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IN THE SUPREME COURT OF FLORIDA

FRANK WALLS,

Appellant,

v. CASE NO. 80,364

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

(a) Procedural History

The Appellant's statement is accepted.

(b) Facts

The Appellant's brief presents eight issues. The facts relevant to each issue will be set forth in order.

Facts: Point I

The first point on appeal challenges the trial court's discretionary decision denying a challenge for cause as to a juror (Ms. Walker) whom the defense disliked.

The transcript unequivocally shows that Ms. Walker believed in capital punishment but would set aside her beliefs and follow the court's instructions (R 288-293). The defense challenged Walker for cause, but, interestingly, defense counsel only did so "out of caution" (R 303),[1] and not out of any certainty of bias. The challenge was denied (R 303).

On (R 306) the court "backed up" and noted that Ms. Walker could not be "challenged" because she was "not yet on the jury". The defense, meanwhile, was given an extra peremptory challenge which it used on a Mr. Sims (R 306). That challenge placed Ms. Walker on the jury, the challenge for cause was renewed and

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[1] MR. LOVELESS: "Your Honor, in an abundance of caution, I'm going to also challenge Miss Walker for cause. I know she later came around and said she could follow it, but she was very, very straightforward in saying that she believed that any person who was convicted of murder ought to get the death penalty. I feel that she should also be challenged for cause."

denied (R 306-307). Another peremptory challenge was requested and denied (R 307).

Facts: Point II

After the entire petit jury had been selected the defense suddenly accused the State of discrimination in its use of peremptory challenges (R 329). In particular, the defense questioned "the last five strikes by the State". (R 329). Counsel for Mr. Walls then retracted the comment as to Ms. Hinson (a white female), but claimed the four previous strikes were leveled against African-Americans (R 329).

When asked by defense counsel to identify the last four strikes prior to Hinson, the Court replied "Smith, Kelly, Garvin, Hussey." (R 330).

The State explained its challenge to Mr. Smith as being predicated on two factors. First, Smith had a learning disabled son that might cause him to relate to the defendant and deny the State a fair trial (R 330). Second, Smith worked with inmates and expressed the opinion that they did "not get a fair shake" (R 196) (the prosecutor paraphrased this as "got a raw deal" (R 330)).

The court accepted the decision as race-neutral (R 330). In fact, a white female who gave similar answers was also struck by the State (R 331).[2]

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[2] The court found that a majority of the petit jury was black (R 331), and that the murder at bar involved a white defendant and a white victim (R 331).

The State explained its peremptory challenge to Peggy Kelly by noting her reluctance to vote for the death penalty. (She was "not against it" but "not sure" she could ever vote for it (R 282)). The defense made no effort to "rehabilitate" her.

Mr. Garvin was approximately the same age as Mr. Walls, and appeared to be very hostile to the prosecutor (R 333). Garvin also stated he would not vote for death if there was "any way out of it."[3] (R 333).

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[3] His testimony was confusing at best (R 244-255):

> WILLIAMS: Do you believe there's a place for the death penalty in our society?
>
> GARVIN: Yes.
>
> WILLIAMS: If we had a chance to do away with it, and we had a referendum, would you vote for it or against it?
>
> GARVIN: I'd vote against it if there was another way around it.
>
> WILLIAMS: You'd vote against it. You'd rather we didn't have a death penalty then.
>
> GARVIN: It depends on, like I said, if I felt he was really guilty.
>
> COURT: I don't know if he understood what you meant by a referendum. I think if you'll go over that once again.
>
> WILLIAMS: Instead of letting the Legislature decide for us whether we were going to have a death penalty or not, suppose we let the people decide. Based upon what you know and what you've heard, where you've been and everybody you've ever talked to about it and read about it in the newspapers, and you had a chance to vote whether this country or state should have a death penalty, would you be more likely to vote for or against it?
>
> GARVIN: Probably vote for it, I'm not sure.

The next potential juror (Hussey) was white, therefore there was no defect in the challenge (R 334).

Venireman Shores was also white (R 334), as was Dalafave (R 334), and Hayes (R 334), and no response (white or black) was made as to "Wilson" (R 334). The court found no misconduct, prompting defense counsel to say:

> Your Honor, that's not the issue. I'm not charging racial prejudice. I'm not charging that there was any pattern of exclusion. I am charging that it appears that at least four persons were excluded because of their race.

(R 335).

Facts: Point III

The jury was not worked inordinate or even "long" hours. The trial court announced a time schedule of 9:00 a.m. to 5:30 p.m., which the jury found acceptable (R 340). Frequent recesses

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> WILLIAMS: That's all I have, Your Honor.
>
> LOVELESS: Mr. Garvin, I understood you to say that you would vote against it if there was a way around it, is that what you said?
>
> GARVIN: Yes, sir.
>
> LOVELESS: But not seeing a way around it, you would be compelled to vote for it.
>
> GARVIN: Yes.
>
> COURT: Mr. Loveless, I don't think he understood what he was talking about at that point was referendum. I think he meant he was talking about a trial.
>
> LOVELESS: Is that what you thought, Mr. Garvin?
>
> GARVIN: Before he explained it again that's what I thought.

and a ninety-minute lunch period were observed every day (R 409). At the close of the State's case, the defense argued that court should adjourn for the day despite the fact that it was only 3:50 p.m. (R 703). Extensive argument ensued, prompting the court to note that everyone arrived in court at 8:30 a.m., worked three and a half hours, took a ninety minute lunch, worked two more hours for a grand total of only five and a half hours work (R 705).

The State and defense completed their closing arguments by 5:53 p.m. (R 760). The jury, which was sequestered, deliberated until 10:00 p.m., and then retired for the night (R 760). Court reconvened at 9:00 a.m., the next morning.

The only "problem" juror was Ms. Walker, who, on the morning of the third day, looked like she might be "nodding." (R 567). Ms. Walker was questioned by the court (R 571-572). Ms. Walker said she had had a good night's sleep and was awake during the testimony of the witness (R 571-572).

The defense moved for a mistrial and the motion was denied (R 574).

After the final arguments, the jury was advised it would be sequestered and Ms. Walker requested assistance in getting medication from her home (R 762). Ms. Walker was clearly confused regarding the nature of sequestration (including who would pay for the hotel bill), and, at first, wanted off the jury (R 762-770). After receiving her medicine she served without any further incident and did not again appear in any recorded conversations with the court.

Facts: Point IV

The Appellant's brief correctly recites the proposed and given jury instructions.

Facts: Point V

The Appellant's statement is accepted.

Facts: Point VI

Point VI argues the weight of the evidence supporting the "heinous, atrocious or cruel" factor, the "cold, calculated and premeditated" factor, and the "avoid arrest" factor. Each of these points will be discussed in the argument portion of the brief to avoid redundancy.

The Appellant also argues that the aggravating factor of murder "for pecuniary gain" was "doubled" with the "kidnapping-burglary" factor. The trial court stated that the two factors were properly applied because "pecuniary gain" was sufficiently removed from "kidnapping" so as to apply (R 1164-1165).

The Appellant's brief correctly quotes the standard jury instructions given by the trial court to the advisory jury. The claim that these instructions fail to "limit and guide" the jury's consideration is legally meritless.

(A) The Heinous, Atrocious, Cruel Instruction

The standard jury instruction given in this case was not the "short form" instruction condemned in Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), but, rather, was the long form instruction validated by this Court in Hall v. State, 614 So.2d 473 (Fla. 1993).

Facts: Point VII

The defense called several experts in an effort to establish the existence of some extreme mental or emotional disturbance. While the trial court rejected this "statutory" factor, it found non-statutory mitigation in Mr. Walls' possible brain damage (R 1170), his low intelligence (R 1170), his immaturity (R 1170, and low self-control (R 1170).

Facts: Point VIII

The sentencing judge made the following findings in aggravation and mitigation (R 1161, et seq.): (1) Walls stealthily entered the Alger home, knowing it was occupied (R 1161); (2) Walls cut curtain lines for rope, then deliberately kicked over a fan to wake up the victims (R 1161); (3) Walls was armed with a knife and a pistol (R 1161); (4) Walls forced Ann Peterson to tie up Ed Alger (R 1161-1162), then Walls took Ann to the living room and tied and gagged her (R 1162); (5) Walls returned to the bedroom, fought with Alger (who was partially untied), and killed him (R 1162), Alger was shot three times (R 1162); (6) Walls returned to the living room, told Ann what had happened, struggled with her, ripped off her shirt and moved her to another bedroom (R 1162); (7) Ann was shot once, non-fatally, began screaming and was shot again (R 1162); (8) Walls used a pillow as a silencer (R 1162), and said his intent was to leave no witnesses (R 1162); (9) After the killings, Walls stole Alger's wallet, money and a fan. Walls dumped Alger's identification papers in a dumpster and returned the car he had

stolen (earlier that evening) (R 1163), then Alger went to a bar (R 1163).

The court found the following aggravating factors (R 1163-1166): (1) Walls was "previously" convicted of a violent felony (the murder of Alger); (2) the murder was committed during a burglary and during a kidnapping; (3) the murder was committed to avoid detection and arrest; (4) the murder was committed for pecuniary gain; (5) the murder was heinous, atrocious and cruel; (6) the murder was cold, calculated and premeditated.

In mitigation, the court found (R 1168-1169): Statutory factors: (1) No significant criminal history; (2) the defendant was 19½ years old. Nonstatutory factors: (1) the defendant is emotionally handicapped (R 1169); (2) the defendant has learning disabilities and possible, slight brain damage (R 1170); (3) the defendant's "IQ" scores have declined and he functions at the emotional level of a 12 or 13 year old (R 1170); (4) Walls voluntarily surrendered to the police, confessed and cooperated with the investigation (R 1170); (5) Walls had a loving relationship with his own family (R 1170); (6) Walls was a good worker (R 1170); (7) Walls was kind to "weak" people, cripples and animals (R 1170).

The court found that this mitigating evidence would not outweigh even one aggravating factor (R 1170).

SUMMARY OF ARGUMENT

The Appellant has failed to establish the presence of any reversible error.

No abuse of discretion has been demonstrated in regards to the court's handling of any jury selection issues. Similarly, the court has not been shown to have overworked the jury or to have erred in handling its questions. Finally, the court's jury instructions were appropriate.

The trial court did not err in finding six valid statutory aggravating factors or in determining that those factors outweighed Mr. Walls' proffered mitigation.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S CHALLENGE FOR CAUSE

The Appellant contends that juror Walker was so biased in favor of the death penalty that she should have been removed "for cause". This argument represents a hardening of the position taken by the defendant at trial, where he found Ms. Walker's statements sufficiently equivocal to merely challenge her "out of caution" (R 303). The simple truth is that Ms. Walker, while a believer in capital punishment, clearly stated that she would follow any instruction given by the court (R 288, 295).

The Appellant argues that Singer v. State, 109 So.2d 7 (Fla. 1959), compels the exclusion of any prospective juror whenever a reasonable doubt exists as to the ability of the juror to be fair. The Appellant fails, however, to mention that Singer was recently distinguished in Hall v. State, 614 So.2d 473 (Fla. 1993).

In Hall, the defendant used all of his peremptory challenges, including an additional challenge, and he demanded yet another peremptory challenge so that he could remove a juror he felt was biased. (Hall argued that the juror had been tainted but did not challenge him for cause). When the motion was denied, Hall moved for a mistrial.

In denying relief, this Court held that Singer recognizes the "mixed question of law and fact" surrounding the court's decision, and went on the hold that the trial court did not abuse

its discretion in refusing to grant piecemeal peremptory challenges.

The correct standard for assessing the trial court's decision is the "abuse of discretion" standard. Padilla v. State, 618 So.2d 165 (Fla. 1993); Pentecost v. State, 545 So.2d 861 (Fla. 1989); Cook v. State, 542 So.2d 964 (Fla. 1989). Where, as here, the challenged juror clearly states that she can lay aside her feelings and follow the directions of the trial court, no abuse of discretion can be gleaned from the cold record. Valdes v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S481; Lusk v. State, 446 So.2d 1038 (Fla. 1984); Davis v. State, 461 So.2d 67 (Fla. 1984).

Here, of course, the juror stated she could follow the court's instructions, but more importantly, the defense only challenged her "out of caution". To suggest that relief be granted on the basis of this record would be contrary to the law and the facts.

POINT II

THE PROSECUTOR DID NOT EXCLUDE AFRICAN-AMERICAN JURORS ON THE BASIS OF RACE

The second point on appeal is a pretextual claim of error citing to Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), State v. Neil, 457 So.2d 481 (Fla. 1984), and Slappy v. State, 522 So.2d 18 (Fla. 1988). The record is immutable on this point. Defense counsel did not have any basis for any legitimate Batson claim. Counsel did not know how many African-American jurors had been challenged, who they were, or even why. We again note counsel's own concession on point:

> Your Honor, that's not the issue. I'm not charging racial prejudice. I'm not charging that there was any pattern of exclusion. I am charging that is appears that at least four persons were excluded because of their race.

(R 335).

Trial counsel never explained this facially inconsistent position and, on appeal, does not even try. Appellant is proceeding as though a legitimate question had been raised, without mention to the fact he failed to develop a Batson claim.

This is purely a claim of opportunity, based upon nothing more than the presence of a large number of African-Americans in the venire and the inevitable exclusion of at least one of them. Again, when the "objections" came, defense counsel named names without knowing who was or was not African-American.

Turning to the challenged venirepersons, we find that both were excluded for legitimate, race-neutral reasons.

The state was clearly not comfortable with Ms. Kelly's responses regarding her willingness to vote for the death penalty. In reply, Walls quotes Ms. Kelly's voir dire responses indicating an ability to vote "for" death. If this was a Witherspoon v. Illinois, 391 U.S. 510 (1968), claim, Walls' citations would be relevant, however, this is not a Witherspoon case and the State is not required to show sufficient hostility to support a challenge for cause. This is a Batson case, and the non-record indicia of hostility, reluctance or bias observed by the prosecutor and the trial court can combine with a cold transcript to justify a challenge. Atwater v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S496.

The trial court's finding of no racial bias is entitled to great weight. Suggs v. State, ___ So.2d ___, (Fla. 5th DCA 1993), 18 Fla.L.Weekly D2129; Files v. State, 582 So.2d 352 (Fla. 1991); Green v. State, 583 So.2d 647 (Fla. 1991). This Court relies upon the presumptive fairness of the trial judge in reviewing any Batson claim. Reed v. State, 560 So.2d 203 (Fla. 1990). Here, the State articulated grounds that were race-neutral. The court made such a finding.

Turning to Mr. Garvin, the reasons cited were also race-neutral.

The State noted that Garvin worked with inmates and generally felt the State had given them a bad deal. Garvin's responses regarding the death penalty were confused ("referendum vs. trial"), but clearly indicated he would vote against the death penalty if there was any possible way around it. Walls' brief relies upon Witherspoon argument, but this is not a Witherspoon case and the State does not have to meet that standard.

Given the observations by the trial judge, the race-neutral reasons advanced by the prosecutor, the legal presumption that the judge followed the law, and the confused and contradictory "objection" by trial counsel, it is obvious that the Batson claim at bar is meritless. The trial court correctly denied relief and no abuse of discretion has been demonstrated. Reed, supra; Files, supra.

POINT III

THE JURY WAS NOT OVERWORKED OR ABUSED BY THE TRIAL COURT

The claim that the jury was overworked is simply not true.

The trial court followed a schedule that ran from 9:00 a.m. until roughly 5:30 p.m., with morning and afternoon recesses and a ninety minute lunch.

Mr. Walls cites to the day that the penalty phase evidence was received, but fails to note that court adjourned by 5:40 p.m. (R 930), after a typical work schedule and frequent breaks. Thus, the only "long" day put in by the jury was the evening they were sequestered to consider Mr. Walls' guilt.

There is no factual similarity between this case and United States v. McClain, 823 F.2d 1457 (11th Cir. 1987). No extraordinary hours were worked (an eight hour day is not unusual), no special conditions had to be invoked, no jurors fell asleep and no one complained of fatigue.

The only incidents cited by Mr. Walls as "indicative" of jury fatigue involved the same juror, Ms. Walker.

On the third day of trial the judge detected her "nodding" during the testimony of the coroner. The court questioned Ms. Walker and determined she was not asleep, not fatigued and had enjoyed a full night's sleep the night before. The court was justified in finding no basis for a mistrial. Whitehead v. State, 446 So.2d 194 (Fla. 4th DCA 1984).

On the last day of trial, Ms. Walker needed a ride home to get her medicine and was of the (mistaken) belief that she had to pay the hotel bill if the jury was sequestered. The problem was

easily resolved without objection by the defense.[4] Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984); Clark v. State, 363 So.2d 331 (Fla. 1978).

Again, an eight hour day is not onerous and the practice of sequestration has never been held to constitute reversible error. The decision to conduct the trial from 9:00 a.m. to 5:30 p.m. was clearly within the court's discretion.

This issue is clearly devoid of merit and unworthy of extended discussion.

POINT IV

THE TRIAL COURT DID NOT ERR IN GIVING THE STANDARD JURY INSTRUCTIONS ON VARIOUS AGGRAVATING FACTORS

The fourth point on appeal questions the trial court's decision to give standard jury instructions (on the statutory aggravating factors) and not to give special jury instructions on both aggravating and mitigating factors.

To avoid redundant argument, the State notes at the outset that the standard jury instructions on the "heinous, atrocious, cruel" and "cold, calculated, premeditated" factors have not been declared improper or somehow constitutionally deficient. On the contrary, the instruction on the "heinous, atrocious, cruel" factor was specifically approved in Hall v. State, 614 So.2d 473 (Fla. 1993), while the cited case of Hodges v. Florida, ___ U.S. ___, 121 L.Ed.2d 6 (1992), was decided, on remand, in Hodges v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S255, on

[4] As noted before, Walker was taken to her home, got her medicine and served without further incident or discussion.

procedural grounds.[5] Mr. Walls filed a pretrial objection to the standard instructions (R 1107-1114).

(A) The Heinous, Atrocious, Cruel Instruction

The trial court gave the approved standard jury instruction on the "heinous, atrocious, cruel" (HAC) aggravating factor; to-wit:

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

(R 1011-1012).

Mr. Walls wanted the following instruction:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously, suffered such pain for a substantial period of time before death.

(R 1108).

The proposed instruction is inaccurate, misleading and clearly one to which Mr. Walls was not entitled. Butler v.

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[5] The Hodges decision notes, en passant, that challenges to the "premeditation" factor as vague have been rejected, citing Fotopoulos v. State, 608 So.2d 784 (Fla. 1992), and Klokoc v. State, 589 So.2d 219 (Fla. 1991).

State, 493 So.2d 451 (Fla. 1986). The most glaring deficiency in the proposed instruction is its elimination of conscienceless and indifferent murders from the milieu of possible crimes.

Mr. Walls' instruction would only allow the HAC factor if the crime:

> (1) Was especially planned as a torturous or cruel murder.
>
> (2) Induced "extraordinary" mental or physical pain.
>
> (3) Was committed against a victim who remained conscious for a "substantial period of time".

None of which adequately adheres to the law regarding this factor.

As the State will show in its proportionality argument below, the murder of Ann Peterson was so clearly heinous, atrocious and cruel that any "error" attending the use of the standard instruction was harmless beyond any reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Ann Peterson was asleep in her own home when Walls intentionally woke her (R 1165). She was forced at gunpoint to tie up her boyfriend (R 1165). She was taken to the living room, bound and gagged (R 1165). "She was left to hear the violent life and death struggle between the defendant and her boyfriend." (R 1165). She heard the three shots fired into Mr. Alger (R 1165). She saw Walls return to her rather than Alger (R 1165). Ann begged to be told Mr. Alger was alive and Walls told her, "No" (R 1165). Walls confessed to taunting and terrifying Ann (R 1166). Walls ripped off her clothes (R 1166). He marched her

into the front bedroom (R 1166). He shot her non-fatally (R 1166). Ann laid screaming on the floor (R 1166). Walls then shot her in the head (R 1166).

Ann Peterson suffered the deliberate infliction of both mental and physical anguish at the hands of a callous and uncaring killer. Mr. Walls' instruction sought to unduly restrict the HAC factor to exclude murders that are heinous due to the callous indifference of the killer, but given Walls' confession that he never intended to leave any witnesses and that he taunted Ann Peterson prior to beating, shooting and killing her, it is clear that the HAC factor would have applied even under his incorrect definition.

Just as this Court has upheld the concept of "harmless error" in cases arising under Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) (incorrect HAC instruction), see Gorby v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S263; cf. Thompson v. State, 619 So.2d 261 (Fla. 1993), the concept should be applied when the "HAC" instruction was a correct one.

(B) The Cold, Calculated, Premeditated Instruction

The Appellant's challenge to the "cold, calculated, premeditated" (CCP) instruction is a hopeful request for an extension of Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), based upon Hodges v. Florida, supra, which we have already discussed.

Mr. Walls' CCP instruction suffered from the same legal and factual problems as his HAC instruction. The multiple

instructions (set out on page 55 of Appellant's brief), do not clarify or correctly refine the CCP factor. Instead, they clearly seek to redefine the factor in a manner which unduly limits the factor's scope. As such, the proposed instructions could fairly be defined as a comment on the evidence, disallowed by Fenelon v. State, 594 So.2d 292 (Fla. 1992).

The first set of instructions (brief at 55), correctly state that proof of heightened preparation for a burglary is not necessarily proof of heightened preparation for any ensuing murder, but the instruction goes on to usurp the jury's duty to weigh such evidence by flatly declaring Walls' "heightened preparation" inapplicable "even if it does exist". Similarly, the instruction expansively defines a "pretense of moral or legal justification" as "any claim" propounded by the defense, and is totally inaccurate.

In contrast to the proposed instruction, the standard instruction clearly satisfied constitutional standards. See Arave v. Creech, ___ U.S. ___, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). As noted therein, a jury instruction is only required to guide the sentencer, not precisely dictate the applicable sentence. See Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); Lewis v. Jeffers, 497 U.S. 764 (1990).

The Supreme Court, in Arave, noted the difference between those jurisdictions in which the judge, guided by decisional law, is the sentencer rather than the jury. (In Florida, the judge is the sentencer and the advisory jury does not report findings in aggravation or mitigation, but, rather, merely provides a

recommendation. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Hildwin v. Florida, 490 U.S. 638 (1989)). Since the sentencer in Florida is the judge, and not the jury, Arave v. Creech applies to the extent that the diminished impact of any jury instruction (to a non-sentencing jury) on the final sentence is apparent.

It is well settled that the standard jury instructions should be given when they correctly state the law. In the Matter of the Use of Standard Jury Instructions, 431 So.2d 594 (Fla. 1981). In this case Mr. Walls has failed to show any error in the standard instruction. He simply preferred his own.

Given the fact that this crime clearly qualified as cold, calculated and premeditated (again, see below), any error was harmless. DiGuilio, supra.

Walls planned this crime as a murder from the outset. The rational inference drawn from the record by the judge, as sentencer, was that Walls (who confessed to a motive of witness-elimination):

> ". . . proceeded directly to the back bedroom and intentionally awakened both victims. He made no effort to conceal his identity. The property that he ultimately took was taken from the living room area, and the taking of that property did not necessitate waking and confronting the victims.

(R 1167).

Thus, all of the evidence of planning and preparation recounted by the court (R 1166-1167), clearly applied to the murder rather than simply to any burglary, and the CCP factor would apply under either the standard or proposed instructions.

(C) Non-Statutory Mitigation

The trial court did not recite special jury instructions recognizing as "proven" various non-statutory mitigating factors proposed by the defense. Again, the jury was told that it was not limited in its consideration of any mitigating factor, including any aspect of the defendant's character or record (a point confessed in Walls' brief at page 61). The defense, however, wanted more:

> I would request, specifically request the court to instruct the jury on the fact he was diagnosed as having a -- as being learning disabled, had a learning disability, diagnosed as having impaired judgment, diagnosed as having impaired reasoning, diagnosed as being of limited intellectual ability, including defined as borderline mentally retarded. He was diagnosed as having a hyperactive or attention deficit disorder. He was diagnosed as having organic mental syndrome or brain damage. He was diagnosed as having a bipolar disorder. I would request the court specifically instruct the jury that these may be considered by them.

(R 964).

The State objected, noting that the standard instruction allowed the defense to argue all of those factors (R 965), causing defense counsel to state:

> Two things. First, we believe that these -- those seven things are established clearly by evidence of the doctors, all three doctors, and we also believe that the specific language of number 8, gives the court the option and opportunity to so instruct the jury, and we request that it be done.

(R 969).

The court was not required to give any special instruction listing every possible, or even proffered, non-statutory

mitigating factor. Smith v. State, 556 So.2d 1096 (Fla. 1990). The jury was not precluded from considering any evidence, Smith, supra. Johnson v. Dugger, 520 So.2d 565 (Fla. 1988), and of course, the trial judge considered all proffered non-statutory factors and discussed them in his order (R 1168). Thus, any "error" would clearly be harmless even if it existed.

(D) Duress

The defense wanted the trial court to alter the definition of "duress" (a statutory mitigating factor) to include some self-imposed "duress" that would arguably flow from other mental or emotional problems.

Section 921.141(e), Fla.Stat., clearly refers to the domination of a given defendant by another person and, as a result, the presence of external "duress". See Beltran-Lopez v. State, 583 So.2d 1030 (Fla. 1991); Hill v. State, 515 So.2d 176 (Fla. 1987); Toole v. State, 479 So.2d 731 (Fla. 1985). The concept of "internal duress", in addition to being facially illogical (the defendant did not coerce himself), is at most simply redundant to the statutory and non-statutory factors relating to "extreme mental or emotional disturbance" or some lesser mental problem. Thus, the proposed instruction both misstated the law and was superfluous. No reversible error is present.

POINT V

THE TRIAL JUDGE DID NOT ERR IN ANSWERING A QUESTION FROM THE ADVISORY JURY

As the Appellant correctly notes, the parties agreed that the advisory jury's request for a definition of "emotional disturbance" could not be answered, while they disagreed over the first part of the question (R 1018-1022).

The troublesome question related to the third statutory mitigating factor, which provided for mitigation if the defendant committed the offense "while he was under the influence" of an extreme mental disturbance. The question was somewhat illogical, since it asked "do you mean preexisting or present?" (mental disturbance) (R 1018). Clearly, the mental disturbance had to exist at the time of the offense (i.e., "while he was under"), so conditions that either antedated or postdated the crime did not apply to that specific factor.

When the court reread the instruction, it did not mislead the jury. While Mr. Walls embarks upon his own argument (focusing on the term "extreme"), it is clear that it is Mr. Walls, not the court, who has failed to understand the nature of the question. The question dealt with time, not the definition of "extreme". As such, Mr. Walls' argument is irrelevant.

In Waterhouse v. State, 596 So.2d 1008 (Fla. 1992), this Court reaffirmed the existence of judicial discretion in responding - or refusing to respond - to jury questions. (In that case, the trial court's refusal to respond was found not to have constituted an abuse of discretion where the defense was not inhibited from presenting or arguing any theory of mitigation by the Court's action).

Here, the court did not refuse to respond. It simply rejected Mr. Walls' argument regarding a topic not raised by the jury's question. It cannot be said that the defense was prejudiced in any way by the court's action.

POINT VI

THE TRIAL COURT DID NOT ERR IN FINDING THE EXISTENCE OF FIVE AGGRAVATING FACTORS

The Appellant's sixth point on appeal contests the trial court's findings in aggravation following a unanimous jury recommendation of death. (R 1120). As previously noted, the death sentence was applied to the murder of Ann Peterson. The court found the following aggravating factors: (1) Mr. Walls had a prior conviction for a violent felony (i.e., the murder of Edward Alger during the same event). See Zeigler v. State, 580 So.2d 127 (Fla. 1991); (2) the murder was committed during a burglary and also during a kidnapping; (3) the murder was committed to avoid arrest; (4) the murder was committed for pecuniary gain; (5) the murder was heinous, atrocious and cruel, and (6) the murder was cold, calculated and premeditated without any pretense of moral justification. (R 1194-1197).

The trial court, as the sentencer under Florida law, had to weigh the evidence supporting each aggravating factor. On appeal, the review function addresses evidentiary sufficiency, not weight. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). All inferences from the facts must be taken in favor of the sentence. Spinkellink v. State, 313 So.2d 666 (Fla. 1975); Gilvin v. State, 418 So.2d 996 (Fla. 1982).

(A) The Murder was Especially Heinous, Atrocious and Cruel

Ann Peterson suffered extensive and prolonged mental anguish and personal humiliation in addition to the physical pain inflicted by Walls' beating her, shooting her non-fatally and finally executing her. The trial judge, as sentencer, found that Ann Peterson was asleep in her own home (R 1196). She was forced at gunpoint to tie up Edward Alger (R 1196). Ann was then led into a second bedroom (R 1196). Ann was bound and gagged (R 1196). Ann had to listen to Edward fighting for his life and then being killed (R 1196). After hearing three shots, Walls came into her bedroom (R 1196). Ann begged for word that Edward was alive, but Walls told her he was not (R 1196). Walls conceded that he began to taunt and terrify her (R 1197). Walls wrestled with Ann and ripped off her clothes (R 1197). Walls took Ann to the front room and untied her (R 1197). His avowed intent was to leave no witnesses (R 1197). Walls fired a nonfatal shot into Ann's cheek, causing more pain (R 1197), then Walls executed her (R 1197).

The court stated that Ann, who knew of Edward's death, had knowledge of her own impending death and suffered "a level of terror, panic and utter hopelessness beyond comprehension." (R 1197).

On appeal, Mr. Walls argues that there was nothing particularly cruel about this murder, focusing solely upon the final, fatal, gunshot (Brief at 69), and representing that this brutal crime was nothing more than an "instantaneous shooting death". While Mr. Walls may feel entitled to disregard the record, this Court cannot.

Again, there is more here than a "gunshot". Ann was tied up and led from room to room. Ann heard Edward getting killed. Ann had to endure taunting and deliberate efforts to scare and humiliate her by Walls. Ann was beaten and disrobed. She was shot non-fatally. She had time to contemplate her own death.

No one can discount her fear and anguish, or deny its application to the HAC factor. Routly v. State, 440 So.2d 1257 (Fla. 1983); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); White v. State, 403 So.2d 331 (Fla. 1981); Preston v. State, 607 So.2d 404 (Fla. 1992).

In Steinhorst, the four victims stumbled upon a drug off-loading operation. One victim died in a possible exchange of gunfire at the scene. The other three victims, as problem witnesses, were bound up and later executed by shots to the head. Their terror and contemplation of their own death, supported the HAC finding despite the execution-style killing. Other cases addressing the fear and anguish aspect of HAC include Garcia v. State, 492 So.2d 360 (Fla. 1986); Koon v. State, 513 So.2d 1253 (Fla. 1987) (victim's quick death preceded by hours of terror), and Jackson v. State, 522 So.2d 802 (Fla. 1988) (victim shot, forced into car trunk, driven around, killed later).

In addition to the terror, taunting and anguish, Ann was subjected to a physical beating that was totally unnecessary. Again, this supports the finding of HAC. Cherry v. State, 544 So.2d 184 (Fla. 1989); Chandler v. State, 534 So.2d 701 (Fla. 1988).

The tauntings and beatings were not a necessary part of the execution process. Indeed, this murder was a clear departure from the "norm" of a simple shooting. Ponticelli v. State, 593 So.2d 483 (Fla. 1991). Here, Walls either chose to torture his victim or he was utterly indifferent to her suffering. Shere v. State, 579 So.2d 86 (Fla. 1991); Cheshire v. State, 568 So.2d 908 (Fla. 1990); Dougan v. State, 595 So.2d 1 (Fla. 1992).

Of course, none of Walls' cases address the factors present in this case. In Brown v. State, 526 So.2d 903 (Fla. 1988), Bonifay v. State, ___ So.2d ___ (Fla. 1992), 18 Fla.L.Weekly S464, and Teffeteller v. State, 439 So.2d 840 (Fla. 1983), the encounters between the killer and victim were brief, even where the victim said "don't shoot" or a similar phrase. In Armstrong v. State, 399 So.2d 953 (Fla. 1981), the exact details of the murders were unknown, except that at least one of the victims had a gun and shot one of the codefendants. Santos v. State, 591 So.2d 160 (Fla. 1991), was a bizarre domestic case in which, for a time, the defendant did not even believe the victim was dead.

Again, our case involved taunting, beating, evidence of prolonged anguish and either utter indifference to or enjoyment of Ann's suffering. The HAC factor clearly applied.

(B) The Murder was Cold, Calculated, Premeditated

It is undisputed that the "cold, calculated, premeditated" (CCP) factor requires heightened premeditation. Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986). Ironically, Walls concedes that this factor applies to witness elimination murders, and (of course) Walls specifically

murdered Ann to eliminate a witness. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987).

The evidence of careful planning is undisputed. Walls began by burglarizing a car lot and stealing a car (R 1197). Walls armed himself and committed a late-night burglary without wearing gloves or a mask, thus making no effort to conceal his identity (R 1198). The property stolen from the victims came from the living room area and did not necessitate waking the victims (R 1198). Similarly, there was no reason to separate the victims after tying them (R 1198).

After the killings, Walls checked the house to ascertain that no incriminating evidence remained (R 1198). At home, Walls showered, changed clothes, took Alger's "ID" from the stolen wallet and disposed of Alger's papers in a local dumpster (R 1198).

On appeal, Walls persists in the theory that he "prepared a burglary, not a murder". While a selective and myopic view of the record could support this claim, proper consideration of the record highlights the factors noted by the trial court. Atwater v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S496.

Walls armed himself. This fact proves an anticipation or expectation of possible homicide (just as it does in the so-called "non-triggerman" cases). See Tison v. Arizona, 481 U.S. 137 (1987), and can support a "CCP" finding. Lamb v. State, 532 So.2d 1051 (Fla. 1988); Huff v. State, 495 So.2d 145 (Fla. 1986); Eutzy v. State, 458 So.2d 755 (Fla. 1984); Koon v. State, 513 So.2d 1253 (Fla. 1987).

Simple premeditation necessary to support a murder conviction can occur in an instant, but, here, the obvious intent was to kill the victims all along. First, as noted above, Walls killed Ann to "eliminate a witness". Yet, despite his concern about witnesses, Walls never wore gloves, or a mask, or anything else that might conceal his identity. The only logical conclusion is that Walls knew - going in - that there would be no surviving witnesses. Second, Walls could have successfully completed the theft of the victims' property by stealing it from their living room without waking them. Walls, however, began by cutting the drapery cords (for rope) and kicking over the victims' fan for the express purpose of waking them up. The court found that this was not consistent with the theory that Walls just wanted to grab some loot and get out of the house. (R 1196). Walls wanted the victims to be awake because he wanted to kill them as part of his plan. Lamb v. State, supra; Atwater v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S496.

While Edward Alger fought with Walls, it is true that Walls had no reason to go back to the bedroom where Alger was tied up. The "property" he wanted was in the living room. While Alger fought for his life, we have only Mr. Walls' word for how it started or why.[6] (Walls was not sentenced to death for the Alger killing, proving that he received the benefit of the doubt).

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[6] See Duncan v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S268. Defendant's self report that he "went nuts" prior to stabbing victim not binding on court.

Walls agreed, however, that he at least waited and contemplated prior to killing Ann. After "calming himself down", he went back to Ann, taunted her, beat and disrobed her, marched her to another room, shot her, took a pillow to use as a silencer, and shot her again. His motive was to eliminate a witness. This scenario reflects heightened and prolonged premeditation. Hall v. State, 614 So.2d 473 (Fla. 1993); Atwater v. State, supra.

Whether Mr. Walls would assign the same weight to the evidence, the fact remains that the CCP finding enjoyed sufficient record support to prove its existence beyond a reasonable doubt.

(C) The Trial Court did not Err in Finding that the Crime was Committed in the Course of a Burglary and Kidnapping

Mr. Walls concedes that the trial judge may find and apply an aggravating factor not given to the advisory jury, see Ruffin v. State, 397 So.2d 277 (Fla. 1984). His reference to Espinosa v. Florida, supra, is not clearly understood, since, by not telling the jury it could consider "kidnapping", Walls benefited by having a potential aggravator removed from the jury's sentencing equation. (In any event, without factoring in this aggravator the jury recommended "death" by a 12-0 vote).

Mr. Walls does not contest the existence of sufficient facts to support the finding of "kidnapping" and has waived that issue. The statutory factor, of course, also would include Walls' crimes of robbery or burglary, so the application of this aggravating factor cannot be questioned. Preston v. State, 444 So.2d 939 (Fla. 1984); Washington v. State, 362 So.2d 658 (Fla. 1978).

(D) The Trial Court did not Err in Finding Murder Committed to Avoid Arrest

In a desperate attempt at creativity, Walls said that the motive for his crime was not "witness elimination" even though he said so (R 675). Instead, displaying a fundamental inability to grasp the difference between a "motive" and mental illness, Walls begs the court to rule that "mental illness" was the equivalent of "motive".

It is submitted that Mr. Walls' dominant motive for this murder was a desire to eliminate a witness and, by doing so, avoid arrest (R 675). The best evidence, as noted in the court's sentencing order, is Walls' precise confession of this point (R 1195). Therefore, the finding was proper, Kokal v. State, 492 So.2d 1317 (Fla. 1986), and this case is wholly unlike Knowles v. State, ___ So.2d ___ (Fla. December 16, 1993), Case No. 79,644, wherein no such independent evidence of a dominant motive existed or was found by the sentencer.

The self-serving claim that this crime was the product of some serendipitous onset of mental stress is refuted by the record.

The entire scheme undertaken by Mr. Walls was carefully planned, organized, logical and methodical from the preparatory burglary of the car dealership to the handling of the execution of Ann Peterson to the checking of the trailer (for evidence) to the disposal of Alger's papers. Walls knew what he was doing and Walls knew why he was doing it. When Walls said he killed Ann to eliminate a witness that was strong evidence of witness

elimination to "avoid arrest" that no amount of lawyerly sophistry can erase. Witness elimination is a valid means of establishing the "avoid arrest" factor. Lopez v. State, 536 So.2d 226 (Fla. 1988); Scull v. State, 533 So.2d 1137 (Fla. 1988); Bryan v. State, 533 So.2d 744 (Fla. 1988) (execution of robbery victim); Kokal v. State, 492 So.2d 1317 (Fla. 1986); Remeta v. State, 522 So.2d 825 (Fla. 1988).

(E) The Trial Court did not "Double" Two Aggravating Factors

The trial court found that the murder was committed for pecuniary gain and that it was committed during an enumerated felony (kidnapping). The court's order specified that the "pecuniary gain" factor was being applied due to the presence of a "kidnapping" were though a burglary and a robbery were also present.

Mr. Walls' brief concedes that the trial court was correct in its pronouncement, see Routly v. State, 440 So.2d 1257 (Fla. 1983); Lightbourne v. State, 438 So.2d 380 (Fla. 1983), and does not contest the fact that the continued movement of Ann Peterson satisfied the requirements of "kidnapping". His only argument is that the absence of a jury instruction on "kidnapping" negated the court's ability to apply the "pecuniary gain" factor as well as the "kidnapping" theory itself.

Again, the argument is pure conjecture and, in fact, was not preserved below. The evidence concededly supported kidnapping, the court could find kidnapping, Ruffin, supra; the defense was not prejudiced by the absence of an instruction on kidnapping and, given the court's concededly correct finding, there was no "doubling". Routly, supra.

Six strong aggravating factors are present in this case which are not offset by such weak mitigation as "Walls surrendered" or "Walls liked his own family" (R 1201-1202). It is submitted that the death penalty would be appropriate in this case even if some aggravating factors were disallowed. Williams v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S405; Thompson v. State, 553 So.2d 153 (Fla. 1989), see Mann v. State, 603 So.2d 1141 (Fla. 1993).

POINT VII

THE TRIAL COURT DID NOT USE AN IMPROPER STANDARD OF PROOF IN REJECTING OR ACCEPTING MITIGATING FACTORS

The seventh point on appeal tries to distinguish the phrases "preponderance of the evidence" and "greater weight of the evidence" in determining whether a statutory mitigating factor has been established. The trial judge said "preponderance" while the caselaw refers to "greater weight". Nibert v. State, 574 So.2d 1059 (Fla. 1991); Campbell v. State, 571 So.2d 415 (Fla. 1990). We submit that the phaseology used by the court in referring to a statutory mitigating factor was not significantly different than the terms used in Nibert or Campbell, thus rendering this argument moot. The defendant has already confessed the relevance of Henry v. State, 613 So.2d 429 (Fla. 1993), although he attempts to distinguish Henry.

The mere proffer of evidence supporting a mitigating factor does not compel the finding of said factor if the evidence is not credible or is rebutted by other evidence. Thus, the trial court has discretion to find, or not to find, any suggested mitigating

factor. Ponticelli v. State, 593 So.2d 483 (Fla. 1990); Dougan v. State, 595 So.2d 1 (Fla. 1992); Preston v. state, 607 So.2d 404 (Fla. 1992).

The key, of course, is that any proffered evidence be considered, whether or not the putative mitigator is "found". Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987). There is no claim of Hitchcock error here.

POINT VIII

THE TRIAL COURT DID NOT FAIL TO WEIGH MITIGATING EVIDENCE OF "EXTREME EMOTIONAL DISTURBANCE" OR "IMPAIRED CAPACITY"

It cannot seriously be alleged that the defendant's mitigating evidence was not "considered". Indeed, the use of the phrase in Mr. Walls' brief is simply an exercise in tactical necessity, so that he can argue his actual claim: disagreement with the trial court's findings.

This court has repeatedly held that defendants cannot dictate the existence of mitigating factors to the trial court and that trial courts are free to reject any factor they find unsupported by the greater weight, or preponderance, of the evidence. Dougan, supra; Ponticelli, supra; Hall v. State, 614 So.2d 473 (Fla. 1993).

While Mr. Walls can complain about his "mental problems" ad aeternum, he cannot deny the existence of the following evidence: (1) The crime was preplanned; (2) the Appellant actually carried off two burglaries without being impaired by "stress" or other problems; (3) the Appellant did not "react to stress", he created

the stress and had the singular power to stop the crime at any time he wanted; (4) the Appellant consciously elected not to halt the episode, but to continue the offense for the specific purpose of eliminating a witness (R 675); (5) Dr. Chandler testified that Walls' mental problems did not render him incompetent or out of control (R 817); (6) Dr. Valentine said that in 1985 he diagnosed a bipolar mood disorder (see below). He did not relate the disorder to the crime; (7) Dr. Hagerott, a psychologist, had to confess that she relied upon hearsay, contradictory background information and, in fact, had to "guess" or "assume" unknown facts to reach the conclusion for which she was hired (R 865-866), and that her opinion regarding his mental state in 1987 was based upon tests run in 1992, after Walls had gone years without medication (R 874).

Given the Appellant's failure to link any suspected mental disorder to the crime itself, the issue for the trial judge (as sentencer) was the issue of how much weight the court, in its discretion, Daugherty v. State, 419 So.2d 1067 (Fla. 1982), would actually assign to the evidence.

Unlike Knowles v. State, ___ So.2d ___, 18 Fla. L. Weekly S.646 (Fla. 1993), we are not dealing with a case in which uncontroverted mental mitigating evidence was simply ignored. Here, the Court acknowledged the mitigating value of Mr. Walls' evidence, but due to its contradictory nature (and the lack of any nexus to the crime), the evidence was viewed as non-statutory mitigation rather than statutory mitigation. This was clearly within the discretion of the court, Arbelaez v. State, ___ So.2d

___, (Fla. 1993), 18 Fla. L. Weekly S.500; Stano v. State, 460 So.2d 890 (Fla. 1985), since this court has previously recognized the diminished value of so-called "mental mitigating evidence" that has little or no nexus to the crime. James v. State, 489 So.2d 737 (Fla. 1986); see also, Davis v. State, 604 So.2d 794 (Fla. 1992) (Court may weigh underlying evidence regarding mental mitigation and resolve conflicts.)

Given the totality of the record, Mr. Walls' claim of "extreme mental disturbance" suffered from several deficiencies.

First, the record facts regarding his conduct, his planning, and his clear motive are inconsistent with any theory of some florid, psychotic, episode. See Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988).

Second, not one expert could say that Walls was definitely having a "manic" episode back in 1987 on the night of the crime. Thus, no nexus between his alleged illness and the crime was proven. Bundy, supra; see also Bundy v. Dugger, 675 F.Supp. 622 (M.D. Fla. 1987); James v. State, 489 So.2d 737 (Fla. 1986).

Third, as noted in the Bundy cases, "bipolar mood disorder" involves periodic "moods" that last about two weeks. Between episodes the patient is "normal". One is not "manic" one minute, "depressed" the next and "normal" the next. Mr. Walls planned and carried off a series of burglaries and two murders. He considered his actions before killing Ann Peterson and articulated a motive (witness elimination) that was lucid and rational. (Walls' claim that he "went nuts" briefly after killing Alger proved nothing, see Duncan v. State, supra).

The trial court had to exercise its discretion in resolving the conflict between the facts of the crime and its observations of Mr. Walls (which were proper, see Johnson v. State, 442 So.2d 185 (Fla. 1983)), and conflicting medical theories that, even if true, were not linked to the night of the crime and did not uniformly declare "incompetence". Bundy, supra. This exercise of discretion is not subject to reweighing on appeal.

Although it rejected the "statutory" factor, the trial court gave non-statutory weight to Walls' low intelligence, his immature behavioral control and his "emotional handicaps" (R 1169-1170).

It cannot be said that the court erred just because it disagreed with Mr. Walls. Dougan, supra; Ponticelli, supra.

POINT IX

THE SENTENCE OF DEATH WAS PROPORTIONAL

The concept of "proportionality" has been held to apply to the facts of the particular crime as opposed to some broad based collection of "burglary-murders" or "contract killings". According to Kramer v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S.267, the key is the relative weight allotted by the sentencer to the aggravating and mitigating factors.

Mr. Walls cannot possibly overcome the valid aggravating factors at bar. His crime is aggravated by the killing of Edward Alger, the crime was committed during a felony, the crime was committed for pecuniary gain and to eliminate a witness. The crime was cold, calculated and premeditated. The crime was heinous, atrocious and cruel.

Mr. Walls cannot even confront the factors without changing his story. Now, Walls rejects his own prior statements and claims he merely killed Ann Peterson as an "impulse". As noted above, the facts of this case include planning, taunting, beating, motive and careful execution followed by "defensive precautions". This was not a crime of impulse. The valid aggravators at bar were found, both singularly and collectively, to outweigh Walls' paltry mitigating evidence. The court's decision is clearly supported by the record.

Given the similarity of this murder to such cases as Hall, supra; Atwater, supra; Lamb, supra; Routly, supra, and other cited cases involving torture, witness elimination, felony murder and mental anguish, cited above, the death penalty was clearly in proportion to the crime.

In contrast to the strong aggravating evidence, the proffered mitigation was exceedingly weak.

First, as noted above, no nexus was established between Walls' status as a poor classroom student and his crimes. Walls carried out not one, but two successful burglaries (the car theft and the trailer entry). Indeed, Walls even successfully returned the stolen car to the dealership after the murders were completed (R 677). The planning and intelligence demonstrated by Mr. Walls clearly demonstrates the absence of any nexus between his crimes and any mild "organic" or "emotional" mental problems. James v. State, 489 So.2d 737 (Fla. 1986). Although Walls relied upon a recent mental health evaluation, the evaluation performed on Mr. Walls five years after the murders was barely. Johnston v.

State, 583 So.2d 657 (Fla. 1991); Engle v. Dugger, 576 So.2d 696 (Fla. 1991).

Mr. Walls' loyalty to his own family does not set him apart from the rest of humanity nor does it explain or ameliorate his crime. Thus, it stands as exceedingly weak "mitigation", see, e.g., Rogers v. State, 511 So.2d 526 (Fla. 1987); Valle v. State, 581 So.2d 40 (Fla. 1990) (evidence of difficult childhood unrelated to murder does not mitigate offense), even though such evidence may be considered. Holsworth v. State, 522 So.2d 348 (Fla. 1988); Stevens v. State, 552 So.2d 1082 (Fla. 1989); Hill v. State, 519 So.2d 179 (Fla. 1988). Clearly, none of Mr. Walls' good and loving traits interceded on behalf of Ann Peterson as he taunted, tortured and killed her.

Given the absence of any solid nexus between the mitigating factors at bar and the crime, and given the presence of overwhelming evidence in aggravation, the trial judge clearly did not abuse his discretion in determining that death was an appropriate sentence. Pettit v. State, 591 So.2d 618 (Fla. 1992); Sireci v. State, 587 So.2d 450 (Fla. 1991).

CONCLUSION

The judgment and sentence 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 hand delivery to Nancy A. Daniels, Public Defender and Mr. W. C. McLain, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 11th day of January, 1994.

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