

FILED

SID J. WHITE

SEP 30 1992

CLERK, SUPREME COURT

By 
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JOHN C. BARRETT,

Appellant/
Cross-Appellee,

v.

CASE NO. 78,743

STATE OF FLORIDA,

Appellee/
Cross-Appellant.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
FL. BAR. #302015
210 N. Palmetto Avenue
Suite 447
Daytona Beach, Florida 32114
(904) 238-4990

COUNSEL FOR APPELLEE/
CROSS-APPELLANT

TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES.....ii

CROSS APPEAL

POINT I

THE SENTENCING COURT SHOULD PROPERLY HAVE
FOUND THAT THE MURDERS WERE COMMITTED IN
A HEINOUS, ATROCIOUS OR CRUEL MANNER.....1

CONCLUSION.....3

CERTIFICATE OF SERVICE.....3

TABLE OF AUTHORITIES

CASES:

PAGE:

<i>Heiney v. State,</i> 447 So.2d 210 (Fla. 1984).....	2
<i>Roberts v. State,</i> 510 So.2d 888 (Fla. 1987).....	2

CROSS APPEAL

POINT I

THE SENTENCING COURT SHOULD PROPERLY
HAVE FOUND THAT THE MURDERS WERE
COMMITTED IN A HEINOUS, ATROCIOUS OR
CRUEL MANNER.

Appellant cites the trial court's findings in support of its argument that the judge correctly found that the death of Johnson and the other victims was not accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim. Appellee would respond that it is the trial judge's findings which, in fact, demonstrate error in failing to find the existence of this aggravating factor. First, the judge found that "Johnson's wounds could well have been inflicted instantaneously in four or five rapid blows before unconsciousness." (R 4924). Such finding is a contradiction in terms. A state of unconsciousness can hardly occur instantaneously when it is arrived at by four or five blows. Appellee maintains that the judge was in clear error in holding that "while the evidence does show that Larry Johnson's body exhibits defensive wounds to his hands and shoulders, the amount of time he suffered has not been shown." (R 4924). Neither the statute nor established case law require the state to demonstrate that any suffering occurred over a length of time. One awesome realization that you are about to meet your maker should be more than enough. A victim is not required to intone and repeat like a mantra the awful thought that he is about to be killed. Appellee also takes issue with the court's


finding that "these defensive wounds would have been no more than instinctive reaction." (R 4924). Defensive wounds are clearly indicative of the fact that either consciousness has not been lost or has been regained. Such defensive actions are the result of thoughts aided by adrenaline. Raising one's arm in a protective posture is simply not an involuntary movement like breathing. Although such action may be described as instinctive because of the swiftness with which it is executed, it is clearly based on thought and sped along by the adrenaline which courses through the body in great moments of fear. Instinct cannot tell a victim which arm to raise or which way to turn. There is no evidence that any of the injuries in this case occurred after death. While it would certainly be tidy for some medical expert to describe the order of wounds, it is hardly possible in cases like this without the testimony of an eye witness to the actual crime. The finding of this factor has never been that restrictive in its application. The HAC factor has been found in countless bludgeoning deaths previously cited. See, e.g., *Roberts v. State*, 510 So.2d 888 (Fla. 1987); *Heiney v. State*, 447 So.2d 210 (Fla. 1984).

CONCLUSION

Based on the above and foregoing argument the appellee respectfully requests that his honorable court reverse the order of the sentencing judge refusing to find the aggravating factor that the murder was especially heinous, atrocious or cruel applicable.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL


MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
Fla. Bar #302015
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR APPELLEE/
CROSS-APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief of Appellee/Cross-Appellant has been furnished by Delivery to Larry B. Henderson, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida, this 28th day of September, 1992.


Margene A. Roper
Of Counsel