FILED
SID J. WHITE
DEC 23 1993
CLERK, SUPREME COURT
By ____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CHARLIE THOMPSON,

Appellant,

v. Case No. 81,039

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

OF COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE NO.

PRELIMINARY STATEMENT 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

ISSUE I 4

WHETHER THE TRIAL COURT ERRED BY DENYING THE APPELLANT'S MOTION FOR MISTRIAL

ISSUE II 11

WHETHER THE TRIAL COURT ERRED BY FINDING THE AGGRAVATING CIRCUMSTANCES OF AVOID ARREST, PECUNIARY GAIN, HEINOUS, ATROCIOUS, OR CRUEL, AND COLD, CALCULATED AND PREMEDITATED.

ISSUE III 19

WHETHER APPELLANT'S ATTACKS UPON THE CONSTITUTIONALITY OF THE FELONY MURDER AND COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTORS, AND INSTRUCTIONS THEREON, ARE PROCEDURALLY BARRED.

ISSUE IV 22

WHETHER THE TRIAL COURT ERRED IN ITS TREATMENT OF THE MITIGATING FACTORS EXISTING IN THIS CASE.

ISSUE V..26

WHETHER THE DEATH SENTENCES IMPOSED IN THE INSTANT CASE ARE PROPORTIONALLY WARRANTED.

ISSUE VI...29

WHETHER IMPOSITION OF THE DEATH PENALTY UPON A MILDLY MENTALLY RETARDED DEFENDANT VIOLATES THE CRUEL AND/OR UNUSUAL PUNISHMENT PROHIBITION OF THE STATE AND FEDERAL CONSTITUTIONS.

ISSUE VII..32

WHETHER THE PROVISION OF THE FLORIDA DEATH PENALTY STATURE ALLOWING A MAJORITY DEATH RECOMMENDATION VIOLATES THE STATE AND FEDERAL CONSTITUTIONS.

CONCLUSION...33

CERTIFICATE OF SERVICE.....................................33

TABLE OF CITATIONS

PAGE NO.

Bertolotti v. State,
534 So. 2d 386 (Fla. 1988) 20

Brown v. State, 565
So. 2d 304, 308 (Fla. 1990) 32

Bryan v. State,
533 So. 2d 744 (Fla. 1988) 14-15

Campbell v. State,
571 So. 2d 415, 420 (Fla. 1990) 23

Card v. State,
453 So. 2d 17 (Fla.), *cert. denied*, 469 U.S. 989 (1984) 13

Carter v. State,
560 So. 2d 1166 (Fla. 1990) 27

Carter v. State,
576 So. 2d 1291 (Fla. 1989) 29

Castle v. State,
305 So. 2d 794, 797 (Fla. 4th DCA 1974) 7

Cheshire v. State,
568 So. 2d 908 (Fla. 1990) 23

Clark v. State,
443 So. 2d 973 (Fla. 1983) 20

Cooper v. State,
492 So. 2d 1059 (Fla. 1986) 15

Craig v. State,
585 So. 2d 278 (Fla. 1991) 27

Czubak v. State,
570 So. 2d 925 (Fla. 1990)..8

Davis v. State,
18 Fla. Law Weekly S 385 (Fla. June 24, 1993)..................21

Ellison v. State,
349 So. 2d 731 (Fla. 3d DCA 1977)..............................7

Engle v. State,
510 So. 2d 881 (Fla. 1987)......................................14

Espinosa v. Florida,
505 U.S. ____, 112 S.Ct. ____, 120 L.Ed.2d 854 (1992)..........21

Fitzpatrick v. State,
527 So. 2d 809 (Fla. 1988)......................................26

Floyd v. State,
497 So. 2d 1211 (Fla. 1986).....................................15

Geralds v. State,
601 So. 2d 1157 (Fla. 1992)......................................8

Haliburton v. State,
561 So. 2d 248 (Fla. 1990)......................................15

Hall v. State,
614 So. 2d 473 (Fla. 1973)......................................12

Hall v. State,
614 So. 2d 473 (Fla. 1993)......................................30

Hansbrough v. State,
509 So. 2d 1081 (Fla. 1987).....................................15

Harmon v. State,
527 So. 2d 182 (Fla. 1988)....................................14

Henry v. Wainwright,
721 F.2d 990 (11th Cir. 1983)..................................20

Hildwin v. Florida,
490 U.S. 628, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989)...........20

Jackson v. State,
522 So. 2d 802 (Fla. 1988)....................................15

Jones v. State,
569 So. 2d 1234, 1238 (Fla. 1990)..............................32

Kennedy v. Singletary,
602 So. 2d 1285 (Fla.), cert. denied,
____ U.S. ____, 120 L.Ed.2d 854 (1992)..........................21

Kokal v. State,
492 So. 2d 1317 (Fla. 1986)....................................15

Koon v. Dugger,
18 Fla. Law Weekly S 201 (Fla. March 25, 1993).................19

Koon v. State,
513 So. 2d 1253 (Fla. 1987)....................................15

Lowenfield v. Phelps,
484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).............20

McMillian v. Pennsylvania,
477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)..............20

Menendez v. State,
419 So. 2d 312 (Fla. 1982)....................................20

Occhicone v. State,
570 So.2d 902 (1990)..32

Parker v. State,
476 So. 2d 134 (Fla. 1985)....................................15

Penry v. Lynaugh,
492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)...........30

Porter v. Wainwright,
805 F.2d 930, 943 n. 15 (11th Cir. 1986).......................20

Preston v. State,
607 So.2d 404, 411 - 412 (Fla. 1992)......................12, 24

Ragsdale v. State,
609 So. 2d 10 (Fla. 1992).....................................21

Randolph v. State,
562 So. 2d 331 (Fla. 1990)....................................14

Reed v. State,
560 So. 2d 203 (Fla. 1990)....................................14

Robertson v. State,
611 So. 2d 1228, 1232 (Fla. 1993)..............................11

Ruff v. State,
495 So. 2d 145 (Fla. 1986)....................................15

Scott v. State,
603 So. 2d 1275 (Fla. 1992)...................................27

Stanley v. State,
357 So. 2d 1031, 1034 (Fla. 3d DCA 1978)........................7

State v. Johnson,
616 So. 2d 1 (Fla. 1993)......................................19

Steinhorst v. State,
412 So. 2d 332 (Fla. 1982)..................................19, 32

Sullivan v. State,
303 So. 2d 632 (Fla. 1974).......................................7

Swafford v. State,
533 So. 2d 270 (Fla. 1988)......................................17

Trushin v. State,
425 So. 2d 1126 (Fla. 1982).................................19, 32

Walton v. State,
547 So. 2d 622 (Fla. 1989)......................................14

White v. State,
403 So. 2d 331 (Fla. 1981)......................................20

Young v. State,
579 So. 2d 721 (Fla. 1991)......................................14

Zeigler v. State,
587 So. 2d 127 (Fla. 1991)......................................14

PRELIMINARY STATEMENT

The instant case is a mandatory appeal from the imposition of sentences of death and this Honorable Court has jurisdiction pursuant to Article V, Section 3(b)(1) of the Florida Constitution. References to the record on appeal will be made by the symbol "R" followed by the appropriate page number. References to the trial and sentencing transcripts will be made by the symbol "T" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

As to Issue I: Where defense counsel invited a response from a state witness on cross-examination, appellant cannot be heard to complain that the witness uttered hearsay statements. In any event, the admission of the hearsay statement was harmless beyond a reasonable doubt in light of the evidence presented at trial.

As to Issue II: Appellant's appellate challenge to four of the six aggravating factors found by the trial judge should be rejected by this Honorable Court. The state adduced sufficient evidence to prove the existence of these aggravators beyond and to the exclusion of any reasonable doubt.

As to Issue III: Appellant's constitutional challenge to the felony murder and cold, calculated and premeditated aggravating circumstances is procedurally barred. No objection or other type of challenge was made on the basis of purported unconstitutionality before the trial court.

As to Issue IV: The record of this case reveals that the trial judge considered and weighed all mitigation propounded by appellant. Merely because appellant would accord more weight to the mitigators than did the trial judge does not necessitate a finding that the trial court erred.

As to Issue V: The death sentences imposed for the two brutal murders in this case are proportionally warranted. In comparison with like cases, these highly aggravated murders warrant imposition of the ultimate penalty.

As to Issue VI: Appellant has not properly preserved his appellate challenge to the constitutionality of executing a mentally retarded defendant. In any event, the facts of this case show that appellant was merely borderline mentally retarded, and the legislature of the State of Florida has never evinced its intent to treat such persons, or even persons with more severe mental retardation, differently from other first degree murderers.

As to Issue VII: Appellant's challenge to the purported unconstitutionality of Florida's majority vote rule with respect to jury recommendations has not been preserved for appellate review. In any event, this Honorable Court has consistently rejected the argument advanced by appellant.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING THE APPELLANT'S MOTION FOR MISTRIAL.

As his first point on appeal, appellant contends that the trial court erroneously denied a motion for mistrial made after, on cross-examination, a state witness testified that members of his work crew told him that they saw appellant remove the victims from the cemetery office with a gun in his pocket. Appellant contends that this comment was inadmissible hearsay and its utterance denied appellant his right to confront witnesses against him. For the reasons expressed below, appellant is entitled to no relief on this point.

Herman Smith was the grounds supervisor at Myrtle Hill cemetery (T 307). On direct examination, the state had elicited testimony to disprove an allegation that Smith had attempted to cash a check for $1500 at a particular lounge. This check was the check obtained by appellant during the course of the events which culminated in the murders of William Russell Swack and Nancy Walker. On cross-examination, defense counsel attempted to elicit a response from Mr. Smith that he had not seen appellant at the cemetery on the day of the murders. This entire line of questioning, which forms the basis of appellant's first issue, was as follows:

> Q. But on August 27th, 1986, did you work at the cemetery?

A. Yes, sir. I had my crew working at the office that day.

Q. Was Mr. Thompson working on that day?

A. No. He had quit his job.

Q. Did you see Mr. Thompson at the cemetery?

A. No. Everybody that appeared there knows Mr. Thompson because he was working in my crew at the time.

Q. I'm not arguing with you about that, Mr. Smith, and I don't want you to think that I am. Can you just answer this question for me? On August 27th 1986, did you at any point in time while you were working on that day see Charlie Thompson on the grounds of the Myrtle Hill Cemetery?

A. My crew have told me he was at that time. I got to explain myself.

Q. No, sir. Just tell me this: "Did you, sir, see Thompson on August 27th at the cemetery? Did you see him?

A. No., sir, but my crew did. My crew did.

<u>Q. When did your crew see him?</u>

A. I was the foreman out there this particular day. They was there working at the office when they seen Mr. Thompson go in there and carry Ms. Swack and Ms. Nancy. They said he had a gun in his pocket.

THE COURT: Take the jury out.

(T 312 - 313; emphasis added)

Defense counsel initially requested the trial judge to give a curative instruction to the jury to have them disregard Mr. Smith's last remark. This was done "because I think that it's curative at this point in time" and, therefore, defense counsel was specifically not asking for a mistrial (T 313).

Subsequently, defense counsel again "still [thought] that [he] would prefer the court to do what [he] first asked," namely, to have the court give a curative instruction. However, defense counsel expressed his concern "about the possibility that the remedy may prove to be incomplete" and "that since this is the third retrial . . . [an] appellate court in this review of this matter may say that I did not do enough to stop at this time" and asked the court to grant a mistrial (T 316). The court denied the motion for mistrial and gave a curative instruction, instructing the jury as follows:

> . . . Members of the jury, the witness, Mr. Smith was asked a question whether he had seen Mr. Thompson at the cemetery at the date in question, and his answer to that was no, he did not. The remainder of his answer -- You are being instructed to disregard the remainder of his answer concerning what somebody told him may have occurred. You will disregard all of the answer except the witness saying, no, he did not. (T 319)

Candidly, your appellee does not dispute appellant's contention that the final remarks made by Mr. Smith on cross-examination were hearsay and had the effect of denying appellant the right to confront the members of the cemetery crew who saw appellant removing the victims from the cemetery. However, your appellee strenuously asserts that the response by Mr. Smith was to defense counsel's questioning and, hence, the testimony of Mr. Smith was "invited" thereby bringing into play the "invited error doctrine." "[T]he invited error rule . . . stands for the proposition that a defendant cannot take advantage on appeal of

an error which he himself induced at trial." Stanley v. State, 357 So. 2d 1031, 1034 (Fla. 3d DCA 1978), citing Sullivan v. State, 303 So. 2d 632 (Fla. 1974); Castle v. State, 305 So. 2d 794, 797 (Fla. 4th DCA 1974); Ellison v. State, 349 So. 2d 731 (Fla. 3d DCA 1977).

In his brief, appellant contends that Mr. Smith's testimony was not responsive to defense counsel's questioning (Appellant's brief at page 29). Appellant's point is well-taken with respect to defense questioning concerning whether or not Mr. Smith had seen appellant on the day in question. To those questions Mr. Smith stated that he did not but his crew did. At this juncture, it was incumbent upon defense counsel not to proceed any further for no prejudicial testimony had yet been elicited. However, and most significantly, defense counsel continued his questioning by asking Mr. Smith, "When did your crew see him?" (T 312). It was in response to this direct question that Mr. Smith responded by stating that members of his crew had seen appellant "go in there and carry Mr. Swack and Ms. Nancy. They said he had a gun in his pocket" (T 312 - 313). Thus, although Mr. Smith was initially non-responsive to defense counsel's questioning, there was no need to continue along this line of questioning. Defense counsel should have at this time turned to the trial judge and requested that the witness be required to respond only to the questions asked and not to inject extraneous matters into the testimony. But this was not done. A direct question was asked of Mr. Smith as to what his crew saw. Having been asked this question, the witness responded appropriately.

The instant case must be contrasted with the situation presented in Czubak v. State, 570 So. 2d 925 (Fla. 1990). There, this Honorable Court rejected the state's argument that certain testimony of a state witness was invited error. This Court held that the state witness' comment was not "invited" because it was unresponsive to the question asked by defense counsel. It was held that defense counsel could not anticipate a response made by the witness. In the instant case, however, defense counsel could not have helped but anticipate the response Mr. Smith would give to the question, "When did your crew see him?" Appellant should not be permitted to take advantage on appeal of a response he himself invited at trial.

Appellant further contends that the curative instruction given by the trial judge was insufficient under the facts of this case. As set forth above, this was the remedy first sought by defense counsel after Mr. Smith's testimony. Apparently recognizing that he should have attempted to stop the line of questioning before Mr. Smith delved into prejudicial matters, defense counsel reconsidered and eventually requested the court to grant a mistrial. The trial judge denied the motion for mistrial and gave the curative instruction set forth above. Thus, even if the error had not been invited, your appellee would assert that the trial judge applied the proper remedy by utilizing a curative instruction. In his brief, appellant relies upon Geralds v. State, 601 So. 2d 1157 (Fla. 1992), for the proposition that it is futile to give a curative instruction in

the context of a witness discussing prior felony convictions of a defendant. This was the same situation presented to this Court in Czubak, where this Court noted that a curative instruction would not have overcome the error of permitting a witness to relate to the jury information concerning prior felony convictions. However, Geralds and Czubak can be distinguished from the situation presented sub judice. Prior felony convictions are extrinsic to the case being tried, whereas the testimony at issue herein deals with the facts of the case being tried. According to the state's theory and the evidence presented, appellant was at the scene of the crime and Mr. Smith's testimony dealt with that matter. Indeed, the state's evidence showed that a large man approximately six feet tall and 220 lbs., a description perfectly fitting appellant, was seen in the office of Swack and Walker immediately prior to their disappearance (T 179 - 184). Therefore, your appellee submits that the testimony of Mr. Smith, being generally related to and consistent with the evidence presented by the state, was susceptible to a curative instruction because no extrinsic matters were injected into the trial.

In any event, your appellee respectfully submits that error, if any, was harmless beyond a reasonable doubt. It is submitted that the verdict was not affected by Mr. Smith's testimony. As aforementioned, there was testimony that a person fitting appellant's description, although not positively identified, was in the office of the victims immediately prior to their removal.

Additionally, the last entry in a ledger on Mr. Swack's desk was a check in Swack's handwriting dated August 27, 1986 (the date of the homicides) payable to appellant for $1500 (T 165 - 171, 192 - 194). On the date of the homicides, appellant was seen wearing a watch which had not been seen on his person before (T 321 - 324). The evidence showed that Mr. Swack had been wearing a watch prior to the homicide (T 122). Further testimony presented by the state indicated that appellant attempted to sell a ring to Kenneth Bell (T 326 - 328). Also, appellant had attempted to obtain a car using the check for $1500 he had obtained from the Myrtle Hill Cemetery (T 199, 215 - 216). Finally, Marvin Lacy, a jailhouse informant, testified that when he asked what appellant was charged with, appellant replied that he was in jail for stabbing a man and shooting a woman (T 275, 285). Lacy further testified that appellant acknowledged that he was arrested for trying to cash a personal check from the man he had stabbed and that he had that man write the check for $1500. Appellant also acknowledged that the went to the car lot to cash the check so he could leave town, and that he had also sold some jewelry (T 276). Based upon this evidence, and especially in light of the admissions appellant made to Lacy, error, if any, in the admission of Herman Smith's testimony was harmless beyond a reasonable doubt.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY FINDING THE AGGRAVATING CIRCUMSTANCES OF AVOID ARREST, PECUNIARY GAIN, HEINOUS, ATROCIOUS, OR CRUEL, AND COLD, CALCULATED AND PREMEDITATED.

In the sentencing order entered by the Honorable Diana M. Allen, Circuit Judge, the court found six aggravating factors to have been proven beyond a reasonable doubt. On appeal, appellant does not attack the court's finding of two of the aggravators, namely prior conviction of another capital felony or of a felony involving the use or threat of violence and the capital felony was committed while the defendant was engaged in the commission of a kidnapping. Appellant does, however, contend that four other aggravating factors found by the trial judge were improperly found. For the reasons expressed below, appellant's contentions are without merit.

Appellant first contends that the trial court improperly found that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. He contends that purportedly pursuant to Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993), the trial judge improperly found an aggravating circumstance based upon logical inferences drawn from the evidence. This Court held in Robertson that a trial court may not draw logical inferences to support a finding of a particular aggravating circumstance when the State has not met its burden. In the instant case, however, the state did meet its burden by

the evidence which clearly, and beyond a reasonable doubt, showed that appellant's motive in committing the murders was to avoid arrest. In Preston v. State, 607 So. 2d 404, 409 (Fla. 1992), this Court recognized that:

> We have upheld the application of this aggravating circumstance in cases similar to this one, where a robbery victim was abducted from the scene of the crime and transported to a different location where he or she was then killed. (citations omitted)

In the instant case, appellant obtained a check for $1500 from Mr. Swack, one of the victims. The defendant then abducted Mr. Swack and Ms. Walker to a different location where they were both killed. Thus, as in Preston and Hall v. State, 614 So. 2d 473 (Fla. 1973), the avoid arrest aggravator is applicable where the victim is transported to another location and then killed. Coupled with the fact that appellant used to work at the cemetery and was known to both of the victims, the evidence presented by the state shows, beyond a reasonable doubt, that a dominant motive in these murders was to eliminate witnesses.

The gist of appellant's argument seems to be that if the defendant does not admit to someone that he killed his victims in order to eliminate them as witnesses, the avoid arrest aggravator can never be found. Your appellee disagrees and asserts that where, as here, evidence plainly shows that the defendant, in essence, robbed the victims of money to which appellant was not entitled, where appellant was known personally by the victims, and where the victims were abducted and transported to another

locale to meet their deaths, the state has adduced sufficient evidence to show, beyond a reasonable doubt, the applicability of the avoid arrest aggravating factor.

Appellant also contends that the pecuniary gain aggravating factor was improperly found by the trial judge. Appellant speculates that there were other possible reasons for the issuance of a check in the amount of $1500, rather than the $150 to which appellant believed (wrongly) he was entitled. Appellant's speculative reasons are, however, totally unreasonable. Appellant would have this Court believe that when someone is frightened they are going to mistakenly write a check for an incorrect amount or that someone who is in the process of being abducted is going to think of writing a larger amount to make it more difficult to cash the check. A reasonable person would not believe that these are possibilities. The evidence showed that appellant obtained at least $1350 to which he was not entitled and that alone supports a finding that the murders were committed for pecuniary gain.

It appears that appellant's main concern and contention is that it should not be permissible for this Court to sustain both the avoid arrest and pecuniary gain factors in the same case. Appellant does acknowledge that Preston v. State, supra, and Card v. State, 453 So. 2d 17 (Fla.), cert. denied, 469 U.S. 989 (1984), are two cases in which this Court has approved finding both the avoid arrest and the pecuniary gain factors in the same

case. However, rather than being an unusual phenomenon, this has been the consistent approach undertaken by this Court where, as here, the evidence clearly shows the applicability of both factors. See, e.g., Zeigler v. State, 587 So. 2d 127 (Fla. 1991); Young v. State, 579 So. 2d 721 (Fla. 1991); Randolph v. State, 562 So. 2d 331 (Fla. 1990); Reed v. State, 560 So. 2d 203 (Fla. 1990); Walton v. State, 547 So. 2d 622 (Fla. 1989); Bryan v. State, 533 So. 2d 744 (Fla. 1988); Harmon v. State, 527 So. 2d 182 (Fla. 1988); Engle v. State, 510 So. 2d 881 (Fla. 1987). These cases make it clear that there can indeed be two motives for a murder, and those motives may be so inextricably entwined, as here, so as to support the application of both the avoid arrest and pecuniary gain aggravating factors. Here, appellant intended to acquire money and he needed to eliminate the witnesses who most definitely could recognize him. The trial judge correctly found the applicability of the pecuniary gain, as well as the avoid arrest, aggravating factor.

The murders committed in the instant case were clearly heinous, atrocious or cruel. At the very least, the manner in which the homicides were committed evidence appellant's utter indifference to the suffering of his victims. There is no doubt as to victim Swack that the evidence shows nine stab wounds, their character and location indicating a struggle. At least one of the stab wounds was lethal and the cause of death was a gunshot wound to the head and multiple stab wounds. This

Honorable Court has previously recognized that multiple stab wounds form a sufficient basis for a finding of heinous, atrocious, or cruel. See, e.g., Haliburton v. State, 561 So. 2d 248 (Fla. 1990); Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Floyd v. State, 497 So. 2d 1211 (Fla. 1986).

The trial court's finding of heinous, atrocious or cruel can be supported for both the Swack and Walker homicides because of the victims' fear and emotional strain prior to death. The evidence shows that subsequent to appellant's obtaining the $1500 check at the office, he kidnapped the two victims, took them to a secluded area, forced them to remove their clothes, stabbed Swack nine times and shot and then turned his attention to victim Walker who had witnessed the incident. See Bryan v. State, 533 So. 2d 744 (Fla. 1988) (victim kidnapped, held under duress and fear, transported to an isolated area, struck in head and killed with shotgun blast to face); Jackson v. State, 522 So. 2d 802 (Fla. 1988) (victim undoubtedly aware of his impending death); Koon v. State, 513 So. 2d 1253 (Fla. 1987) (victim marched into swamp and executed); Ruff v. State, 495 So. 2d 145 (Fla. 1986) (victim aware he was about to be murdered by his son); Kokal v. State, 492 So. 2d 1317 (Fla. 1986) (marching victim to execution site, beating and shooting him); Cooper v. State, 492 So. 2d 1059 (Fla. 1986) (victims aware of impending death); Parker v. State, 476 So. 2d 134 (Fla. 1985) (17 mile death ride, victim shot execution-style after being stabbed). Indeed, the facts of this case are, as acknowledged by appellant, very similar to those in

Preston v. State, supra (appellant's brief at page 47). Here, the victims were forced to leave the cemetery office, were driven to a different locale, were walked to a wooded area, and were forced to disrobe. Here, as in Preston, the victims suffered great fear and terror prior to their murders. Contrary to appellant's assertion in his brief, there is direct evidence of the victims great fear and terror during the events. Appellant attempts to downplay the bite mark found on Ms. Walker's arm, yet the evidence in this case established that the bite mark was on her arm where her mouth was resting when found. Her bite occurred while she was alive (T 265 - 267). It is unimaginable that there can be any greater evidence of fear and terror of impending death than a self-inflicted bite to one's own arm while one is witnessing the murder of a coworker. The trial court's finding that the murders of Swack and Walker were especially heinous, atrocious or cruel is well-supported by the evidence in this case.

Petitioner's contention that the cold, calculated and premeditated aggravating factor is inapplicable is wholly without merit. Heightened premeditation has been shown beyond a reasonable doubt in this case. As the trial court recognized, appellant had disputed his worker's compensation claim for several months prior to the murders. He had expressed his displeasure to a number of people on different occasions as to the cemetery's failure to pay what appellant believed he was

owed. This anger culminated in the events which occurred on August 27, 1986. If appellant had not intended to kill his victims, why would he not have left the premises after obtaining what he believed was due him. Instead, as part of a careful and prearranged plan to kill, appellant abducted his victims, transported them to a different locale and brutally murdered them. This Honorable Court upheld the finding of the heightened premeditation aggravating factor (as well as the avoid arrest factor) in Bryan v. State, supra:

> . . . Circumstances (e)[avoid arrest] and (i)[cold, calculated and premeditated] are supported by the evidence that after the victim was robbed of his wallet and car keys, he was nevertheless kidnapped and taken to a distant and isolated area for the murder. The only conclusion that can be drawn from this evidence is that appellant, who was a wanted bank robber, did not want the victim to raise an alarm after the robbery and coldly calculated that he must be murdered and his body disposed of so as to avoid detection.

Bryan v. State, 533 So. 2d at 748 - 749. In Swafford v. State, 533 So. 2d 270 (Fla. 1988), this Court discussed the applicability of the cold, calculated and premeditated aggravating factor:

> . . . The cold, calculated, premeditated murder, committed without pretense of legal or moral justification, can also be indicated by circumstances showing such facts as advanced procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. *See, e.g., Burr v. State*, 466 So. 2d 1051, 1054 (Fla. 1985), *cert. denied*, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985); *Eutzy v. State*, 458 So. 2d 755, 757 (Fla.

> 1984), *cert. denied*, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). The evidence was sufficient to sustain the finding here. (text at 277)

All of the factors discussed in Swafford, i.e., advanced procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course, are all present in the instant case.

Your appellee further submits that the murder was not committed with a pretense of any moral or legal justification. Appellant premises his argument on the purported notion that he honestly believed that he was entitled to money from the cemetery. Even if appellant's belief was correct in that they did owe him money, that is no justification, either moral or legal, for lashing out and committing murder. The cold, calculated and premeditated aggravating circumstance was proved to the exclusion of any reasonable doubt.

Although appellant may contest the factual basis for the finding of the aggravating circumstances discussed under this issue, there is no basis for his contention that the trial court erroneously instructed on these aggravating factors. As discussed above, the state adduced sufficient evidence to satisfy the burden of demonstrating that the aggravating factors were proven beyond and to the exclusion of any reasonable doubt. Appellant's point must fail.

ISSUE III

WHETHER APPELLANT'S ATTACKS UPON THE CONSTITUTIONALITY OF THE FELONY MURDER AND COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTORS, AND INSTRUCTIONS THEREON, ARE PROCEDURALLY BARRED.

As his next point on appeal, appellant claims that the aggravating circumstances of felony murder and cold, calculated and premeditated are unconstitutionally overbroad and that jury instructions on these factors were unconstitutionally vague. These claims are procedurally barred.

In his brief, appellant concedes that defense counsel did not object to the two aggravating circumstances at issue on the grounds that they are unconstitutional (appellant's brief at page 54). It is axiomatic that failure to present an issue to the trial court precludes appellate review. See e.g., Koon v. Dugger, 18 Fla. Law Weekly S 201 (Fla. March 25, 1993) (a claim that this Court's interpretation of the cold, calculated, and premeditated aggravating factor is unconstitutionally overbroad was procedurally barred for failure to raise at trial); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Appellant's reliance upon Trushin v. State, 425 So. 2d 1126 (Fla. 1982), is misplaced. In Trushin, it was determined that a criminal defendant may attack the facial validity of a criminal statute for the first time upon appeal if the defendant was convicted under that statute. This is because, as this Court later discussed in State v. Johnson, 616 So. 2d 1 (Fla. 1993), this type of issue may be raised for the first time on appeal only if

the error is fundamental, an error so "basic to the judicial decision under review and equivalent to a denial of due process." Id. at 3. The instant case does not involve a prosecution under an unconstitutional statute. Rather, we are dealing with aggravating factors and, as the United States Supreme Court held in Hildwin v. Florida, 490 U.S. 628, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), "[T]he existence of an aggravating factor here is not an element of the offense, but is instead a 'sentencing factor that comes into play only after the defendant has been found guilty'", citing McMillian v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). Thus, the failure to present any constitutional challenge to the statute or statutes at issue here results in the nonavailability of appellate review.

Assuming arguendo that the merits of this claim could be reached, appellant would still be entitled to no relief. Appellant challenges the felony murder and cold, calculated and premeditated aggravating circumstances as facially overbroad because they duplicate the elements of first degree murder. Appellant's challenge to the "automatic aggravator" has been squarely rejected by both federal and state courts. See Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); Porter v. Wainwright, 805 F.2d 930, 943 n. 15 (11th Cir. 1986); Henry v. Wainwright, 721 F.2d 990 (11th Cir. 1983); Bertolotti v. State, 534 So. 2d 386 (Fla. 1988); Clark v. State, 443 So. 2d 973 (Fla. 1983); Menendez v. State, 419 So. 2d 312 (Fla. 1982); White v. State, 403 So. 2d 331 (Fla. 1981). In

Lowenfield, supra, the United States Supreme Court observed that as long as the required narrowing process occurred in a capital case, the fact that an aggravating circumstances duplicates one of the elements of the crime does not make the death sentence constitutionally infirm. The Court observed that in the State of Florida, the definition of a capital offense is narrowed by the finding of aggravating circumstances at the penalty phase. Therefore, the United States Supreme Court has already sanctioned the permissibility of using what appellant would describe as an "automatic aggravator" and no constitutional infirmity appears.

Appellant also makes the now-familiar complaint concerning the jury instructions in this case. He contends that error under Espinosa v. Florida, 505 U.S. ____, 112 S.Ct. ____, 120 L.Ed.2d 854 (1992), appears in this case due to the jury instructions given. However, it is beyond dispute that the failure to raise objection as to the jury instructions given precludes appellate review. See e.g., Davis v. State, 18 Fla. Law Weekly S 385 (Fla. June 24, 1993); Ragsdale v. State, 609 So. 2d 10 (Fla. 1992); Kennedy v. Singletary, 602 So. 2d 1285 (Fla.), cert. denied, ____ U.S. ____, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992). Thus, in accordance with the well-established precedent of this Honorable Court, appellant's Espinosa claim must be rejected as procedurally barred.

Inasmuch as no constitutional challenges were made to either the statute or jury instructions via objection at trial, appellant's third point must fail.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ITS TREATMENT OF THE MITIGATING FACTORS EXISTING IN THIS CASE.

Appellant next contends that the trial judge erred by failing to find and weigh statutory and nonstatutory mitigating factors, to-wit: mental or emotional disturbance, impaired capacity to conform conduct to the requirements of law, brain damage, and a history of drug abuse. A review of the instant record and of the order entered by the trial judge reveals that the trial judge followed the law and accorded weight to all mitigation propounded by appellant. For the reasons expressed below, appellant's fourth point must fail.

With respect to the statutory mental mitigating factors, appellant contends that the trial court erroneously refused to find an extreme emotional disturbance or impaired capacity to conform conduct to the requirements of law. Appellant contends that the evidence of one psychologist, Dr. Robert Berland,[1] went unrebutted by the state and the trial judge was, thus, compelled to find the statutory mitigating factors. Your appellee respectfully submits that appellant has missed the point. The trial judge did not ignore the evidence adduced by the defense with respect to appellant's mental infirmities. Merely because the judge did not find the statutory aggravating factors does not

---

[1] Dr. Berland is no stranger to this Honorable Court. See e.g., Henry v. State, 574 So. 2d 66, 71 (Fla. 1991).

mean that the trial court failed to properly consider the matters presented by the defense evidence. The trial judge specifically found that "the defendant's chronic mental illness was given some weight by the Court as a nonstatutory, mitigating factor" and "the Court gave some weight to this testimony [of impaired conduct and appreciation of criminality] that the Defendant was moderately disturbed and exhibited some symptoms of mental illness as a nonstatutory, mitigating circumstance" (R 225). Thus, this Court's admonition in Cheshire v. State, 568 So. 2d 908 (Fla. 1990), that any emotional disturbance must be considered and weighed by the sentencer was satisfied in the instant case. Appellant appears to be arguing that there is greater weight to be accorded to a mitigating circumstance merely because of its denomination as statutory rather than nonstatutory. There is no provision in law, or indeed in logic, to support this proposition. The sentencer is required to consider and weigh any matters pertaining to the character of the defendant, and this requirement is satisfied whether we denominate a mitigator as statutory or nonstatutory. The gist of appellant's complaint appears to be that the trial judge did not accord sufficient weight to the mental health mitigators. However, it is axiomatic that "the relative weight given each mitigating factor is within the province of the sentencing court." Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990). The instant case does not present a situation where a trial judge dismissed unrebutted evidence of mental infirmities, but rather

is one where the trial judge accorded the weight deemed sufficient within the calculus of the sentencing decision.

Appellant further complains that there is no specific mention in the trial court's order of brain damage or a history of drug and alcohol abuse. Your appellee respectfully submits that these items are certainly encompassed by the trial court's findings as to appellant's mental infirmities. The testimony of Dr. Berland was the sole source of the mention of brain damage and the history of drug and alcohol abuse. The trial judge certainly gave weight to this testimony as exemplified by the findings detailing the mitigating factors to be weighed in this case. Also, appellant never propounded as a theory in this case that his drug and alcohol abuse was somehow a factor in the commission of the two murders. If drug or alcohol was a factor in the commission of a crime, appellant's guilt may have somehow been ameliorated and this factor could have been given more weight. Cf. Preston v. State, 607 So.2d 404, 411 - 412 (Fla. 1992). In any event, it is significant to observe that no where in the defendant's sentencing memorandum, or in any of the argument presented by defense counsel, is there a request for the trial judge to consider as separate and distinct nonstatutory mitigating factors brain damage or a history of drug and alcohol abuse. This Honorable Court squarely held in Lucas v. State, 568 So. 2d 18, that it is incumbent upon the defense specifically to set forth the nonstatutory mitigation to be considered by the trial judge:

> . . . 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 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 mitigating circumstances.

Nevertheless, your appellee submits that the trial judge considered all of the mitigation that appears in this record and weighted the mitigation imposing the two sentences of death. Indeed, the trial judge gave considerable weight to appellant's mild retardation (R 226). A review of this record reveals that the trial judge correctly considered and weighed all mitigating evidence propounded by appellant. Therefore, appellant's fourth point is without merit.

ISSUE V

WHETHER THE DEATH SENTENCES IMPOSED IN THE INSTANT CASE ARE PROPORTIONALLY WARRANTED.

Appellant argues that the sentences of death imposed in the instant case are not proportionate to other death cases because, basically, appellant's moral culpability simply is not great enough to deserve sentences of death. Your appellee contends that the sentences of death were properly imposed in the instant case as the murders were such to set Thompson and his killings apart from the average capital defendant.

The jury in the instant case recommended death sentences and the trial judge found the existence of six aggravating circumstances and, in the weighing process, gave considerable weight to appellant's mild mental retardation and gave weight to appellant's chronic mental illness and his family background. Based upon the aggravation existing in this case, the sentence of death are proportionate to other death cases and the lower court did not err in imposing both sentences of death. Your appellee disputes appellant's characterization of himself as "a seriously emotionally disturbed man-child, not a cold-blooded, heartless killer." (Appellant's brief at page 71, citing Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). Conspicuously missing from the sentencing calculus in Fitzpatrick were the aggravating factors of heinous, atrocious, or cruel and cold, calculated and premeditated homicide. As discussed above, these factors were appropriately found by the trial judge and their inclusion in the

weighing process demonstrates the proportionality of the sentences imposed in the instant case.

Appellant's reliance upon Scott v. State, 603 So. 2d 1275 (Fla. 1992), Craig v. State, 585 So. 2d 278 (Fla. 1991), and Carter v. State, 560 So. 2d 1166 (Fla. 1990), is totally misplaced in that the instant case is not a jury override case. Not only is the instant case not a jury override case, it is not a case in which the trial judge failed to find mental mitigating factors urged by an appellant. Instead, it represents a case where the court considered and found the presence of mental mitigating factors, weighed them, and properly concluded that the facts of the brutal homicides militated against a determination of life imprisonment as an appropriate sentence. Indeed, no matter what may be the extent or degree of mental impairment by other defendants in other criminal contexts, it is abundantly clear in this case that Thompson's mental problem did not inhibit him from committing a calculated, premeditated double homicide. This case does not typify a sudden passion killing or an overreaction to a stressful situation put in the way of the accused. Rather, Thompson went to the victim's office with a gun for the purpose of obtaining money from them; he then kidnapped the two victims and transported them to a secluded location where he shot both of them in the head execution-style (after stabbing Swack nine times).

The truth of the matter is that appellant is an extremely violent man -- witness his prior sexual battery of his girlfriend

and stabbing of her brother. Despite a lower than average intelligence, Appellant is fully capable of planning and carrying out a kidnapping by removing his victims to a secluded area where he will remain undetected and killing them in cold blood.

Acceptance of appellant's claim would lead invariably to the result that those defendants able to bring forward a "mental health expert" to bemoan the stress visited upon the accused by life's vicissitudes would obtain the reward of life imprisonment, irrespective of the viciousness of their murders or the minimal degree that an emotional impediment played in the homicidal episode.

This Honorable Court should find that the death sentence imposed for the brutal double homicide in this case are proportionally warranted.

ISSUE VI

WHETHER IMPOSITION OF THE DEATH PENALTY UPON A MILDLY MENTALLY RETARDED DEFENDANT VIOLATES THE CRUEL AND/OR UNUSUAL PUNISHMENT PROHIBITION OF THE STATE AND FEDERAL CONSTITUTIONS.

On appeal, appellant renews a claim he set forth in the trial court, that is, that execution of the mentally retarded should be found unconstitutionally prohibited. For the reasons expressed below, appellant is entitled to no relief on this point.

In the instant case, Dr. Charles Logan examined appellant and concluded that appellant met the criteria for mild retardation (R 454 - 456). Dr. Robert Berland administered the Wechsler Adult Intelligence Scale and determined that appellant had an overall I.Q. of 70, a score which falls within the upper limit of retardation.[2] Thus, the evidence adduced by appellant reveals that, at best, appellant is borderline mentally retarded, a finding similar to that made in Carter v. State, 576 So. 2d 1291 (Fla. 1989). The same rejection of appellant's claim herein should obtain as it did in Carter.

---

[2] For some reason, Dr. Berland did not administer the newer, revised Wechsler Adult Intelligence Scale. He speculated that if he had, appellant's I.Q. would have been in the range of 62 or 63, a range he described as well into the retarded level (T 490 - 491, 504 - 505). It is interesting to observe that although Dr. Berland believed that an I.Q. of 62 or 63 is well into the retarded level, Dr. Logan, who did administer the revised Weschler Adult Intelligence Scale testified that appellant's score rendered him mildly retarded.

In any event, appellant places exclusive reliance in his argument on Chief Justice Barkett's dissenting opinion in Hall v. State, 614 So. 2d 473 (Fla. 1993). Although your appellee respects the opinion of Chief Justice Barkett, that opinion is not shared by the citizens of Florida's elected representatives. In Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the United States Supreme Court held that the constitutional prohibition against cruel and unusual punishment is not offended by execution of mentally retarded defendants. In rejecting the defense argument there, the court noted that only one state explicitly banned executions of retarded persons found guilty of a capital offense. The court found the evidence insufficient to demonstrate a national consensus of opposition. The Court also rejected the defendant's reliance on alleged public sentiment reflected in certain public opinion surveys, observing:

> The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present there is insufficient evidence of a national consensus of executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment. (106 L.Ed.2d at 289)

The legislature in the State of Florida has not acted to prohibit the execution of mentally retarded citizens. In a Florida Bar Journal article, Davis, Executing the Mentally Retarded (February, 1991, pp. 12 - 17), the author observes at footnote 20:

> The Florida legislature also considered similar legislation for the first time in the 1990 session, but it did not get out of committee.

The refusal of the Florida legislature to act on the request to provide immunity or protection from the electric chair for mentally retarded defendants is the best expression, according to Penry, of the existing societal consensus.

Appellant would have this Honorable Court create a per se rule that all persons below a certain I.Q. score should be immune from the sanction of capital punishment. Such a rule neglects to consider an individual's capacity and moral culpability for the conduct in question and is unwise public policy which should not be adopted. Moreover, such a per se rule would contravene the long-standing capital jurisprudence that attention should be given to the individualized characteristics of the defendant. This Honorable Court, in the absence of a legislative intent to bar capital punishment of mentally retarded murderers, should not create such a rule.

ISSUE VII

WHETHER THE PROVISION OF THE FLORIDA DEATH PENALTY STATURE ALLOWING A MAJORITY DEATH RECOMMENDATION VIOLATES THE STATE AND FEDERAL CONSTITUTIONS.

Appellant's final point on appeal is clearly procedurally barred. He admits that no constitutional challenge to a jury's majority vote for a penalty verdict was raised below. Thus, this issue has not been preserved for appellate review. Occhicone v. State, 570 So.2d 902 (1990); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Additionally, as discussed above, the claim raised does not call into applicability the holding of Trushin v. State, 425 So. 2d 1126 (Fla. 1982), for no fundamental error is presented under this claim. It is also unavailing for this appellant to cite to Taylor v. State, Case No. 80,121, as a case presently pending before this Court in which this issue has been presented. In Taylor, there was a limited objection presented to the trial court which may have preserved an issue for appeal. Where that is clearly not the case here, this point must be rejected on the basis of a procedural default.

In any event, this Honorable Court, as acknowledged by appellant, has previously ruled adversely to appellant on this issue. Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990). No reason is made to appear why, even if the merits of this claim were before this Court, this Court should recede from Brown and Jones. Appellant's final point must be rejected.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the judgment and sentences of death imposed by the trial judge should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
Florida Bar ID#: 0238538
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Paul C. Helm, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 20th day of December, 1993.

OF COUNSEL FOR APPELLEE.