence from a portion of the suppression

hearing had any effect upon Stein's case. Accordingly, no relief is warranted. **Cf. Beltran-Lopez, supra; Vileener** (possibility that defendant prejudiced by temporary absence of counsel "purely speculative and unsubstantiated"); **Sullivan v. State**, 303 So.2d 632, 635 (Fla.1974)(reversible error cannot be predicated upon speculation).

Finally, even if this Court regards Morrow's temporary absence from a portion of May 23, 1991 suppression hearing as error, it is difficult to see how, or why, Stein should be afforded a new **trial**. Presumably, if counsel's absence had any effect upon the process, it led to an unreliable ruling on the suppression hearing itself; as noted above, this is a particularly unlikely scenario, given the fact that attorney Morrow, when present, contributed literally nothing to the proceeding, relying upon attorney Chipperfield. Such being the case, the only tangible "prejudice" which Stein could be said to suffer in this regard would be the wrongful admission of evidence seized pursuant to the search warrant; this situation, thus, is clearly distinguishable from one involving the absence of counsel from a portion of the trial itself, in which the effect of counsel's absence could literally be impossible to determine.

The only item of evidence which was seized pursuant to the warrant and admitted at trial against Stein was the empty case which had held his rifle (TR 621-2, 675); the spent shotgun shells from the front porch were not seized by the police at the time that the warrant was executed, but rather were voluntarily handed over, several days later, by Kyle White, another occupant

of the trailer (TR 627-8) **Cf. Delap v. State,** 440 So.2d 1242, 1250-3 (Fla.1983)(discussion of "independent source" doctrine). Appellee respectfully suggests that even if admission of the rifle case can be considered error, such would be harmless beyond a reasonable doubt under **State v. DiGuilio, supra,** and that no reasonable possibility exist that this error contributed to the verdict. **Cf. Farinas v. State,** 569 So.2d 425 (Fla.1990) (admission of murder weapon, seized in warrantless search, harmless error). Here, two witnesses testified to seeing Stein with a rifle on the night of the murder (TR 618-620; 586-80); also, Kyle White testified to having seen Stein purchase the rifle in Arizona and further described for the jury all the specifics of the rifle itself, **i.e.,** those same matters set forth on the rifle box as to the rifle's caliber, capacity, etc. (TR 622-3, 628). Accordingly, the instant convictions should be affirmed in all respects.

ARGUMENT: POINT III

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO TWO INADVERTENT STATEMENTS BY STATE WITNESSES.

As his final attack upon his convictions, Stein contends that he is entitled to a new trial due to two inadvertent statements by state witnesses while testifying. Specifically, Appellant points to Kyle White's reference to a "hit list" (TR 611), and to the portion of Detective Scott's deposition, which was read aloud, in which the officer referred to "a skin head or light blond headed white male." (TR 669). Appellee respectfully questions whether any claim of error is preserved in regard to

the latter testimony, but would suggest that, in any event, reversible error has not been demonstrated, and that Stein's convictions should be affirmed in all respects.

In resolving this claim, it is, of course, necessary to examine the record in some detail. Prior to trial, the state filed its notice, pursuant to § 90.402(2), Fla. Stat. (1989), to the effect that it intended to offer evidence concerning conversations in which Christmas and Stein planned the robbery of another Pizza Hut, on Lem Turner Boulevard, and the murder of the manager thereof (R 230). Around the same time, the defense filed a motion in **limine**, seeking to preclude the state from introducing any evidence regarding Stein's involvement with "hate groups"; racist literature had been found in Stein's trailer (TR 146; R 234-5). At a hearing on June 7, 1991, the prosecutor stated that he had only filed the Williams Rules notice out of an abundance of caution, in that the discussion of the potential robbery of the other Pizza Hut had occurred at the same time that Stein and Christmas planned the robbery and murders in this case; this case involved the robbery of the Pizza Hut on Edgewood Avenue (TR 242, 247). After argument of counsel, the judge stated that the evidence appeared to be admissible (TR 247). When defense counsel stated that he had a motion in **limine** in regard to Stein's being involved with a white supremacy group, the prosecutor announced that he would not introduce any evidence of that nature (TR 251). Subsequently, defense counsel filed another motion in **limine**, seeking to preclude admission of evidence concerning the discussed robbery of the other Pizza Hut

and the shooting of its manager (R 251-2). At the hearing of June 17, 1991, defense counsel agreed that the matter could be deferred until the time at which the evidence was offered (TR 254).

A proffer was held during the testimony of Kyle White, the roommate of Appellant and Marc Christmas (TR 600-9). At this time, White testified that he had been present when Stein and Christmas discussed robbing various Pizza Huts in the Jacksonville area (TR 601-4). The two asked White if there was any way that they could "beat the alarm system" of the Pizza Hut located on Lem Turner Boulevard (TR 602). When White stated that such was unlikely, the two discussed shooting the assistant manager of the store, as he was on his way to the bank to deposit the money, remarking that such would be "taking out two birds with one stone" (TR 602); White pointed out that the store was located in the middle of a busy neighborhood (TR 602). Discussion then turned to robbing the Pizza Hut on Edgewood Avenue which, apparently, had a less sophisticated alarm system (TR 602-4); during this conversation, both defendants indicated an intention to eliminate any witnesses (TR 604). After the arguments of counsel, the judge ruled that this evidence was admissible (TR 607-8). Accordingly, White re-presented this testimony before the jury, and in discussing the planned robbery of the Lem Turner Boulevard and the shooting of its manager, White stated that Christmas had suggested that they "hit Jope Vanderberg at the bank and that way they could kill two birds with one stone." (TR 611). The prosecutor then asked what

Christmas had meant by "hit," and White responded, "To kill him, eliminate him. Apparently, Joke Vanderberg was on a hit list of some sort." (TR 611).

At this point, defense counsel objected, and stated that White's reference to a hit list "makes it sound like a Mafia sort of thing." (TR 611-12). The judge disagreed, noting that the jury had no idea who Vanderberg was, and stating that it was unlikely that the jury would draw the same conclusion as defense counsel had (TR 612). When the state offered to clarify the statement, as well as the fact that Vanderberg was the manager of Lem Turner Pizza Hut, defense counsel objected and moved for mistrial (TR 613). The judge denied the motion, and the following exchange took place:

> **Q.** You had mentioned that they had planned to hit the manager Jope at the bank. Who is Jope?
>
> **A.** Jope Vanderberg is the manager of the Lem Turner Pizza Hut.
>
> **Q.** And by hit what did they mean?
>
> **A.** To kill him.
>
> **Q.** Okay. And in connection with what would they be killing Jope for?
>
> **A.** I'm sorry?
>
> **Q.** They would be killing Jope for dropping the deposit off at the bank?
>
> **A.** Exactly, exactly.
>
> **Q.** And that's what you meant, right?
>
> **A.** Yes, sir.
>
> (TR 614).

No further objection was interposed, and, indeed, the matter was never raised again.

On appeal, Stein contends that admission of the above testimony improperly attacked his character, and relies upon such precedents as **Jackson v. State**, 451 So.2d 458 (Fla.1984), in which this Court reversed a conviction and sentence of death due to the admission of testimony to the effect that the defendant had boasted of being a "thoroughbred killer.". Appellee suggests that Appellant's reliance upon **Jackson** is misplaced. First of all, if Appellant is now complaining of the admission of **any** testimony regarding the planned robbery of the Lem Turner Pizza Hut and/or the killing of its manager, this point is not preserved for appeal. Defense counsel's objection below was **not** to the subject matter of the witness's testimony, **i.e.**, the discussion of this robbery and murder, but rather to the fact that the witness had, gratuitously, used the colorful term "hit list", which defense counsel contended "made it sound like a Mafia sort of thing." (TR 611-12); additionally, it should be noted that defense counsel did not interpose an objection at the time the testimony concerning this other planned robbery began (TR 610).

It is, of course, well recognized that, in order for an argument to be presented on appeal, it must have been the specific legal ground asserted as a basis for objection below. **See, e.g., Occhicone v. State**, 570 So.2d 902, 906 (Fla.1990); **Bertolotti v. State**, 565 So.2d 1343 (Fla.1990); **Steinhorst v. State**, 412 So.2d 332 (Fla.1982). Even if it could be said that

defense counsel objected, pretrial, to the admission of this evidence, it is clear that any such "objection" would have to be renewed at the time that the evidence was actually admitted, in order to preserve the point. **See, e.g., Correll v. State**, 523 So.2d 562, 566 (Fla.1988)(objection must be renewed, following denial of pretrial motion in **limine**); **Glendening v. State**, 536 So.2d 212 (Fla.1988)(objection to testimony on one basis at trial did not preserve other legal argument for appeal). Further, even if this argument were properly preserved, it is clear that the discussion concerning the robbery of the other Pizza Hut and shooting of its manager was inextricably bound with Stein's and Christmas' plans for the instant crimes, and was otherwise relevant and properly admitted. **See, e.g., Henry v. State**, 574 So.2d 66, 70-71 (Fla.1991)(facts of second killing were "inextricably bound" with murder at issue and properly admitted); **Bryan v. State**, 533 So.2d 744, 745-8 (Fla.1988)(admission of defendant's prior bank robbery and boat theft admissible to, **inter alia**, give the jury a full and accurate picture of the full context of the crimes); **Jackson v. State**, 522 So.2d 802, 805-6 (Fla.1988)(evidence of defendant's prior assault on unnamed person on day of murder admissible to show entire context out of which criminal action occurred); **Heiney v. State**, 447 So.2d 210 (Fla.1984)(evidence of defendant's shooting of codefendant admissible to show entire context out of which criminal action occurred); **Smith v. State**, 365 So.2d 704 (Fla.1978).

Accordingly, the only claim properly before this Court refers to whether a mistrial should had been granted, due to Kyle

White's gratuitous reference to a mythical "hit list." The state suggests that it was not. Although opposing counsel seeks to minimize this fact, Appellee would maintain that the prosecutor's follow-up questioning dispelled any misapprehension that the witness's testimony might have caused. Thus, as a result of the subsequent questions, the jury clearly understood that any plan to shoot the manager of the Lem Turner Pizza Hut had simply been motivated by robbery, and that no "hit list" existed (TR 614). A motion for mistrial is addressed to the sound discretion of the trial judge, and should only be granted in cases of absolute necessity. **See, e.g., Sireci v. State**, 587 So.2d 450 (Fla.1991); **Randolph v. State**, 562 So.2d 331 (Fla.1990); **Johnston v. State**, 497 So.2d 863, 869 (Fla.1986). In this case, the judge did not abuse his discretion in concluding that a mistrial was not warranted. **See, e.g., Dailey v. State**, 594 So.2d 254 (Fla.1991)(erroneous admission of testimony concerning defendant's efforts to avoid extradition no basis for reversal); **Omelus v. State**, 584 So.2d 563 (Fla.1991)(erroneous reference which suggested existence of other murder no basis for mistrial); **Haliburton v. State**, 561 So.2d 248 (Fla.1990)(reference to statement, "Well, there's a couple more people I want to get," harmless error); **Buenoano v. State**, 527 So.2d 194 (Fla.1988)(gratuitious comment by witness, to the effect that defendant set fire to her own home for insurance proceeds, insufficient basis for mistrial); **Harmon v. State**, 527 So.2d 182 (Fla.1988)(irrelevant testimony that defendant planned insurance fraud harmless error); **Henderson v. State**, 463 So.2d 196

(Fla.1985)(testimony concerning defendant being wanted in other jurisdictions irrelevant, but harmless error). Accordingly, the instant convictions should be affirmed.

Appellee respectfully suggests that Stein's other claim merits less discussion. Detective Scott was too ill to attend the trial, and, as a result, his deposition was read aloud (TR 665). Prior to this, there was an extensive discussion between the parties as to what portions of the deposition would, and would not, be presented (TR 655-665); for instance, reference to certain physical evidence, such as clothing, which was not later introduced at the trial, was excised (TR 659-664). During the witness's reading of Scott's deposition, the witness recited Scott's description of his investigation of the crime, noting how he had talked to the managers of the Edgewood Avenue Pizza Hut "to see if they knew anyone who had dark hair who would be acquainted with a skin head or light blond headed white male." (TR 669). At this point, defense counsel requested a bench conference, and complained that this represented a portion of the deposition which was not to be read; the state disagreed (TR 669-670). Defense counsel then contended that he was objecting because the term "skin head" had "connotations" of the prior motion in **limine** (TR 670). The court suggested that the prosecutor move on, and he did so (TR 670).

As noted earlier, Appellee respectfully questions the preservation of this point, in that it would appear highly questionable whether defense counsel offered the court below an opportunity to correct any error. **Cf. Lucas v. State**, 376 So.2d

1149 (Fla.1979)(defendant not entitled for relief where he simply deferred to trial court's ruling). This is particularly true, given the fact that defense counsel, assuming that he ever did object, apparently did not secure any ruling on his objection. **See Richardson v. State**, 437 So.2d 1091, 1094 (Fla.1983)(claim on appeal concerning irrelevant testimony that defendant "shook his private" at witness not preserved, where defense counsel never secured ruling on his motion to strike). While it is true that this Court held, in **Holton v. State**, 573 So.2d 284 (Fla.1990) that a defendant need not move for a mistrial, after his objection has been overruled, in order to preserve a claim of error, the state respectfully suggests that such holding has no application here, inasmuch as, as noted, it would appear that Appellant's objection was neither sustained nor overruled. **See also Ferguson v. State**, 417 So.2d 639, 641 (Fla.1982)(if objectionable comment is made, proper procedure for defense counsel is to object and request curative instruction); **Duest v. State**, 462 So.2d 446 (Fla.1985); **Buenoano v. State, supra**. In this case, of course, defense counsel neither requested a curative instruction or mistrial, in regard to this testimony. Accordingly, this claim is not preserved for appellate review.

To the extent that this Court disagrees, Appellee would contend that reversible error has not been demonstrated. From its context, it is clear that the detective's reference to a "skin head" was a reference to an individual with extremely short hair, as opposed to one exposing certain ideological views. Scott's testimony was to the effect that he was seeking

information concerning "anyone who had dark hair who would be acquainted with a skin head or light blond headed white male." (TR 669). Other witnesses described Stein as having extremely short hair (TR 430, 585, 619). While it would appear that the term, "skin head," has now taken on other connotations, Webster's Third New International Dictionary (1981) defines the term as "a person with a bald or close shaven head," whereas Webster's II New Riverside University Dictionary (1984) defines the term as, "a young British working class tough with close cropped hair." On the basis of this record, there is no reason to conclude that the jury below drew the most sinister interpretation possible from this term, which, it should be noted, was not directly tied to Appellant. Accordingly, Stein's reliance upon such cases as **Dawson v. Delaware**, ___ U.S. ___, 117 L.Ed.2d 309 (1992) would seem misplaced, and any error **sub judice** was harmless under **State v. DiGuilio, supra.** The instant convictions should be affirmed in all respects.

ARGUMENT: POINT IV

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO HIS SENTENCES OF DEATH, IN THAT THE SENTENCES ARE SUPPORTED BY VALID AGGRAVATING CIRCUMSTANCES AND THE SENTENCER'S REJECTION OF THE PROFFERED MITIGATION WAS NOT ERROR.

In sentencing Appellant to death, Judge Wiggins found, as to the sentence imposed for the murder of Bobby Hood, that the murder had been committed by one with a prior conviction for a crime of violence, § 921.141(5)(b), Fla. Stat. (1989), that the homicide had been committed during the course of a robbery, §

921.141(5)(d), Fla. Stat. (1989), that the homicide had been committed for purposes of avoiding arrest, § 921.141(5)(e), Fla. Stat. (1989), and the homicide had been committed in a cold, calculated and premeditated manner, § 921.141(5)(i), Fla. Stat. (1989); in regard to the sentence imposed for the murder of Dennis Saunders, the court found all of the above aggravating circumstances, as well as a finding that the homicide had been especially heinous, atrocious or cruel, § 921.141(5)(h), Fla. Stat. (1989) (R 354-368). In mitigation, the court found, as to both sentences, that Stein had no significant history of prior criminal activity, § 921.141(6)(a), Fla. Stat. (1989) (R 362-5). The court also made a specific finding, pursuant to **Jackson v. State**, 575 So.2d 181 (Fla.1991), that there was strong evidence that Stein actually committed the murders, as well as evidence that he fully contemplated that lethal force would be used, that he was a willing participant in the crime, and that he evinced a reckless disregard for human life, such that the death penalty was appropriate (R 365-7). Appellant raises a multifaceted attack upon his sentences of death, attacking all but one of the findings in aggravation, and, further, the sentencer's failure to find certain mitigation. Each claim will now be addressed.

(A) **The sentencer's finding that the murder of Dennis Saunders was especially heinous, atrocious or cruel was not reversible error.**

The parties begin this point with virtually immediate disagreement. It is apparently Appellant's view that this aggravating circumstance was found as to both homicides (Initial Brief at 39-41). It is, however, the state's position that the

aggravating circumstance was only found as to the sentence imposed for the murder of Dennis Saunders. The sentencing order in this case is essentially a joint order, i.e., the findings made apply to both sentences. The judge's finding as to this factor, however, is somewhat different. While the judge began his finding by noting that the victims were forced into the bathroom, he went on:

> Victim Bobby Hood was then shot four times in the head and once in the chest at close range (within eight inches), with the bullets going in a downward path. From the evidence presented it appears that Bobby Hood was shot and killed before Dennis Saunders. **The amount of mental anguish that Mr. Saunders must have gone through before his execution was extremely cruel and heinous as he saw what happened to his friend and fellow worker Bobby Hood, as he awaited his own fate.** Victim Dennis Saunders was shot four times all around the body, including in the leg, in the arm and in the chest, indicating that he was not going down easily.
>
> (R 361-2) (emphasis supplied).

Inasmuch as there was not comparable finding regarding the mental anguish suffered by Bobby Hood and/or any express finding that his murder had been "extremely cruel and heinous," it is the state's position that this aggravating circumstance was not found as to Bobby Hood.

As to the merits of the finding as to the murder of Dennis Saunders, the state recognizes, as Appellant notes, that this Court has disapproved the finding of this aggravating circumstance in cases in which the victim has died quickly from multiple gunshots. See, e.g., **Brown v. State**, 526 So.2d 903 (Fla.1988); **Amoros v. State**, 531 So.2d 1256 (Fla.1988).

Nevertheless, Appellee would respectfully submit that these cases are not dispositive, in that the sentencer did not find this aggravating circumstance due to the victim's anguish and fear stemming from **his** own shooting, as occurred in **Brown** and **Amoros**, but rather due to the victim's suffering and mental anguish after witnessing the murder of the other victim, with the knowledge that he would be next. In cases involving multiple victims, and multiple shootings, this Court has consistently upheld this aggravating circumstances, where it is clear that one victim was forced to watch another meet his fate. Thus, in **Garcia v. State**, 492 So.2d 360, 367 (Fla.1986), this Court affirmed the finding of this aggravating circumstance, where, during the robbery of a farm market, the victims were forced to lie prone on the floor, and then executed one by one, this Court concluding that the "fear and emotional strain which the victims endured as they awaited execution" constituted a proper basis for this aggravating circumstance. **See also Steinhorst v. State**, 412 So.2d 332, 339-340 (Fla.1982)(in case of multiple homicides, "first victim suffered the least and last suffered the most," in that the last watched the execution of the prior victims and felt "the hope of survival vanish"); **Henderson v. State, supra** (while victims died instantaneously from single gunshot to the head, they were bound and gagged and "could see what was happening and obviously experienced extreme fear and panic while awaiting their own fate."); **Francois** v. **State**, 407 So.2d 885, 890 (Fla.1981)(in case of multiple homicides by shooting, aggravating circumstance properly found "on the basis of the mental anguish inflicted on

the victims as they waited for their single 'executions' to be carried out.").

This Court has held that, in determining the applicability of this aggravating circumstances, the sentencer may apply a common sense inference from the circumstances. **See Gilliam v. State**, 582 So.2d 610, 612 (Fla.1991). In this case, Judge Wiggins concluded, on the basis of the evidence presented, that Saunders had been the second victim to be killed. The record indicates that the victims were found on the floor of the men's bathroom, Hood lying on his side up against one of the walls and Saunders lying face down, partially underneath the sink (TR 488, 497). Hood had been shot four times in the head, and once in the chest, at such close range that gun powder residue was left behind (TR 533-550); the pathologist concluded that Hood had been sitting down at the time that he was first shot and that the shooter had been standing over him (TR 553-6). Saunders had been shot four times, with entrance wounds to the back of the neck, the right shoulder, the left side of the chest and the left thigh, not all at such a close range that gunpowder residue was left behind (TR 559-564). The pathologist testified that Saunders had initially been shot while lying on the floor but that, in contrast to Hood, he had also been shot while moving (TR 570-1). The pathologist also noted that Saunders had blood stains on his clothes which did not match with the location of his wounds, again suggesting movement (TR 571-2). Accordingly, the record supports the judge's conclusion that Saunders witnessed the execution of Bobby Hood, and knew that he would be

next, vainly seeking refuge under the bathroom sink. This was unnecessarily torturous and indicated an utter indifference on the part of Stein to the suffering of Dennis Saunders. Accordingly, the finding of this aggravating circumstance was proper. **See Garcia, supra; Steinhorst, supra; Henderson, supra; Francois, supra.**

Should this Court disagree, Appellee would respectfully contend that the finding of this aggravating circumstance, as to the sentence imposed for the murder of Dennis Saunders, was harmless error, under **State v. DiGuilio, supra;** as noted, the state contends that the aggravating circumstance was not found as part of the sentence imposed for the murder of Bobby Hood. This was a double murder, completed during the course of another violent felony, and it was well planned and for the purpose of removing all witnesses; the mitigation proffered was minimal. There is no reasonable possibility that the trial court in this case would have concluded that the valid aggravating circumstances as to both murders were outweighed by the evidence presented in mitigation, and it can be said that the trial court would have imposed the same sentences without finding this aggravating circumstance. **See Gore v. State,** 17 FLW S247 (Fla. April 16, 1992); **Maharaj v. State,** 17 FLW S201 (Fla. March 26, 1992); **Watts v. State,** 593 So.2d 198 (Fla.1992); **Capehart v. State,** 583 So.2d 1009 (Fla.1991); **Shere v. State,** 579 So.2d 86, 96 (Fla.1991)(**citing Clemons v. Mississippi,** 494 U.S. 738 (1990)); **Rogers v. State,** 511 So.2d 526 (Fla.1987). Accordingly, any error was harmless beyond a reasonable doubt, and the instant sentences should be affirmed in all respects.

(B) **The sentencer's finding, as to both sentences, that Stein had a prior conviction for a crime of violence was not error.**

As his next attack upon the sentences of death, Stein contends that it was error, as to each sentence, for the judge to have found the aggravating circumstance pertaining to prior conviction for crime of violence, due to the contemporaneous murder of two victims in this case. Appellant contends that this was not what the legislature intended, and cites to recent caselaw involving construction of the habitual offender statute, **State v. Barnes**, 595 So.2d 22 (Fla.1992). Appellee would respectfully submit that Appellant's reliance upon **Barnes** is misplaced, and that no error has been demonstrated in this regard. In **Ruffin v. State**, 397 So.2d 277, 282-3 (Fla.1981), this Court specifically rejected any analogy between the capital sentencing statute and that involving habitual offenders, noting that, "The purpose of considering previous violent convictions in capital cases differs from the purpose of habitual offender statute"; such purpose, of course, under **Elledge v. State**, 346 So.2d 998, 1001 (Fla.1977), is "to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for." Further, in **Pardo v. State**, 563 So.2d 77, 80 (Fla.1990), this Court overturned, on cross-appeal, a judge's finding that this aggravating circumstance could not apply to contemporaneous convictions in a multiple homicide; the judge therein had concluded "that the legislature intended this aggravating circumstance to refer to offenses other than the ones for which he [the defendant] is being accused and tried." No

error has been demonstrated, **see Correll, supra**, and the instant sentences should be affirmed in all respects.

(C) **The sentencer's finding, as to both sentences, that the homicides were committed to avoid arrest and were cold, calculated and premeditated was not error.**

In his next attack upon his sentences of death, Stein contends that it was error for the sentencer to have found both that the homicides had been committed for purposes of avoiding arrest, § 921.141(5)(e), and that they were cold, calculated and premeditated, § 921.141(5)(i). Appellant does **not** attack the finding of either of these aggravating circumstances as unsupported by the record, but merely suggests that they have been impermissibly doubled. Appellee disagrees, but would note that, even if Appellant were correct, no relief would be afforded, in that the simple double "counting" of aggravating circumstances has no effect upon the weighing process. **See, e.g., Hargrave v. State**, 366 So.2d 1, 5 (Fla.1978)(double counting of aggravating circumstances no basis for reversal of sentence, even where mitigation found; statute contemplates more than mere tabulation of sentencing factors); **Jackson v. State**, 498 So.2d 406, 411 (Fla.1986). Appellant's decision not to contest the factual bases for these aggravating circumstances would seem well taken, in that the record clearly indicates that Stein and Christmas not only planned these crimes carefully, but expressly intended that no witnesses be left alive (TR 609-617, 630). **Cf. Wickham v. State**, 593 So.2d 191 (Fla.1991).

This Court has previously that there is no reason why the facts of a given case may not support multiple aggravating

factors, provided that they are themselves separate and distinct and not merely restatements of one another. **See Echols v. State,** 484 So.2d 568, 575 (Fla.1985). The aggravating circumstance under § 921.141(5)(e) obviously focuses upon the defendant's motivation for the crime, whereas that under § 921.141(5)(i) not only focuses upon heightened premeditation, but also upon the manner in which the crime is executed. **See, e.g., Swafford v. State,** 533 So.2d 270, 277 (Fla.1988)(cold, calculated and premeditated aggravating circumstance may be supported by evidence showing advance procurement of murder weapon, lack of resistance or provocation and appearance of killing carried out as matter of course). This Court has previously rejected similar "doubling" arguments as to the finding of these two aggravating circumstances. **See Hodges v. State,** 595 So.2d 929, 934 (Fla.1992); **Cooper v. State,** 492 So.2d 1059, 1062 (Fla.1986). Further, this Court has affirmed the finding that both of these aggravating circumstances under comparable factual circumstances. **See, e.g., Remeta v. State,** 522 So.2d 825 (Fla.1988)(defendant murdered convenience store clerk during robbery, and stated that he "took out the witness"). Accordingly, Appellant has demonstrated no error in this regard, and the instant sentences should be affirmed in all respects.

(D) **The sentencer's rejection of certain proffered mitigation was not error.**

Stein next contends that his sentences of death must be reversed, because Judge Wiggins allegedly failed to consider and weigh in mitigation to-wit: (1) "that Marc Christmas was the primary actor motivating this crime." (Initial Brief at 47) and

(2) "good character testimony," presented through Stein's sister and girlfriend. Appellant contends that such failure to consider and weigh violates such precedents of this Court as **Rogers v. State, supra, Campbell v. State,** 571 So.2d 415 (Fla.1990) and **Santos v. State,** 591 So.2d 160 (Fla.1991). Appellee would suggest, however, that for purposes of this point on appeal, this Court's decision in **Lucas v. State,** 568 So.2d 18 (Fla.1990) is dispositive, and that reversible error has not been demonstrated.

The record in this case indicates that, at the sentencing proceeding of June 20, 1991, defense counsel announced that he would not be calling the defense expert, Dr. Krop, because "the test results did not show any brain damage"; Stein personally indicated his agreement with this decision (TR 848-9). The state called one witness, and, through cross-examination, the defense elicited the fact that Marc Christmas had prior convictions for grand theft (TR 855). The defense then called Sandra Griffin, Appellant's adopted sister, who stated that, when Stein came to visit her in Arizona, he often played well with her children (TR 857-8); she also testified that she had a very good relationship with her brother (TR 858). On cross-examination, the witness stated that she believed that Appellant had moved out of their parent's house some years ago, when he dropped out of high school, and that she had last lived with him in 1984 (TR 860); she also stated that she had not seen Appellant in the last year and a half since he had moved to Jacksonville (TR 861-2).

The defense also called Christine Moss, who had dated Stein since November 1990, and testified that Appellant had been a

"father figure" for her baby son (TR 863). Appellant indicated on record that he understood that he had the right to testify, but stated that he did not wish to do so (TR 869-870). In his closing argument to the jury, defense counsel argued that the jury should spare Stein because Marc Christmas was more culpable (TR 902-3); counsel also pointed out that Stein had no significant history of prior criminal activity (TR 903), and, further, that Stein might be sentenced to serve fifty years in jail before any parole (TR 904). Counsel closed his argument by stating that the defense was not arguing that Stein "has an antisocial personality problem, or that he didn't get a certain toy when he was three years old," but contended that the reason he had put on evidence from Stein's sister and girlfriend was "to show what type of person he is, the good side of him." (TR 906).

In his sentencing order, Judge Wiggins found that Stein had no significant history of prior criminal activity, § 921.141(6)(a) (R 363). The judge also found that "absolutely no evidence or testimony" had been presented in support of the mitigating circumstance relating to the defendant having been under the substantial domination of another, § 921.141(6)(e), Fla. Stat. (1989), and, further, that no evidence had been presented to support the statutory mitigating circumstance to the effect that Stein had been an accomplice in a capital felony committed by another in which his participation was relatively minor, § 921.141(6)(d), Fla. Stat. (1981) (R 364). After detailing the statutory mitigating circumstances, the judge, in a section entitled, "Nonstatutory Mitigating Circumstances," held

that there were no other aspects of Stein's character or record or circumstances of the offense "which would militate in favor of Steven Edward Stein or his conduct in this matter." (R 365). The judge concluded, after considering both statutory and nonstatutory mitigating circumstances, that there were no mitigating circumstances to outweigh the sufficient and grave aggravating circumstances justifying the death penalty (R 365). In a lengthy discussion, pursuant to **Jackson v. State**, 575 So.2d 181 (Fla.1991), the judge specifically found: (1) that there was "strong evidence" that Stein did kill or attempt to kill the victims; (2) that Stein clearly intended that the killings take place or that lethal force be employed during the robbery and (3) that Stein was a major participant in the robbery and his acts demonstrated a reckless disregard for human life (R 365-7).

Appellee would suggest that Appellant's contentions in regard to Marc Christmas are not well taken.[3] There is competent, substantial evidence in the record to justify the judge's rejection of any mitigating factor in this regard. **Cf. Nibert v. State**, 574 So.2d 1059, 1062 (Fla.1990). Kyle White testified that both Stein and Christmas discussed the robbery of this Pizza Hut and the murder of any witnesses (TR 617). White saw Stein leave the house on the night of the murders, carrying the murder weapon, his .22 caliber Marlin rifle; Stein told him that he was going to sell this rifle to Christmas' father for one

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[3] Christmas was tried after Stein and was likewise found guilty on all counts. Although the jury recommended life, the judge overrode such recommendation and imposed sentences of death. Christmas' appeal is presently pending before this Court as **Christmas v. State**, FSC Case No. 79,044.

hundred dollars ($100), although that witness expressly denied such allegation (TR 620, 642). There is, of course, no question of Stein's presence at the Pizza Hut during the murder, and, the next day, it was Stein who handed over five hundred dollars ($500) in cash for the purchase of the motorcycle (TR 646).

While, apparently, there was some conflict in White's testimony, in that, he had, at some point, given his opinion that Stein had not intended to kill anyone (TR 629, 634, 638), the witness still maintained that Stein had agreed that no witnesses would be left behind (TR 630). To the extent that there was in fact conflict in White's testimony, it was, of course, up to the sentencer to resolve any such conflict, and Stein has failed to demonstrate that he merits any relief in this regard. **Cf. Campbell, supra** (mitigating evidence must be established by greater weight of the evidence; court's finding will be upheld if supported by sufficient competent evidence in the record); **Dougan v. State**, 595 So.2d 1, 5 (Fla.1992)("Deciding whether particular mitigating circumstance has been established and, if established, the weight afforded it lies with the trial court, and the trial court's decision will not be reversed because an appellant reaches the opposite conclusion."); **Bassett, supra** (death penalty not disproportionate for defendant, even though codefendant, who actually killed victims, received life sentence); **Hall v. State**, 420 So.2d 872, 874 (Fla.1982)(death penalty not disproportionate where, even though defendant did not actually kill victim, he provided the weapon used and was present at her death); **White v. State**, 403 So.2d 331, 339 (Fla.1981)(trial court's rejection of

"accomplice" and domination mitigating circumstances not error, where, even though defendant did not personally kill victims, he participated in the felony and was present when crime planned and loot divided); **Jacobs v. State**, 396 So.2d 1113, 1116-7 (Fla.1981)(death penalty not disproportionate where "co-triggerman" received life sentence). Reversible error has not been demonstrated.

Appellant's other complaint is equally not well taken. Initially, the state would question whether defense counsel below complied with the dictates of **Lucas**, in "identifying for the court the specific nonstatutory mitigating circumstances he was attempting to establish." **Lucas**, 568 So.2d at 24. While defense counsel did, in closing argument, make one brief reference to Stein's alleged "good side," the state would respectfully contend that such was not specific enough. **Cf. Hodges, supra** (defendant's complaint that sentencing order did not specifically address his childhood, educational background, close family relationships and employment history as nonstatutory mitigation, rejected where defendant did not point out to the judge the nonstatutory mitigators which he felt that he had established). A similar result is dictated **sub judice**. Additionally, the state respectfully questions how Stein's alleged goodness with children, the only nonstatutory mitigator arguably established below, "ameliorated the enormity of his guilt," **see Lucas, supra, Eutzy v. State**, 458 So.2d 755, 759 (Fla.1984), such that it could be considered truly mitigating in nature.

The trial court in his order expressly stated that he had considered all the nonstatutory mitigating evidence presented, and any lack of clarity in the order and/or any failure of the sentencer to weigh the amorphous "good brother/good boyfriend" testimony presented was, at worst, harmless error. **See, e.g., Downs v. State**, 572 So.2d 895, 901 (Fla.1990); **Cook v. State**, 581 So.2d 141, 144 (Fla.1991)(trial court's failure to discuss nonstatutory mitigation in order, relating to defendant being a follower, nonviolent, good worker and family member, harmless error, "in view of double murder involved in the case"); **Wickham**, 593 So.2d at 194 (sentencer's failure to find and weigh mitigating evidence concerning defendant's abusive childhood, alcoholism, extensive history of hospitalization for mental disorders and related matters harmless error, in light of very strong case for aggravation); **Pace v. State**, 17 FLW S205 (Fla. March 26, 1992)("Even if one or more nonstatutory mitigating factors were wrongfully rejected, such would be harmless error"). The instant sentences of death should be affirmed in all respects.

Finally, although Appellant has not expressly raised this matter, the state would suggest that the instant death sentences are not disproportionate. This case bears great similarity to **Cook, supra**. In that case, the defendant and two accomplices robbed a Burger King and murdered two of the employees. This Court found the death sentence appropriate, even though such sentence was only applied as to the sentence imposed for the murder of one victim, where, as here, the defendant had no

significant criminal history; **Cook** was, however, if anything, less aggravated than the instant case, in that in **Cook**, there was no evidence of a prearranged plan to kill all witnesses. This case is also similar to **Jones v. State**, 411 So.2d 165 (Fla.1982), and **Meeks v. State**, 339 So.2d 186 (Fla.1976), both of which involved convenience or liquor store robberies in which the defendant and his accomplices forced the victims to lie on the floor and then executed them systematically by gunpoint. Unlike many appellants who appear before this Court, Steven Stein can point to no truly mitigating factor in his past, **i.e.**, no abusive childhood or major mental illness, which could explain or even partially excuse his criminal conduct. Rather, it is clear that he and his codefendant simply chose to execute two other human beings, so that they could have a motorcycle. In light of the substantial aggravation and dearth of mitigation, the instant sentences are clearly appropriate, and should be affirmed in all respects.

ARGUMENT: POINT V

FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE ADMISSION OF TESTIMONY AT THE PENALTY PHASE CONCERNING STEIN'S CARRYING OF A CONCEALED WEAPON.

Appellant contends that his sentences of death must be reversed, because, at the penalty phase, Detective Thorwart testified, without objection, that Stein, at the time of arrest, had been carrying a loaded .38 caliber pistol in his jacket; the witness further stated that carrying a concealed firearm was a third degree felony (TR 852-3). Stein maintains that this

testimony was inadmissible, as representing a nonstatutory aggravating factor which irretrievably tainted his sentencing proceeding. Appellee disagrees, and would initially note that no claim of error has been preserved in this regard. No contemporaneous objection was interposed in regard to the admission of this testimony, and, accordingly, any claim in this regard has been waived. **See Sochor v. State**, 580 So.2d 595, 602 (Fla.1991)(claim that improper evidence admitted at penalty phase waived, in absence of objection); **Bertolotti v. State, supra** (In order for claim to be raised on appeal, matter must first been presented to trial court); **Steinhorst, supra.**

To the extent that this Court disagrees, reversible error has nevertheless not been demonstrated. It is well established that the scope of evidence which may be admitted at the penalty phase in a capital case is broader than that at trial, given the fact, **inter alia**, that the purpose of such sentencing proceeding is to engage in a "character analysis" of the defendant. **See, e.g., Elledge, supra; Hildwin v. State**, 531 So.2d 124 (Fla.1988); **Hodges, supra.** Additionally, it is only appellate counsel's position that this evidence constituted nonstatutory aggravation (Initial Brief at 52). In his closing argument, the prosecutor contended that this evidence went towards rebutting the mitigating circumstance of no significant criminal history, under § 921.141(6)(a) (TR 892). Under Florida law, the admission of this evidence was clearly proper for this purpose. **See, e.g., Lucas**, 568 So.2d at 22, n.6 (arrest or other evidence of criminal activity, without convictions, may be used to rebut mitigating

circumstance relating to lack of significant criminal history; evidence presented that defendant had "broken into" victims home properly admitted); **Walton v. State**, 547 So.2d 622, 625 (Fla.1989)(direct evidence of defendant's drug activity properly admitted to rebut mitigating circumstance); **Washington v. State**, 362 So.2d 658, 666-7 (Fla.1978)(testimony concerning apparently uncharged burglary and dealing in stolen property properly admitted to rebut this mitigating factor). Additionally, the judge expressly instructed the jury that they could not consider this matter as an aggravating factor (TR 909-910).

Further, assuming that any error was committed **sub judice**, such was unquestionably harmless under **State v. DiGuilio, supra.** First of all, it must be noted that the judge did, in fact, find this mitigating circumstance (R 363). Secondly, defense counsel below made use of this testimony during his closing argument, in support of his contention that Stein was unlikely to have actually committed these murders, because he was in possession of a different gun, i.e., the .38 caliber pistol, as opposed to the .22 caliber rifle, which was the murder weapon (TR 904). Finally, given the strength of the aggravating circumstances **sub judice**, no reasonable possibility exists that the admission of this evidence effected the sentences. **See, e.g., Rogers**, 511 So.2d at 533 (admission of evidence concerning defendant's violent outburst in restaurant, representing nonstatutory aggravating factor, harmless error at penalty phase). The instant sentences should be affirmed in all respects.

ARGUMENT: POINT VI

DENIAL OF APPELLANT'S MOTION FOR MISTRIAL, DURING THE PROSECUTOR'S CLOSING ARGUMENT AT THE PENALTY PHASE, WAS NOT ERROR.

Stein next contends that his sentences of death must be reversed due to improper prosecutorial argument. Specifically, Appellant suggests that the prosecutor sought to invoke sympathy for the victims, and maintains that reversal is mandated under such precedents as **Taylor v. State**, 583 So.2d 323 (Fla.1991), **Jackson v. State**, 522 So.2d 802 (Fla.1988) and **Bertolotti v. State**, 476 So.2d 130 (Fla.1985). Appellee disagrees, and would question the present preservation of at least a portion of Stein's claim.

The record does, in fact, indicate that the prosecutor began his closing argument at the penalty phase by briefly seeking to humanize the victims, pointing out their ages, occupations and the fact that one was married and had a child (TR 871-2). At this juncture, defense counsel announced that he had a motion to make, and stated that he was moving for a new penalty phase, "because of that comment about he's a father of a child and that sort of thing, that is improper comment." (TR 872). The prosecutor indicated that he was aware that extended "victim comment" was improper, but stated that he simply wished to present the victims in the context of the case (TR 872). The judge then denied defense counsel's motion, and the prosecutor briefly pointed out that the victims had been "human beings" who "were trying to earn an honest living to support themselves," before Appellant executed them; he also pointed out that Stein

had ended the victims' "God given right to live a full life and experience life in its fullest." (TR 873). No contemporaneous objection was interposed in regard to these latter remarks (TR 873). Subsequently, defense counsel did object to two other portions of the prosecutor's closing argument, on the grounds that "victim impact," in violation of **Booth v. Maryland**, 482 U.S. 496 (1987), had been introduced (TR 884, 899-900); no claim of error is presented in regard to these latter objections.

Appellee would suggest that no claim of error is preserved in regard to the prosecutor's reference to the victims' "God given right to live," or any portion of the prosecutor's argument after the initial objection (Initial Brief at 54), in that no contemporaneous objection was interposed thereto. **See, e.g., Rose v. State**, 461 So.2d 84, 86 (Fla.1984)(contemporaneous objection rule applies to prosecutorial argument in capital cases). The fact that Appellant objected both prior and subsequent to these remarks does not relieve him of the obligation to contemporaneously object. **See, e.g., Teffeteller v. State**, 495 So.2d 744, 747 (Fla.1986)(prior expression of "concern" cannot "bootstrap" or substitute for lack of subsequent objection to matter); **Nixon v. State**, 572 So.2d 1336, 1340-1 (Fla.1990)(motion for mistrial at close of prosecutor's argument insufficient to preserve point in absence of contemporaneous objection); **Craig v. State**, 510 So.2d 857, 864 (Fla.1987)(motion for mistrial on specific ground cannot preserve unobjected to portions of closing argument for review). It cannot be contended that defense counsel would have regarded further objection in

this vein as "futile," given the fact that, as noted, he did in fact subsequently object on these grounds to two other portions of the prosecutor's argument. Because Appellant failed to afford the judge below the opportunity to correct any error, **see Nixon, supra**, this portion of Stein's claim is barred.

Additionally, as to the objection itself, it must be noted that it was general in the extreme, and this Court has demanded great specificity in this area. **See Bertolotti v. State**, 565 So.2d 1343, 1345 (Fla.1990)(objections to admission of evidence insufficiently specific to preserve "victim impact" claim); **Ferguson v. State**, 417 So.2d at 641 (general objection followed by motion for mistrial insufficient to preserve claim as to prosecutorial argument). At minimum, the objection below can hardly be said to preserve any claim of error based upon the Florida Constitution, as asserted on appeal (Initial Brief at 55). **See, e.g., Forrester v. State**, 565 So.2d 391, 393 (Fla. 1st DCA 1990)(Appellant's claim based upon the Florida Constitution not properly presented on appeal, where such never presented to trial court).

Additionally, this Court, as well as others, has held that brief "humanizing" remarks concerning homicide victims, which do not contain any discussion of victim "worth," do not constitute a basis for reversal. **See Payne v. Tennessee**, ___ U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)(overruling **Booth** and **South Carolina v. Gathers**, 490 So.2d 805 (Fla.1989)); **Bertolotti v. Dugger**, 883 F.2d 1503, 1524, n.19 (11th Cir.1989); **Owen v. State**, 17 FLW S71 (Fla. Jan. 23, 1992)(introduction of victim impact

testimony harmless error, where judge did not give such any weight at sentencing); **Hodges, supra; Watts, supra** (prosecutor's comment to the effect that the life of the victim's wife "would never be the same," insufficient basis for reversal, in light of record); **Valle v. State**, 581 So.2d 40, 48 (Fla.1991)(brief testimony and argument which focused upon loss suffered by victim's family and friends and victim's personal characteristics insufficient basis for relief); **Freeman v. State**, 563 So.2d 73, 75-6 (Fla.1990)(testimony of victim's wife at penalty phase and prosecutor's reference to victim as father and householder insufficient basis for relief); **Grossman v. State**, 525 So.2d 833 (Fla.1989)(**Booth** error harmless, where sentencing order contained no reference to victim impact information); **Bush v. State**, 461 So.2d 936, 941-2 (Fla.1984)(prosecutor's reference to victim's family insufficient basis for reversal, where prosecutor's appeal to jury's sympathies was "of minor impact"); **Jennings v. State**, 453 So.2d 1109 (Fla.1984)(prosecutor's comparison of victim's "rights" with those of defendant insufficient basis for mistrial); **Johnson v. State**, 442 So.2d 185, 187-8 (Fla.1983)(prosecutor's reference to victim's family insufficient basis for mistrial).

The remarks at bar undoubtedly were of "minor impact," if that, in this case, and did not render the sentencing proceeding unfair, **see Darden v. State**, 329 So.2d 287 (Fla.1976); any error was harmless under **DiGuilio, supra.** It is clear that the sentencing judge did not rely upon these arguments in sentencing Stein to death, and Appellee can see little similarity between

this case and **Taylor,** upon which Appellant relies; it should be noted that the argument condemned in **Taylor** was expressly found to be harmless in three other cases. **See Hudson, supra; Jackson, supra; Hodges, supra.** The instant sentences of death should be affirmed in all respects.

ARGUMENT: POINT VII

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO HIS MULTIFACETED ATTACK UPON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR.

As his final claim, Appellant contends that his death sentences must be reversed due to several alleged infirmities in the heinous, atrocious or cruel aggravating circumstance, § 921.141(5)(h). Appellant renews his attack upon the finding of this aggravating factor, and suggests that the jury should never have been instructed upon it. Appellant likewise contends that the prosecutor's argument to the jury, in support of their finding in this factor, was improper. Finally, Appellant suggests that the instruction actually given the jury in this case violated **Maynard v. Cartwright,** 486 U.S. 356 (1988). Appellee would contend that reversible error has not been demonstrated, and will address each of Stein's claims.

(A) **The giving of a jury instruction on the aggravating factor was not error.**

Appellant initially contends that because the evidence did not support an instruction on this factor, it was error for the court to have even allowed the jury to consider it. The state disagrees. Appellee would note that no contemporaneous objection was interposed in regard to the fact that the court instructed

the jury on this aggravating circumstance (TR 846-7; 907-914).[4] This Court has consistently held that contemporaneous objection is necessary to preserve claims of this nature for review. **See Fla.R.Crim.P. 3.390(d); Vaught v. State**, 410 So.2d 147, 150 (Fla.1982); **Dougan v. State**, 470 So.2d 697, 699-700 (Fla.1985)("Absent a specific contemporaneous objection, an instruction cannot be complained about on appeal"). Indeed, in **Sochor v. Florida**, ___ U.S. ___ (June 8, 1992), the United States Supreme Court recognized that this Court consistently applies procedural bar in circumstances such as that **sub judice**. Accordingly, this claim is waived.

To the extent that this Court disagrees, Appellee would simply note that it is the trial judge's obligation to instruct the jury on the aggravating circumstances which are arguably supported by the record, and not to interpose his own judgment. **See, e.g., Suarez v. State**, 481 So.2d 1201, 1209 (Fla.1985)(jury instructions simply apprise jury of arguably relevant aggravating factors from which to choose in making their assessment as to whether death is the proper sentence in light of any mitigation); **Stewart v. State**, 558 So.2d 416, 420-1 (Fla.1990); **Bowden v. State**, 588 So.2d 225, 231 (Fla.1991)(not error for court to instruct on felony murder aggravating circumstance, even where

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[4] Although Stein did file a pretrial motion to prohibit instruction on this aggravating factor, it does not appear that the motion was ever renewed or ultimately ruled upon (R 143); accordingly, no claim of error has been preserved. **See, e.g., State v. Barber**, 307 So.2d 7, 9 (Fla.1974)(reviewing court must confine itself to review of matters which were before the trial court and upon which a ruling adverse to the opposing party was made).

such later not found). Here, a jury question was presented as to the appropriateness of this aggravating factor. **See Haliburton,** 561 So.2d at 252 (not error to instruct jury on heinous, atrocious or cruel aggravating circumstance where evidence was sufficient to present a jury question).

As noted in Point IV (A), **supra,** this aggravating circumstance was properly found in regard to the murder of Dennis Saunders, given the extreme mental anguish which he suffered as he watched the execution of Bobby Hood; even if this Court ultimately disagrees as to the correctness of this finding, it was not error for the jury to consider it, inasmuch as it was at least arguable, under such precedents as **Garcia, supra,** or **Steinhorst, supra.** Also as noted in Point IV, it is the state's position that this aggravating factor was not found as to the sentence imposed for the murder of Bobby Hood. Appellee suggests that submission of this factor to the jury was nevertheless not error, inasmuch as that victim's fear and mental anguish prior to his own death, as well as the execution style of his murder, presented an arguable basis for the finding of this aggravating factor. **See, e.g., Hargrave, supra** (execution style murder of store clerk heinous, atrocious or cruel); **Jones, supra** (same); **Garcia, supra.** Accordingly, error has not been demonstrated. **See, e.g., Bowden, supra** (not error for court to instruct on aggravating circumstance later found to lack evidentiary support); **Johnson v. State,** 438 So.2d 774, 779 (Fla.1983)(not error for court to instruct jury on heinous, atrocious or cruel aggravating circumstance, as well as that involving great risk,

where factors not found and defendant suffered no prejudice thereby).

This situation is distinguishable from that in either **Jones v. State**, 569 So.2d 1234 (Fla.1990) or **Omelus v. State**, 584 So.2d 563 (Fla.1991), in which this Court held that the jury's consideration of this aggravating factor had been error; in **Jones**, it must be noted that other errors prompted this Court's reversal of the death sentence, whereas in **Omelus**, this aggravating circumstance became virtually the entire focus of the sentencing proceeding. In both **Jones** and **Omelus**, it was error to instruct the jury on this aggravating factor as a matter of **law**. **Jones** (acts committed upon dead body could not constitute basis for this aggravating factor); **Omelus** (aggravating factor could not be found as part of sentence imposed upon one who set up contract murder, as opposed to individual who carried it out). In this case, the aggravating circumstance was at least arguable under the law and did not play such a role on the penalty phase that any erroneous consideration could constitute a basis for reversal, especially given the fact, **inter alia**, that this was a double murder in which other significant aggravation was presented which outweighed minimal mitigation. The state would also note that in **Sochor v. Florida, supra**, the United States Supreme Court rejected a contention that the jury's consideration, through jury instruction and argument, of an aggravating circumstance later stricken on appeal, violated the Eighth Amendment. Accordingly, it is clear that reversible error has not been demonstrated, and the instant sentences should be affirmed.

(B) **The prosecutor's closing argument was not reversible error.**

Appellant also argues that the prosecutor offered improper argument as to this aggravating factor, when he drew the jury's attention to Stein's demeanor after the offense, pointing out that he had acted "normal" within approximately one half hour after the murders (TR 887); defense counsel objected to this argument as an "improper comment," and such objection was overruled (TR 887). On appeal, Stein complains that the prosecutor improperly argued "lack of remorse," and relies upon such precedents of this Court as **Pope v. State**, 441 So.2d 1073 (Fla.1983), **Hill v. State**, 549 So.2d 179 (Fla.1989), **Patterson v. State**, 513 So.2d 1263 (Fla.1987) and **McCampbell v. State**, 421 So.2d 1072 (Fla.1982). Appellee would maintain that these cases are distinguishable, and that reversible error has not been demonstrated.

Initially, the state would suggest that it is only appellate counsel's opinion that the argument at issue refers to "lack of remorse." Prior to closing argument, defense counsel moved in **limine** to preclude the state from arguing the lack of remorse, and the prosecutor indicated that he knew that he could not do so under the law; he felt, however, that in support of this aggravating factor, he could draw the jury's attention to Stein's actions and demeanor immediately after the murder, which could be said to have "colored" his actions at the time (TR 870-1). The prosecutor lived up to his word, and simply drew the jury's attention to the fact that Stein had acted "normally" after the murders. This is not the equivalent of elicitation of express

testimony from police officers to the effect that the defendant, in subsequent interviews, indicated a lack of remorse for his offenses. **See Robinson v. State**, 520 So.2d 1, 6 (Fla.1988); **Jones v. State**, 569 So.2d at 1240; **Colina v. State**, 570 So.2d 929, 932-3 (Fla.1990). Rather, it was the prosecutor's view that Stein's "normalcy" at a point and time immediately after the murders, was indicative of a lack of pity or conscience at the time that he killed the victims.

Appellant contends that, under **Pope**, this type of argument is improper. **Pope**, however, did not involve allegedly improper prosecutorial argument, but rather an express finding by the trial court, in imposing a death sentence, that he had considered in aggravation the fact that the defendant had not shown any remorse, "having elected to steadfastly deny his guilt." This Court, quite properly, concluded that a defendant could not be penalized for "exercising rights of due process." **See also Huff v. State**, 495 So.2d 145, 153 (Fla.1986)("Our concern in **Pope** was that it was error to infer a lack of remorse from exercise of constitutional rights."). This Court also pointed out that the "mind-set of the murderer - his consciencelessness and pitilessness" had been rendered irrelevant concerns, due to the fact that the jury instruction had been amended to delete any reference to these terms,

> The new jury instruction on finding a homicide to be especially heinous, atrocious or cruel now reads: 'A crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.' No further definitions of the terms are offered, nor is the defendant's mind-set ever at issue. **Pope**, 441 So.2d at 1078.

This, however, was **not** the jury instruction given **sub judice**. Rather, the jury instruction in this case **does**, in fact, contain "further definitions for the terms," as well as specific reference to the crime at issue as "conscienceless or pitiless." (TR 909). Accordingly, it would seem difficult to fault a prosecutor for utilizing this terminology in arguing the applicability of this aggravating circumstance to the jury or, in making such argument, for drawing the jury's attention to the defendant's mind-set at a time in close proximity to the murders. In contrast to the cases relied upon by Stein, no attempt was made to "penalize" Stein for insisting upon a trial or for failing to exhibit remorse upon arrest. Rather, the prosecutor simply wished the jury to note that Stein had appeared "normal."[5]

Should this Court disagree, Appellee would contend that any error herein was harmless beyond a reasonable doubt, under **State v. DiGuilio**. First of all, Stein's state of mind after the murders was directly relevant to rebut the proposed mitigating circumstance of substantial domination. This mitigating circumstance was presented to the jury (TR 910), and defense counsel's closing argument suggested that Stein had been at the mercy of the "main actor," his codefendant Marc Christmas. Such being the case, Appellee suggests that, although the evidence was not expressly argued for this purpose, the prosecutor would have

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[5] To the extent that this Court regards **Hill v. State** as analogous, the state would simply note that the reversal of the death sentence in that case was primarily predicated upon the finding of an erroneous aggravating circumstance. Further, it is clear that in **Hill**, the jury overheard the prosecutor specifically state that lack of remorse could be considered in aggravation; nothing of that sort occurred **sub judice**.

been justified in pointing to Stein's "normalcy" after the offense, as evidence that this mitigating circumstance did not apply. In other words, if Stein had truly been under the domination of his codefendant, one would not expect him to have acted "normally" immediately after participating in the murder of two innocent persons; rather, he would have appeared nervous, afraid, trapped or, presumably, as if he wished to put as much distance between himself and Christmas as possible. While continuing to maintain that the instant argument did not relate to lack of remorse, the State would note that this Court has, in fact, allowed the state to utilize such evidence or argument in rebuttal of proposed mitigation. **See, e.g., Agan v. State**, 445 So.2d 326, 328 (Fla.1983); **Walton v. State**, 547 So.2d at 625; **Valle v. State**, 581 So.2d at 46. Further, in contrast to the cases cited by Stein, such as **Pope**, **Patterson** and **McCampbell**, the judge in this case made no reference to lack of remorse in his sentencing order; any such reference could, in any event, be regarded as harmless. **See Rutherford v. State**, 545 So.2d 853, 856 (Fla.1989). This Court has previously held that isolated references to a defendant's lack of remorse can constitute harmless error in capital penalty proceedings. **See Valle, supra; Sireci v. State**, 587 So.2d at 454 (testimony of defense witness that, after murder, defendant "seemed rather proud" of crime, constituted improper testimony as to lack of remorse; error harmless). Given the overwhelming aggravation as to this double murder, and minimal mitigation, it can be said that any error herein did not contribute to the sentences imposed. The instant sentences should be affirmed.

(C) **The jury instruction given was not unconstitutional.**

As his final attack upon the sentences imposed, Appellant contends that the instruction given the jury on this aggravating factor was unconstitutional under **Maynard v. Cartwright.** As in the prior section, the state would question the preservation of any claim of error. No contemporaneous objection was interposed in regard to the jury instruction given on this aggravating circumstance on this basis. **See Dougan, supra; Vaught, supra.** Although Appellant filed a pretrial motion to strike this aggravating circumstance, which included an attack on the jury instruction as well (R 34-50), and such motion was denied (R 203), this cannot constitute adequate preservation, in the absence of renewed contemporaneous objection, under this Court's decision in **Sochor, supra.** The United States Supreme Court, of course, expressly approved this Court's finding of procedural bar under these identical circumstances in **Sochor. Sochor v. Florida, supra.** Such holding, additionally, is in accordance with such precedents of **Smalley v. State,** 546 So.2d 720, 722 (Fla.1989), wherein an identical claim was found procedurally barred due to inadequate preservation.

Further, although defense counsel did propose an alternative jury instruction on this aggravating factor, he voiced no objection on constitutional grounds at the time that such was denied (TR 846-7). Counsel's proposed instruction simply represented an alternative version adopted by the committee on standard jury instructions (R 322). Judge Wiggins declined to give this instruction, due to the fact that this Court has not

yet approved it; instead, he announced that he would give the most recent version which this Court had approved (TR 846). Appellant interposed no further objection, and Appellee would contend that he acquiesced in the court's ruling. **See Freeman,** 463 So.2d at 76 (while defense counsel initially objected to the standard jury instruction on this factor as violative of **Maynard,** defense counsel failed to renew objection after court indicated that he would modify instruction with language from **State v. Dixon,** 283 So.2d 1 (Fla.1973); claim not preserved for review); **Lucas,** 376 So.2d at 1151-2 (no claim of error preserved where counsel simply deferred to trial court's statement of the law).

To the extent that this Court disagrees, Appellee would simply contend that the constitutionality of this jury instruction has consistently been upheld. **See, e.g., Martin v. Singletary,** 17 FLW S282 (Fla. May 5, 1992); **Beltran-Lopez, supra; Smalley, supra.** The instant sentences of death should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant convictions of first degree murder and sentences of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL #300179
Assistant Attorney General

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W.C. McLain, Public Defender's Office, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301 this 16 day of June, 1992.

RICHARD B. MARTELL
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STEVEN EDWARD STEIN,

Appellant,

v. CASE NO. 78,460

STATE OF FLORIDA,

Appellee.
_____/

INDEX TO APPENDIX

Stein's Motion to Suppress Physical Evidence
Filed May 9, 1991.....A

Christmas' Motion to Suppress Physical Evidence
Filed May 16, 1991.....B

APPENDIX A

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5-20
6-17

THIS INSTRUMENT IN COMPUTER
NHD

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 91-1505-CF

DIVISION: CR-B

FILED
MAY 9 1991
Henry W. Cook
CLERK CIRCUIT COURT

STATE OF FLORIDA

v.

STEVEN STEIN

MOTION TO SUPPRESS PHYSICAL EVIDENCE

Defendant, **STEVEN STEIN**, by and through the undersigned attorney, pursuant to Rule 3.190(h), Florida Rules of Criminal Procedure, respectfully requests this Honorable Court to suppress the following evidence: All evidence seized as a result of the execution of a search warrant on January 23, 1991, by Detective R.C. Thorwart and other officers of the Jacksonville Sheriff's Office. These items include, but are not necessarily limited to, each and every item listed in the inventory and receipt of the search warrant, including:

1) Nineteen .22 caliber bullets.
2) Seven receipts.
3) One black jacket.
4) One empty .25 caliber box.
5) One green jacket.
6) One blue jean jacket.
7) One .22 rifle box.

Denied
5-29-91

8) Three pants (blue jeans).

9) One red and white striped shirt.

10) Two aprons.

11) One red cap.

12) One box federal .38 caliber bullets.

13) One box .38 caliber mostly empty.

14) One holster.

15) One plastic bag with four .38 caliber bullets.

16) Tow shirts.

17) Booklet Rossi .38 Caliber.

18) Two hate papers.

19) Four pairs of shoes (boots).

As grounds for this motion, Defendant states the evidence mentioned above was seized upon authority of a warrant which did not state probable cause for believing the existence of the grounds upon which the warrant was issued; seized but not described in the warrant; and seized upon authority of a warrant which was illegally executed in violation of Defendant's rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution, and in violation of Defendant's right to privacy guaranteed by Article I, Section 23 of the Florida Constitution.

Defendant further states he has standing to contest the legality of said seizure.

A general statement of the fats on which this motion is based

is as follows:

1) On January 23, 1991, Detective R.C. Thorwart of the Jacksonville Sheriff's Office signed an affidavit for a search warrant for premises located on Mockinbird Road which were occupied by Stein and Co-defendant Christmas. The Honorable Bernard Nachman issued the warrant, and it was execute don January 23, 1991.

2) At the time the warrant was executed, the officers executing the warrant failed to knock and announce pursuant to Section 933.09, Florida Statutes. There was no exigent circumstance to justify that action.

3) Of all of the items listed in the inventory and receipt for the search warrant, only the black jacket and blue jeans are specifically mentioned in the very broad list of items to be seized. However, the affidavit for the search warrant does not mention the black jacket and does not give probable cause to seize it. "Blue jeans" are mentioned in the affidavit when Detective Thorwart wrote that Christine Moss saw Stein wearing a royal blue flannel shirt and blue jeans on the evening of January 20, 1991. However, the affidavit fails to state any reason why blue jeans might constitute evidence or contain evidence to assist in proving the crime. No probable cause is given to seize any particular pair of blue jeans, and the warrant is overbroad when it allows the seizure of all "jeans" without regard to owner and without being more specific in describing them. Moreover, the affidavit appears to eliminate the need to seize any blue jeans when it states that

a bloody flannel shirt and blue jeans were found in a dumpster on January 21, 1991. Detective Thorwart's affidavit for arrest warrant sears that the bloody clothing matched the description of Stein's clothing.

4) The inventory for the search warrant shows the seizure of a red and white striped shirt and two other shirts which are not described. It also shows the seizure of four pairs of shoes or boots. While those items are not specifically named in the search warrant, the search warrant does attempt to authorize the seizure of "clothing" including "shoes" (without any description) and "other clothing described as shirts." Since the warrant does not give a description, it apparently allowed the officers to seize all of the shoes and all of the shirts in the premises. In that regard the warrant is overbroad.

5) The remaining items seized are not named in the warrant and there is no probable cause stated in the affidavit to justify their seizure.

WHEREFORE, Defendant respectfully requests the Court to suppress the above-mentioned evidence.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney and to Alan Chipperfield, Assistant Public Defender, Office of the Public

Defender, by U.S. Mail, this 7th day of May, A.D., 1991.

DAVID & MORROW

JEFFERSON W. MORROW, ESQUIRE
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FLA. BAR NO. 369136

Attorneys for Defendant

APPENDIX B

NCA: 5-6-91

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 91-1504 CF

DIVISION: CR-B

STATE OF FLORIDA

VS.

MARC CHRISTMAS

THIS INSTRUMENT IN COMPUTER G. R.

FILED

MAY 16 1991

CLERK CIRCUIT COURT

MOTION TO SUPPRESS PHYSICAL EVIDENCE

Defendant, MARC CHRISTMAS, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Rule 3.190(h), Florida Rules of Criminal Procedure, respectfully requests this Honorable Court to suppress the following evidence: All evidence seized as a result of the execution of a search warrant on January 23, 1991, by Detective R. C. Thorwart and other officers of the Jacksonville Sheriff's Office. These items include, but are not necessarily limited to, each and every item listed in the inventory and receipt for the search warrant, including:

1. Nineteen .22 caliber bullets.
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8. Three pants (blue jeans).

9. One red and white striped shirt.

10. Two aprons.

11. One red cap.

12. One box federal .38 caliber bullets.

13. One box .38 caliber mostly empty.

14. One holster.

15. One plastic bag with four .38 caliber bullets.

16. Two shirts.

17. Booklet Rossi .38 Caliber.

18. Two hate papers.

19. Four pairs of shoes (boots).

As grounds for this motion, Defendant states the evidence mentioned above was seized upon authority of a warrant which did not state probable cause for believing the existence of the grounds upon which the warrant was issued; seized but not described in the warrant; and seized upon authority of a warrant which was illegally executed in violation of Defendant's rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution, and in violation of Defendant's right to privacy guaranteed by Article I, Section 23 of the Florida Constitution.

Defendant further states he has standing to contest the legality of said seizure.

A general statement of the facts on which this motion is based is as follows:

1. On January 23, 1991, Detective R. C. Thorwart of the Jacksonville Sheriff's Office signed an affidavit for a search warrant for premises located on Mockingbird Road which were occupied by Christmas and Co-defendant Stein. The Honorable Bernard Nachman issued the warrant, and it was executed on January 23, 1991. A copy of the affidavit, search warrant and inventory are attached hereto.

2. At the time the warrant was executed, the officers executing the warrant failed to knock and announce pursuant to Section 933.09, Florida Statutes. There was no exigent circumstance to justify that action.

3. Of all of the items listed in the inventory and receipt for the search warrant, only the black jacket and blue jeans are specifically mentioned in the very broad list of items to be seized. However, the affidavit for the search warrant does not mention the black jacket and does not give probable cause to seize it. "Blue jeans" are mentioned in the affidavit when Detective Thorwart wrote that Christine Moss saw Stein wearing a royal blue flannel shirt and blue jeans on the evening of January

20, 1991. However, the affidavit fails to state any reason why blue jeans might constitute evidence or contain evidence to assist in proving the crime. No probable cause is given to seize any particular pair of blue jeans, and the warrant is overbroad when it allows the seizure of all "jeans" without regard to owner and without being more specific in describing them. Moreover, the affidavit appears to eliminate the need to seize any blue jeans when it states that a bloody flannel shirt and blue jeans were found in a dumpster on January 21, 1991. Detective Thorwart's affidavit for arrest warrant swears that the bloody clothing matched the description of Stein's clothing.

4. The inventory for the search warrant shows the seizure of a red and white striped shirt and two other shirts which are not described. It also shows the seizure of four pairs of shoes or boots. While those items are not specifically named in the search warrant, the search warrant does attempt to authorize the seizure of "clothing" including "shoes" (without any description) and "other clothing described as shirts." Since the warrant does not give a description, it apparently allowed the officers to seize all of the shoes and all of the shirts in the premises. In that regard the warrant is overbroad.

5. The remaining items seized are not named in the warrant and there is no probable cause stated in the affidavit to justify their seizure.

WHEREFORE, Defendant respectfully requests the Court to suppress the above-mentioned evidence.

I HEREBY CERTIFY that a copy of the above and foregoing Motion to Suppress Physical Evidence has been furnished to the Office of the State Attorney, by hand, and Jefferson W. Morrow, Esq., by mail, this 16th day of MAY, A.D., 1991.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

BY: Alan Chipperfield
Alan Chipperfield 0217786
Assistant Public Defender

AC/mk

(PT-04)