IN THE SUPREME COURT OF FLORIDA

SAMUEL JASON DERRICK,

Appellant,

v.

Case No. 79,143

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

SUMMARY OF THE ARGUMENT

Issue I: It is not reversible error for the trial judge to instruct the jury as it did after the jury had announced that it had a tie vote. The judge's response in the instant case with the positive approval and without objection of defense counsel was the correct response in accordance with Rose and Patten and Cave.

Issue II: Derrick did not request a limiting instruction, therefore, according to this Court's decision in Suarez and Patten the jury was properly instructed on both the pecuniary gain and during the commission of a robbery aggravating factors.

Issue III: The written order reflects that the trial judge considered all of the nonstatutory mitigating evidence that was urged by defense counsel and, therefore, the order adequately complies with the dictates of Campbell v. State, 571 So. 2d 415 (Fla. 1990).

Issue IV: There was ample basis upon which the court could find that appellant killed Ram Sharma to avoid the possibility that he would identify him and testify against him if he were later tried for the robbery and to allow for his immediate escape. Accordingly, the trial court did not err in finding the defendant committed the murder for the purpose of avoiding or preventing a lawful arrest.

Issue V: Where the evidence shows that the victim was stabbed thirty-some times, including defensive wounds, and where the victim did not lose consciousness as evidenced by the

defensive wounds, screaming and crawling away from the initial sight of the attack, the trial court properly instructed the jury on the aggravating factor of heinous, atrocious, or cruel and properly found that it was established beyond a reasonable doubt.

Issue VI: Appellant's claim that the court improperly considered the aggravating factor of during the commission of a felony where the jury was instructed on both first degree premeditated murder and felony murder is procedurally barred as it was not presented to the trial court below.

Issue VII: A review of the evidence and similar cases clearly show that this is the type of murder for which the death penalty was intended and that this sentence was proportionate to similar murders.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN RESPONDING TO THE JURY'S INQUIRY REGARDING A SIX TO SIX VOTE DURING THE PENALTY PHASE.

During the penalty phase in the instant case, the court called a conference with the prosecutor and defense counsel. During this conference the court informed the lawyers that he had received a note from the jury stating, "Upon voting on such case, the jury has ended with a vote count of equal amount, six votes for death and six votes for life." The court noted that the jury had attempted to ask the bailiff which form they should sign. The court then suggested that he read over that portion of the instruction which specifically spells out to them that a tie vote goes to the defendant; that once they heard that instruction they would know. (R 382 - 383) Both the state and defense counsel agreed that this was the only proper thing to do. In fact, defense counsel specifically stated, "I think you're required to do just that, Judge." (R 383) The court then showed the instruction to defense counsel who approved the instruction. (R 383 - 385) Thereupon, the court brought in the jury panel and reinstructed them as follows:

> . . . Folks, I have been given the comment that was sent out and I have gone over that with the attorney and, of course, I obviously cannot tell you what you should do. That's not my role and I hope you will disregard anything that I have said that made you think that I preferred one thing over another. But, we have agreed on a particular portion of the instructions which I think might clear things up.

> The advisory verdict need not be unanimous. The recommendation or imposition of the death penalty must be by a majority of the jury. A recommendation of incarceration for life with no eligibility of parole for twenty five years may be made by either a majority of you or an even division of the jury. That is, a tie vote of six to six. (R 385)

Having been given this reinstruction the jury once again retired for deliberations. (R 386) Ten minutes later the jury returned an advisory verdict of seven to five in favor of death. (R 421) The jury was polled and each of the jurors agreed that a majority of the jury joined in the advisory verdict. (R 389 - 392)

Appellant alleges for the first time that it was reversible error for the trial judge to instruct the jury as he did after the jury had announced that it had a tie vote. To support this proposition appellant relies on Rose v. State, 425 So. 2d 521 (Fla. 1983) and Patten v. State, 467 So. 2d 975 (Fla. 1985). It is the state's position that neither Rose nor Patten mandate reversible error in the instant case, as the actions of the court below complied with this Court's directive of Rose and Patten. Moreover, appellant is not entitled to relief as he approved the reinstruction. Cave v. State, 476 So. 2d 180 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986). The failure to object precludes appellate relief.

In Rose this Honorable Court found reversible error where the trial court gave an Allen charge during the penalty phase of a trial after the jury had advised the court by a note that they

were tied six to six and that no one would change their mind at the moment. Similarly, in Patten the jury had advised the trial court that it had become deadlocked during deliberations on whether to recommend a death or life sentence. In both cases this Court held that at that point the trial judge should advise the jury that it was not necessary to have a majority reach a sentencing recommendation because, if seven jurors do not vote to recommend death, then the recommendation is life imprisonment.

This procedure was used in the instant case. Having been informed by the jury that they had a six to six vote and they did not know how to proceed, the trial court, with defense counsel's authorization, advised the jury that a six to six vote was a tie vote resulting in a life recommendation.

Under almost identical circumstances, this Court in Cave held that the judge's response, with the positive approval and without objection of defense counsel, was the correct response. This Court stated:

> During the jury deliberations on the advisory sentence, the jury delivered in the court a note stating:
>
> > We are at a split decision. We would like it stated and published to the Court of this advisory sentence. The current form does not allow for the revelation. Please advise.
>
> With the concurrence of both the prosecutor and the defense counsel, the trial court responded.
>
> > Under the instructions I have given you, if by six or more votes the

> Jury determines that the Defendant should not be sentenced to death, your advisory sentence would be:
>
> The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon the Defendant without the possibility for parole for twenty-five years.
>
> Approximately eight minutes later, the jury reported by a vote of 7 - 5 that it recommended the death penalty. Based on this exchange, appellant argues that they jury's initial request for advice constituted a 6 - 6 vote for life imprisonment which the court should have accepted as such. We disagree, noting first that the query referred to a split decision, not a 6 - 6 vote. Neither the judge nor the parties could know whether the "split decision" referred to an 11 - 1, 6 - 6 or 1 - 11 vote on the death penalty. Thus, the judge's response, with the positive approval and without objection of the defense counsel, was the correct response. We note, further, that after the jury returned its advisory sentence of death, the judge immediately polled each jury member as to whether the advisory sentence was correctly stated and that each member confirmed that it was so.
>
> Cave v. State, 476 So. 2d 180, 186 (Fla. 1985). (emphasis added)

Accordingly, although Derrick's jury did indicate it was split six to six, the judge's response in the instant case with the positive approval and without objection of defense counsel was the correct response in accordance with Rose and Patten and Cave.[1] The state urges this Court to find that this claim is procedurally barred and that Derrick is not entitled to relief.

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[1] The jury, in the instant case, was also polled and each juror affirmed that the vote was correct.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON BOTH AGGRAVATING FACTORS OF COMMISSION DURING THE COURSE OF A ROBBERY AND COMMISSION FOR PECUNIARY GAIN.

Appellant argues that his death sentence is unconstitutional because the jury was permitted to consider both the aggravating factors of "commission during the course of a robbery" and "commission for pecuniary gain." He contends that it was error for the jury to be instructed that it could consider both aggravating factors despite the court's recognition that a finding of both of these circumstances constituted improper doubling of improper circumstances.

Appellant concedes, however, that this Honorable Court in Suarez v. State, 481 So. 2d 1201 (Fla. 1985) has held that it is not improper for a trial judge to instruct the jury on both aggravating factors as the jury instructions simply give the jury a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case. Thus, as long as the judge recognizes that he cannot find both aggravating factors, it is not error to give the jury a list which includes both.

Appellant contends, nevertheless, that he is entitled to relief under Castro v. State, 597 So. 2d 259 (Fla. 1992). In Castro this Honorable Court held that when applicable the jury may be instructed on "doubled" aggravating circumstances since it

may find one but not the other to exist but, when requested, a limiting instruction that properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one should be given. Id. at 261.

Although Derrick did object to the giving of the instruction because it might confuse the jury, he did not request a limiting instruction. In Patten v. State, 598 So. 2d 63 (Fla. 1992), this Honorable Court reviewed a similar case and held that even where defense counsel objects to the giving of the instruction, the trial court is not required to give the limiting instruction unless it is requested by defense counsel. Id. at 66. As there was no request for a limiting instruction, the jury was properly instructed. Suarez and Patten.

Appellant relies on Sochor v. Florida, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) and Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) to support the proposition that although the trial court did not directly weigh any invalid aggravating circumstance, it had to be presumed that the jury did so when they were improperly instructed. Even if the rationale in Sochor and Espinosa applied to the instant case, a position with which the state does not agree, both Sochor and Espinosa make it clear that even such an error is subject to harmless error review. Accordingly, even if this Court should find it was error for the trial court to fail to give a limiting instruction that was not specifically requested by defense counsel, the error was harmless beyond a reasonable doubt. The trial court did recognize that

only one of these factors could be considered and in addition the court found two other substantial aggravating factors. Balanced against little evidence that was truly mitigating, it is beyond a reasonable doubt that the sentence was appropriately imposed.

ISSUE III

WHETHER THE TRIAL COURT FAILED TO CONSIDER ALL NONSTATUTORY MITIGATING FACTORS FOR WHICH EVIDENCE WAS PRESENTED WHEN IMPOSING SENTENCE.

Appellant contends that the trial court erred by failing to consider all nonstatutory mitigating factors for which evidence was presented when imposing its sentence of death. It is the state's position, however, that the written order reflects that the trial judge did indeed consider all nonstatutory mitigating evidence that was urged by defense counsel and, therefore, is in compliance with Campbell v. State, 571 So. 2d 415 (Fla. 1990).

With regard to mitigating factors the court specifically found:

> As to mitigating factors, the court acknowledges its responsibility to consider all nonstatutory mitigating factors as well as the statutory mitigating factors set forth in Florida Statute 921.141(6). The court specifically finds as follows:
>
> (a) Judged by the standard of "reasonable certainty" the court clearly finds that the defendant was quite young at the time of the offense and still appears to be quite young at the time of the sentencing proceedings. Even so, the court has severe doubt that relative youth on the part of the defendant is, standing alone, sufficient to establish this statutory mitigating factor. Even if relative youth were determined to be a mitigating factor by itself, there are no other factors linked with the defendant's relative youth which would permit the court to accord this mitigating factor any significant weight.
>
> (b) As to nonstatutory mitigating factors, the defendant has met the standard of "reasonable certainty" in establishing that

> the defendant has some potential for rehabilitation. Although the defendant has only recently been given an opportunity to assist other inmates in an effort to become literate, the defendant's past assistance of his learning handicapped brother combined with the testimony of Nanci Denaman from the Scwettman Adult Education Center, tends to indicate the defendant is actually motivated in this regard and is not simply taking advantage of an opportunity to make himself look somewhat better to the sentencing jury and the court. (R 454 - 455)

In Lucas v. State, 568 So. 2d 18 (Fla. 1990), this Court set forth the responsibility of the parties under Campbell:

> We have previously held that a trial court need not expressly address each nonstatutory mitigating factor in rejecting them, *Mason v. State,* 438 So. 2d 374 (Fla. 1983), *cert. denied,* 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984), and "[t]hat the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered." *Brown v. State,* 473 So. 2d 1267, 1268 (Fla.), *cert. denied, 474* U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985). More recently, however, to assist trial courts in setting out their findings, we have formulated guidelines for findings in regard to mitigating evidence in *Rogers v. State,* 511 So. 2d 526 (Fla. 1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), and *Campbell v. State,* no. 72,622 (Fla. June 14, 1990). We have even note broad categories of nonstatutory mitigating evidence which may be valid. *Campbell,* slip op. at 9 n. 6. However, "[m]itigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt." Eutzy v. State, 458 So. 2d 755, 759 (Fla. 1984), *cert. denied, 471* U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). We, as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. *Hudson v. State,* 538 So. 2d 829 (Fla.), *cert. denied,* ___ U.S. ____, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989); *Brown v. Wainwright,* 392 So. 2d 1327 (Fla.), *cert. denied,*

454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

Id. at 23

This Court further noted:

> As the state points out, Lucas did not point out to the trial court all of the nonstatutory mitigating circumstances he now faults the court for not considering. Because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. This is not too much to ask if the court is to perform the meaningful analysis required in considering all the applicable aggravating and mitigating circumstances.

Id. at 23, 24

During closing arguments in the penalty phase, defense counsel argued that Derrick was only 20 years old at the time of the crime, that he was a good brother and that Derrick is a pod representative in the prison. As a pod representative Derrick helped other people to read. (R 364 - 365) He also argued that Derrick had many friends who had come in to testify for him including Charlotte Wise who testified that Derrick kept her from beating a man with a shovel. He also argued that Derrick was a good husband. Derrick's wife testified that although it wasn't a perfect marriage and they had disagreements he sometimes helped with the dishes. He did not urge the rest of the factors appellant now faults the court for not specifically enumerating.

It is clear that when read in its entirety, the trial court's order clearly reviewed all the mitigating evidence urged

by defense counsel and made appropriate findings thereon. Furthermore, even if the trial court's sentencing order did not specifically address each of the nonstatutory mitigating circumstances urged by the defendant, the failure to review each and every piece of testimony now being urged by the defendant is harmless. It is clear beyond a reasonable doubt that the judge knew he had to consider each, that he did consider each and therefore, it is beyond a reasonable doubt that the judge would still impose the sentence of death even if the sentencing order had contained findings that each of the nonstatutory mitigating circumstances now being urged had been proven. Cook v. State, 481 So. 2d 141 (Fla. 1991).

Based on the foregoing, the state urges this Court to find that the sentence was properly imposed.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE WAS COMMITTING FOR THE PURPOSE OF AVOIDING OR PERMITTING A LAWFUL ARREST.

Appellant challenges the trial court's finding that appellant murdered the victim Ram Sharma in order to avoid arrest. He contends that the evidence did not establish that factor beyond a reasonable doubt.

The trial court's order with reference to this aggravating factor states:

> (b) The capital felony of which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest. The evidence in this case goes much further than simply demonstrating that the victim knew the defendant and might have identified him to the police at a later time. The defendant's statement to Sergeant Clint Vaugh of the Pasco County Sheriff's Office specifically indicated that the victim recognized him and that the defendant had to stab him to "shut him up". In addition the defendant's statements to Sergeant Vaugh and his statements to his friend, David Lowery, indicated that the victim kept screaming and that he stabbed the victim to keep him quiet. Clearly, the defendant realized that the defendant not only had the potential to recognize him, but actually had recognized him. In addition, the victim's screaming raised the risk that others would have been drawn to the scene and could have interfered with the defendant's efforts to avoid or prevent lawful arrest. (R 453)

In Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987), this Court held that "the mere fact that the victim might have been able to identify the assailant is not sufficient to support finding this factor". In the instant case, there is no

speculation that Ram Sharma "might" have recognized appellant. Appellant's own confession admitted that the victim had recognized him and that's why he killed him. The evidence also showed that the appellant had been in the victim's store before and had asked him for a job on a previous occasion. Further, contrary to appellant's representation, the evidence does not support the conclusion that the murder was just the result of a panic without any consideration as to elimination of the witness.

This Court has made it clear that it is not necessary that intent be proved by evidence of express statement by the defendant or an accomplice indicating their motives in avoiding arrest. Routley v. State, 440 So. 2d 1257 (Fla. 1983). Nor is it required that the elimination of the witness be the only motive for the murder. Thus, even in light of this Court's requirement in Hansbrough v. State, there was ample basis upon which the court could find that appellant killed Ram Sharma to avoid the possibility that he would identify him and testify against him if he were later tried for the robbery and to allow for his immediate escape. Appellant did not just "panic" as in Shafer v. State, 537 So. 2d 988 (Fla. 1989); he stabbed him enough times to make certain that he was dead and consequently unable to identify him to the police. That appellant disagrees with the court's interpretation of these facts does not mean the court's findings were wrong. Further, the fact that appellant was surprised by the number of times he stabbed the victim is not evidence that he was not doing so with the intent to eliminate

the witness. Rather, it is only evidence of his determination to permanently quiet the victim.

Accordingly, the trial court did not err in finding the defendant committed the murder for the purpose of avoiding or preventing a lawful arrest. Nevertheless, should this Honorable Court find that this aggravating factor is not established, based upon the substantial evidence in aggravation and the insignificant evidence in mitigation, error if any, is harmless.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING AND INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR THAT THE OFFENSE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Appellant contends that the trial court erred in finding and instructing the jury on the aggravating factor of especially heinous, atrocious, or cruel, contending that the evidence did not establish this factor beyond a reasonable doubt. It is the state's contention that the trial court properly instructed the jury on the aggravating factor as there was evidence to support it and the trial court's finding was correct.[2]

With reference to this aggravating factor the trial court's order states:

> (c) The capital felony of which the defendant was convicted was especially heinous, atrocious or cruel. In arriving at this conclusion, the court specifically utilizes the standard as set forth in Dixon v. State, 283 So. 2d 1 (Fla. 1973). Specifically, the evidence indicates that the victim's body sustained thirty-three (33) knife wounds, thirty-one (31) of which were characterized as stab wounds and two (2) of which were characterized as puncture wounds. Some of the wounds noted by Dr. Corcoran were characterized as defensive wounds. The scene of the crime indicated that, after the initial attack the victim traveled approximately twenty (20) feet, trailing blood along his path of travel, before falling to the ground where he ultimately died from the combination of blood loss and

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[2] Appellant is not challenging the actual instruction as the entire Dixon instruction was given.

> the collapse of his lungs. Dr. Corcoran noted that many of the numerous stab wounds would have been extremely painful although Dr. Corcoran was unable to say exactly when the victim lost consciousness, the three defensive wounds noted by Dr. Corcoran indicate that the victim experienced a pre-death apprehension of physical pain and death while making his unsuccessful effort to defend himself from the defendant's assault. (R 453 - 454) (emphasis added)

The defendant's own confession indicates that the victim was screaming as he was being stabbed. This statement alone is sufficient to rebut the claim that the victim may have been unconscious. Clearly, if the victim was unconscious he would not have been able to scream while he was being stabbed.

This Court has consistently upheld findings of especially heinous, atrocious, or cruel where the evidence shows the victim was repeatedly stabbed. See Haliburton v. State, 561 So.2d 248 (Fla. 1990); Nibert v. State, 508 So.2d 1 (Fla. 1987); Johnson v. State, 497 So.2d 863 (Fla. 1896); Wright v. State, 473 So.2d 1277 (Fla. 1985); Lusk v. State, 446 So.2d 1038 (Fla. 1984). The facts of this case are particularly close to those in Floyd v. State, 569 So.2d 1225 (Fla. 1990) where this Court upheld the finding of especially heinous, atrocious, or cruel based upon the following evidence:

> "To the support the contention that this murder was heinous, atrocious, or cruel, the state presented the medical examiner's testimony describing the twelve stab wounds Anderson received to the abdomen, the chest, and to her left wrist. Although the medical examiner could not establish a sequence of those wounds, the wound to the chest was fatal 'within a matter of minutes at the

> most,' whereas the other wounds to her abdomen were 'potentially fatal, [from which she] would take a longer time to die'. The jury also heard that Anderson received a bruise to her nose that was consistent with a fight or struggle." Id. at 1232.

Similarly, in Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987), this Court upheld the finding of especially heinous, atrocious, or cruel where the medical examiner identified several of the victim's thirty-some stab wounds as defensive wounds, indicating she was aware of what was happening to her and where the testimony indicated that she did not die or even necessarily lose consciousness instantly.

Therefore, in the instant case, where the evidence shows that the victim was stabbed thirty-some times including defensive wounds, and where the victim did not lose consciousness as evidenced by the defensive wounds, screaming and crawling away from the initial sight of the attack, the trial court properly instructed the jury on the aggravating factor and properly found that it was established beyond a reasonable doubt.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN CONSIDERING AS AN AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED IN PERPETRATION OF A FELONY.

This claim is procedurally barred as it was not presented to the trial court below. Parker v. Dugger, 537 So. 2d 969, 973 (Fla. 1988) (claim that death sentence for felony murder and the use of underlying felony as aggravating factor violates Eighth and Fourteenth Amendments procedurally barred because it was not presented at trial.)[3] There was no objection to the instruction for the aggravating circumstance of robbery on this basis. Accordingly, the state urges this Honorable Court to find the procedural bar exists to preclude any and all consideration of this issue now or in the future.

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[3] Appellant relies on the decision in State v. Middlebrooks, 840 S.W. 2nd 317 (10 1992), where the Tennessee Supreme Court reversed a sentence for felony murder which was based on an aggravating circumstance of robbery. As appellant points out this case has been accepted for certiorari review by the United States Supreme Court. Tennessee v. Middlebrooks, 53 Crim. Law Reporter 3013 (April 21, 1993). The fact that the United States Supreme Court has accepted a case that reversed on this claim gives no weight to the argument urged by appellant. The decision in Lowenfield v. Phelps, 484 U.S. 231 (1988), still stands. Likewise, this Court has also consistently rejected this argument on the merits. Waterhouse v. Dugger, 564 So. 2d 1074 (Fla. 1990); Bertolotti v. State, 534 So. 2d 386 (Fla. 1988); Parker v. Dugger, supra; Squires v. State, 450 So. 2d 208 (Fla. 1983); Clark v. State, 443 So. 2d 973 (Fla. 1983); Menendez v. State, 419 So. 2d 312 (Fla. 1982).

ISSUE VII

WHETHER APPELLANT'S DEATH SENTENCE IS PROPORTIONATE.

Appellant argues that should this Honorable Court strike the two aggravating factors of especially heinous, atrocious, or cruel and the commission for the purpose of avoiding or preventing lawful arrest that this would only leave one aggravating factor balanced against one mitigating factor as well as several other nonstatutory mitigators which were not found by the trial court and, therefore, the sentence is not proportionate.

This argument is speculative at best. First, the finding of three aggravating factors and one mitigating factor was proper and well supported by the record. Furthermore, proportionality review is not a recounting of aggravating versus mitigating but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). Under circumstances similar to the instant case, this Honorable Court has consistently upheld the imposition of the death penalty. Haliburton v. State, 561 So. 2d 248 (Fla. 1990) (victim stabbed thirty-one times); Turner v. State, 530 So. 2d 45 (Fla. 1987) (killer pursued and cornered his victim, then stabbed and cut her to death despite her pleas).

A review of the evidence and similar cases clearly show that this is the type of murder for which the death penalty was intended. Accordingly, the sentence should be affirmed.

CONCLUSION

WHEREFORE, based on the foregoing arguments, facts, and citations of authority the judgment and sentence of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 9 day of August, 1993.

OF COUNSEL FOR APPELLEE.