IN THE SUPREME COURT OF FLORIDA

JOHN C. MARQUARD,

Appellant,

v. CASE NO. 81,341

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The Statement of the Case set out in Marquard's brief is substantially correct. However, the following corrections are necessary:

Dr. Jack Merwin, the mental health expert engaged by the State, did not actually conduct a formal interview of the defendant, because the defendant refused to participate in such an evaluation. (R. 700-704). There is no evidence that the victim in this case, Stacey Ann Willetts, suffered from Down's Syndrome other than the assertions of Marquard's attorneys. The trial court stated that the victim's features were not consistent with Down's Syndrome. (R. 1091). The jury found Marquard guilty of first degree murder and armed robbery with a deadly weapon. (R. 1465). Marquard's parole officer's name is Rawls. (R. 1600).

STATEMENT OF THE FACTS

With the following corrections, the Statement of the Facts set out in Marquard's brief is substantially correct:

It is not entirely accurate to state that "[t]he plan to kill Stacey Willetts in South Carolina was abandoned ...". Appellant's Brief at 9. It is more accurate to state that discussions about killing Stacey were had in South Carolina. (R. 1100). When Marquard was first interviewed by law enforcement, he stated that Stacey was alive and well the last time he saw her. (R. 1062). Michael Abshire testified that he and Marquard had discussed killing Stacey for her car and her money prior to

leaving North Carolina for Florida. (R. 1151; 1223). The North Carolina offense for which Marquard was on parole at the time of this murder is denominated "Misdemeanor Larceny". (R. 1609). Marquard specifically waived his right to testify in his own behalf. (R. 1731).

SUMMARY OF ARGUMENTS

POINT 1: Juror Robinson was properly excused for cause based upon his opposition to capital punishment and the credibility determination by the trial court that the juror's opposition to capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

POINT 2: The trial court properly denied Marquard's motion to suppress evidence because under the totality of the circumstances it is readily apparent that the consent to search was voluntarily given.

POINT 3: The state did not improperly introduce evidence of bad character, but rather introduced evidence which was relevant to the murder and was therefore properly admitted.

POINT 4: The trial court properly denied the defense's motion for judgment of acquittal on the armed robbery count because the evidence unequivocally established that the taking of the victim's car and property was not a "mere afterthought" but rather was a motive for the murder. Under the prior decisions of this court, Marquard was properly found guilty of armed robbery.

POINT 5: The trial court did not improperly restrict Marquard's closing argument at the penalty phase of his capital trial. The case relied upon by Marquard is not controlling, and has apparently been superceded by later decisions of this court to the extent that the case relied upon by Marquard differs from the express holding of this court in Nixon v. State, 572 So. 2d 1336 (Fla. 1990).

POINT 6: The trial court properly allowed the state to cross-examine the defendant's mental health expert concerning Marquard's criminal history. This court has previously addressed and rejected the precise claim raised by Marquard. Jones v. State, 612 So. 2d 1370 (Fla. 1993).

POINT 7: The trial court properly found and applied the under sentence of imprisonment aggravating circumstance because Marquard was on parole at the time of this offense. Regardless of the nature of the offense for which Marquard was placed on parole status, there is no question that Marquard was in fact on parole at the time he committed this murder.

POINT 8: The trial court properly applied the especially heinous, atrocious or cruel aggravating circumstance given the facts of this case and the prior decisions of this court.

POINT 9: The trial court properly found the "for pecuniary gain" aggravating circumstance, and did not impermissibly "double" that aggravating circumstance with the "during the course of a robbery" aggravating circumstance.

POINT 10: The trial court properly found and applied the cold, calculated and premeditated aggravating circumstance under the facts of this case and the prior decisions of this court.

POINT 11: Marquard combines five purported errors which he claims had the cumulative effect of denying him a fair trial. To the extent that Marquard claims that his motion for a judgment of acquittal should have been granted, the objection raised at trial is not the same one raised on appeal. Consequently, Marquard failed to preserve that issue. To the extent that Marquard

argues that certain photographic and physical evidence should not have been introduced, that evidence was relevant to the offense, and was properly admitted. To the extent that Marquard claims that the prosecutor improperly attempted to bolster the co-defendant's credibility, that claim is not preserved for review. To the extent that Marquard claims that the state's mental state expert should not have been allowed to observe a portion of the trial, that claim is utterly without merit. To the extent that the defendant claims that the state's mental state expert should not have been permitted to testify that a large number of individuals who are incarcerated in prison are diagnosed as having antisocial personality disorder, that claim is without merit because that testimony is reliable and relevant to the issues before the court.

POINT 12: In his challenge to the constitutionality of Section 921.141, Marquard's claim that the especially heinous, atrocious or cruel and the cold, calculated and premeditated aggravating circumstances were improperly applied have previously been addressed in this brief. To the extent that Marquard raises a claim of error under Caldwell v. Mississippi, that claim is not preserved for review. To the extent that Marquard raises a claim concerning the Tedder rule and the "hindering governmental functional" aggravating circumstance, those claims are not present in this case. To the extent that Marquard challenges the propriety and sufficiency of this court's review, that claim is utterly without merit. To the extent that Marquard raises any other claim in his challenge to the constitutionality of the

Florida death penalty act, those claims are barred because they were not raised by timely objection at trial

ARGUMENT

POINT 1

JUROR ROBINSON WAS PROPERLY EXCLUDED FOR CAUSE BASED UPON HIS OPPOSITION TO CAPITAL PUNISHMENT.

Marquard asserts that prospective juror Robinson was improperly excused for cause pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). While Marquard states the correct legal standard, that standard does not entitle him to relief when it is applied to the facts of this case.

In Wainwright v. Witt, 469 U.S. 412 (1985), the United States Supreme Court clarified the Witherspoon standard, stating that the proper inquiry is "whether the juror's view would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. at 424 [Citations omitted]. See also, Darden v. Wainwright, 477 U.S. 165 (1986). However, when this standard is applied to the facts of this case, it is apparent that Robinson was properly excluded. In the portion of voir dire omitted from Marquard's brief, the following occurred:

> MR. CANAN [prosecutor]: Okay. Now I put you in a box here because let's say there was sufficient proof for you to recommend death, but you really are opposed to it. What do you think you would do?
>
> A VENIREMAN [Robinson]: I don't know. I think I wouldn't impose death.
>
> MR. CANAN: Okay. So no matter what the judge said to you, no matter what the evidence was, I think what you're telling me, and correct me if I'm wrong, that you would not and could not vote

for the death penalty, no matter what the circumstances?

A VENIREMAN [Robinson]: That's right.

(R. 870). A fair reading of the prosecutor's questions and Juror Robinson's answers leaves no doubt that Robinson's opposition to capital punishment would prevent him from carrying out his duties as a juror because he would not, under any circumstances, recommend a sentence of death. That is the test for removal for cause, and Robinson met it.

In his brief, Marquard describes the foregoing portion of voir dire as a "hypothetical question". When the questions are read without an eye toward slanting them to suit one's purpose, it becomes apparent that Marquard's description of those questions is inaccurate. Rather than being hypothetical in nature, those questions are the logical continuation of the previous voir dire questions reproduced in Marquard's brief which were obviously put to the prospective juror in order to determine his feelings about capital punishment. Moreover, even if those questions had been hypothetical in nature, it would make no difference because that would not be error. See, e.g., Robinson v. State, 487 So. 2d 1040 (Fla. 1986).

Finally, as the Supreme Court held in Witt, the ultimate decision on a challenge for cause must be made by the trial judge. Wainwright v. Witt, 469 U.S. at 428. Of course, the trial judge is ultimately required to make a finding as to the venireman's state of mind, and that finding obviously must be based upon a determination of credibility and demeanor. Id. For

that reason, such trial level determinations are entitled to deference on review. Id. The trial court in this case made just such a determination when he granted the state's challenge for cause, stating "my observation of Mr. Robinson is that he agrees with you whenever you say something, and he certainly is not going to disagree with you." (R. 915). That is the very sort of credibility determination referred to in Witt, and it is entitled to deference from this Court. Robinson was properly excluded for cause, and Marquard is not entitled to relief.

POINT 2

THE TRIAL COURT PROPERLY DENIED MARQUARD'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO A CONSENSUAL SEARCH.

Marquard claims that the trial court erroneously denied his motion to suppress various items of evidence seized pursuant to a voluntary search of Marquard's residence. This claim is without merit because the evidence established that Marquard's consent to search was voluntary.

When the totality of the circumstances are fairly considered, it is apparent that Marquard's consent to search his residence was voluntarily given. Marquard voluntarily accompanied the investigators to the Sheriff's Office (R. 1325); was not under the influence of alcohol or drugs (R. 1327);[1] fully cooperated with investigators (R. 646); and knew that he could refuse to consent to the search. (R. 1316). Moreover, Marquard was not subject to any sort of coercive law enforcement tactics. (R. 1312; R. 646). While Marquard was not free to leave at the time he gave consent to search, that does not affect the voluntariness of that consent. Marquard obviously knew what he was doing, and may well have believed that nothing located in his residence could be tied to the murder by any sort of scientific evidence. Whether or not that was Marquard's belief, he specifically told investigators where to look for some of his

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[1] There is no requirement that an individual in Marquard's position be specifically asked if he is under the influence of some intoxicant. Obviously, an experienced investigator such as the deputy involved in this case can make such a determination.

knives. (R. 1312). The totality of the circumstances establish the voluntariness of the consent to search.

To the extent that Marquard relies upon Florida v. Bostick, 111 S. Ct. 2382 (1991), that reliance is misplaced. The Supreme Court did not hold that the fact of questioning on a bus was a factor in determining the voluntariness of a consensual search. Id. at 2387. Reliance on Bostick is misplaced. To the extent that Marquard claims that his consent was involuntary because there was no inquiry into his level of intelligence or education, that claim is specious. Marquard's own mental state expert testified that the defendant was of normal intelligence, and, if the lack of such inquiry was error, it was harmless. (R. 1633).

Moreover, Marquard presented no evidence in support of his motion to suppress, and never argued that he was under the influence of any intoxicant or that he was intellectually impaired to such an extent that he was unable to give voluntary consent to search. While the state bears the burden of proving that the consent to search was voluntary, it is disingenuous to suggest that Marquard's intelligence level precluded a voluntary consent. Under the totality of the circumstances, the consent to search was clearly voluntary. This claim is without merit.

POINT 3

THE STATE DID NOT IMPROPERLY INTRODUCE BAD CHARACTER EVIDENCE.

Marquard argues that the state improperly presented evidence that Marquard and his co-defendant had discussed, on numerous occasions, how to kill by using a knife. Marquard asserts that this evidence is "bad character" evidence which should have been excluded. Further, Marquard claims that this evidence was irrelevant. This claim is without merit.

Marquard's position is that the fact of discussions concerning the use of a knife as a weapon is evidence of "bad character". Such a conclusion requires a leap of logic and is the functional equivalent of an argument that the fact that a murder defendant had received training in self-defense would amount to proof of bad character. Likewise, under Marquard's view of the law, the fact that an individual had received training in the use of firearms and had discussed how to use firearms to kill would amount to evidence of "bad character." However, it is difficult to conclude that the fact that Marquard and his co-defendant had engaged in theoretical discussions about the use of knives amounts to the proof of "bad character" contemplated by § 90.404(2)(b) of the Florida Statutes. Instead, the discussions at issue were no more than talk: there is no suggestion that the discussions at issue ever referred to any specific individual. From the record, it appears that the discussions dealt with an abstract "person", and, while likely not appropriate for the dinner table, these sort of discussions

are not against any law, nor do they indicate bad character. Marquard had received at least some training in the use of knives, and if he wished to share that knowledge with his co-defendant, that was his right. To label such discussions as being indicative of "bad character" is not appropriate and is not supported by the law.

While the fact of discussions centering on the use of knives as weapons does not amount to "bad character", those discussions were relevant to the issues before the court. Specifically, these discussions are relevant to the manner of the victim's death. Marquard and his co-defendant had discussed the use of a knife to cut someone's throat, and the evidence indicated that that is exactly what was done to Stacey Willets. However, because nothing was left of the victim but skeletal remains, it was not possible to determine whether the victim's throat was slashed. For that reason, the prior discussions were relevant.

The introduction of this testimony was not impermissible because it does not amount to bad character. It is evidence of Marquard's professed familiarity with the use of a knife and, as such, is relevant to the murder and was properly admitted. See, e.g., Medina v. State, 466 So. 2d 1046 (Fla. 1985).

Finally, even if the admission of this testimony was error, that error was harmless. Given the strength of the state's case and the overwhelming evidence against Marquard, it is clear beyond a reasonable doubt that any error did not effect the verdict. See, Traylor v. State, 596 So. 2d 957 (Fla. 1992).

POINT 4

THE TRIAL COURT PROPERLY DENIED THE DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL ON THE ARMED ROBBERY COUNT.

Marquard argues that the trial court should have granted his motion for a judgment of acquittal on the armed robbery count of the indictment. The basis of this argument is that there was no evidence to establish that Stacey Willets was murdered for the purpose of taking her property, and that the taking was a mere afterthought. This claim is without merit.

In its sentencing order, the trial court found that one of the identifiable motives for this murder was the taking of the victim's property. (R. 1814). The armed robbery conviction is supported by the evidence, which is that immediately after the victim was killed, the defendant went through her pockets, took her money, her purse and her wallet, and then took her car and other property. (R. 1810). Moreover, the evidence is clear that Marquard and his co-defendant developed a scenario which was used to lure the victim to an isolated area where she was murdered. (R. 1813). Clearly, the murder in this case was planned over a period of time, and was motivated by a desire for the victim's car.

The proof that the taking of Stacey Willet's car was not the "mere afterthought" Marquard claims it was is far stronger in this case than in other cases in which this Court has upheld robbery convictions. For example, in Tafero v. State, 403 So. 2d 355 (Fla. 1981), this Court upheld a robbery and capital murder conviction when the defendant murdered two Florida Highway Patrol

officers and fled in their patrol car. Id. at 359. The evidence in Tafero was that the officers approached the defendant in a rest area on I-95 and were shot to death. Id. at 358, 359. If Tafero was properly found guilty of armed robbery, and that is the law, then Marquard's armed robbery conviction must stand. If the taking in Tafero was not an afterthought, then the taking in this case certainly cannot be given the lengthy planning present in this case. This claim is without merit.

POINT 5

THE TRIAL COURT DID NOT IMPROPERLY RESTRICT THE PENALTY PHASE CLOSING ARGUMENTS.

Marquard argues that he should have been allowed to argue to the jury that he could receive a sentence of life imprisonment for armed robbery which ran consecutive to the sentence imposed for the murder conviction. Because the state's objection to that argument was sustained, Marquard claims that his opportunity to present mitigating evidence was impermissibly restricted. This claim is without merit.

Marquard relies upon Jones v. State, 569 So. 2d 1234 (Fla. 1990), for the proposition that he should have been allowed to argue the technicalities of sentencing as non-statutory mitigation. Jones is distinguishable from this case because in Jones the defendant sought to argue that the defendant could receive two consecutive life sentences for his two capital murder convictions. Id. at 1239. In this case, Marquard had only one murder conviction, and that conviction was the sole matter at issue in the penalty phase of his capital trial. To allow the argument that Marquard claims was proper would invite the jury to speculate about the ultimate sentence to be imposed when the jury has absolutely no input into the sentencing decision as to the robbery conviction. This argument carries with it the potential for confusing and misleading the jury about matters which are not before them. Such an argument is not non-statutory mitigation, it is sheer rhetoric that has no place in the context of capital sentencing.

The rule of law that Marquard advocates would inject into the capital sentencing process the very sort of arbitrary and speculative matters that have been consistently rejected in modern death penalty decisions. While the state does not dispute the principle that relevant non-statutory mitigating evidence should not be barred, the sort of evidence that Marquard claims he should have been allowed to introduce invites the jury to speculate about how the judge will sentence the defendant on a charge on which the jury does not render an advisory verdict. This is not Skipper evidence, nor is it mitigating evidence that falls into any other category of non-statutory mitigation. It is no more than an invitation to the jury to guess what sort of sentence will be imposed.

After this Court decided Jones, upon which Marquard relies, this Court decided Nixon v. State, 572 So. 2d 1336 (Fla. 1990). In Nixon, this Court held that "[t]he fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime." Id. at 1345 [emphasis added]. To the extent that Jones differs, it has apparently been superceded, given the Nixon court's express holding that the potential sentence is irrelevant to the circumstances of the offense. Moreover, as this Court stated in Nixon, "[a]s to offenses in which the jury plays no role in sentencing, the jury will not be advised of the potential penalties." Id.

In this case, Marquard argued that a lengthy prison term was possible for the armed robbery conviction, and that that was

a factor to be considered in sentencing. (R. 1745). That was more than he was entitled to argue. The trial court's ruling was correct, and Marquard is not entitled to any relief.

POINT 6

THE TRIAL COURT PROPERLY ALLOWED INQUIRY INTO MARQUARD'S CRIMINAL HISTORY DURING CROSS-EXAMINATION OF THE DEFENSE MENTAL STATE EXPERT.

Marquard argues that the trial court improperly allowed the state to question his hand-picked mental state expert about Marquard's prior criminal history. This claim is related, at least in part, to Marquard's objection to allowing an examination by a mental state expert retained by the state. Marquard's claim is without merit for two independently adequate reasons.

First, the precise issue contained in Marquard's brief has previously been presented to and rejected by this Court. See, e.g., Jones v. State, 612 So. 2d 1370 (Fla. 1993). In Jones, this Court held that "[t]he defense opened the door to this testimony through the expert's reliance on Jones's background, and the court did not err in admitting this testimony." Id., at 1374. That is the precise situation that exists in this case, and there was no error. A review of the record leaves no doubt that Marquard's expert witness relied upon and considered Marquard's prior criminal history in arriving at his opinions and conclusions. Consequently, that criminal history is fair game for cross-examination, and there was no error in the trial court's ruling. Marquard is not entitled to relief on this claim.

The second reason that the trial court committed no error is because the questioning complained of was relevant to the opinions and conclusions of the state's expert as well. During

the course of the pretrial proceedings, the trial court ruled, at Marquard's insistence, that the mental state expert engaged by the state could not conduct an evaluation of the defendant. (R. 701). As a result of that ruling, the state expert was limited to reviewing documents and listening to the testimony of the defense expert. Consequently, whatever information was in the possession of the defense expert was obviously highly relevant to the opinions of the state's expert, and, as such, was properly elicited during cross-examination.

Further, the defendant's criminal history is obviously relevant to any mental state diagnosis. While Marquard attempts to downplay the significance of his criminal history to a diagnosis by a mental health professional, the fact remains that his criminal history is very relevant. While the defense expert diagnosed Marquard as having "personality disorder not otherwise specified" (R. 1634), the difference between that diagnosis and a diagnosis of antisocial personality disorder is greater than Marquard claims. (R 1702). Further, for the reasons discussed at pp. 32-33, below, it is possible that the diagnosis made by Marquard's hand-picked expert is incorrect. For that reason, it was proper for the trial court to allow thorough and sifting cross-examination into the bases of the defendant's expert's opinions. There was no error, and Marquard is entitled to no relief.

POINT 7

THE UNDER SENTENCE OF IMPRISONMENT AGGRAVATOR WAS PROPERLY FOUND.

Marquard argues that the under sentence of imprisonment aggravating circumstance was improperly applied in his case. The basis of his argument is that the evidence was insufficient to establish this aggravating factor and that the offense for which Marquard was on parole does not exist in the State of Florida. Neither of those claims have merit.

A. The sufficiency of the evidence. To establish the factual basis of this aggravating circumstance, the state introduced a certified copy of Marquard's judgment of conviction from the State of North Carolina. (R. 1606). That document indicates that the defendant received a two-year sentence on February 13, 1991, for an offense denominated "misdemeanor larceny" by the State of North Carolina. Id. The state further presented the testimony of a North Carolina parole officer who testified that Marquard was under her parole supervision at all times relevant to this offense. See, e.g., R. 1600; 1605. In the face of this evidence, Marquard argues that the state failed to prove that he was under a sentence of imprisonment at the time of the murder giving rise to this case.[2] Florida law is settled that the under sentence of imprisonment aggravating circumstance is properly found when the defendant is on parole at the time the murder is committed. See, e.g., Carter v. State, 576 So. 2d 1291

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[2] Marquard does not contend that he did not commit the North Carolina offense, only that his parole status as a result of that offense should not be used as an aggravating circumstance.

(Fla. 1991). There is no dispute that Marquard was on parole at the time of the murder and, because that is the inquiry relevant to the under sentence of imprisonment aggravator, this claim is without merit.

B. The classification of the offense. Marquard argues that his North Carolina conviction was not for an offense which would be a felony under Florida law and that therefore the prior conviction should not have been used to establish an aggravating circumstance. This claim is without merit.

Marquard's argument is based upon the premise that misdemeanor larceny in North Carolina is the same as petit larceny in Florida. That position is incorrect. The record is utterly devoid of support for the defendant's claim that the offense would have been a misdemeanor if it had been committed in Florida. While the State has the burden of proof as to aggravating circumstances, the state proved beyond a reasonable doubt that Marquard was on parole at the time of this murder. To the extent that Marquard claims that the North Carolina conviction is for an offense that would be a misdemeanor in Florida, that is, at most, a matter that goes to the weight to be given to this aggravator, and is a matter that Marquard could have presented evidence about had he chosen to do so. Marquard presented no evidence to support his claims, and he should not be heard to complain. Marquard makes the assertion that he could not be under a sentence of imprisonment had he been convicted of petit larceny under Florida law because he could not have been placed on parole. That argument misses the point. Marquard was

in fact placed on parole, was required to report to a parole officer, and in fact violated that parole status. (R. 1605). His status was clearly that of a parolee under any definition of that term. Surely Marquard does not suggest that an individual incarcerated in a county jail for a misdemeanor offense is not under a sentence of imprisonment for purposes of the death penalty act. The claim contained in his brief is equally without merit.

The law is settled that parole status establishes the under sentence of imprisonment aggravator. Likewise, there is no serious dispute about Marquard's parole status at the time of the murder. Instead, Marquard argues that North Carolina parole is somehow different from Florida parole and that, because his North Carolina stance would not be parole-eligible in Florida, that conviction should not be used to establish an aggravating circumstance. That is a distinction without a difference. Marquard was on parole status, and that is sufficient to establish this aggravator.

C. Even if the trial court erred, that error was harmless. Even if it was error to find the under sentence of imprisonment aggravator, that error was harmless. That aggravator is a relatively weak one anyway, and, even if it is not considered in the sentencing calculus, there is no error. See, e.g., Barclay v. Florida, 463 U.S. 939, 955 (1983); see also, Lindsey v. Smith, 820 F. 2d 1137, 1153 (11th Cir. 1987). Given the other aggravating circumstances present in this case, the death sentence is well-supported by the remaining aggravators. Marquard is not entitled to any relief.

POINT 8

THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR WAS PROPERLY APPLIED.

Marquard argues that the murder for which he was convicted and sentenced to death was not especially heinous, atrocious or cruel. This argument is predicated upon Marquard's view of the evidence, under which the victim lost consciousness immediately. However, that self-serving interpretation is not supported by a fair reading of all of the evidence.

Only two injuries can be objectively identified based upon the physical evidence. Those injuries are to the front left chest at the level of the fifth and sixth ribs, and an injury to the neck at level of the fifth cervical vertebrae. (R. 1011-1012). When those identifiable injuries are considered along with the testimony of the co-defendant, the conclusion must be that the stab wound to the chest was inflicted before the injury to the neck. Moreover, the evidence was uncontroverted that the chest wound would not necessarily be fatal. (R. 1016-1017). In fact, even the neck wound would not necessarily have caused an immediate loss of consciousness. (R. 1016).

Marquard's co-defendant testified that Marquard held the victim's head under water on two occasions, and that after the first attempt to drown the victim she was still moving. The co-defendant testified that the neck wound was not inflicted until after the second drowning attempt. (R. 1126). Taking this testimony as true, it is apparent that Stacey Willets was alive at least during the first attempt to drown her. The evidence

does not establish anything other than a brutal and vicious murder which was without doubt torturous to the victim. The facts of this case demonstrate a murder that was per se heinous, atrocious and cruel. See, e.g., Santos v. State, 591 So. 2d 160 (Fla. 1991); Hitchcock v. State, 578 So. 2d 685 (Fla. 1990). This aggravating circumstance is well established, and Marquard is not entitled to relief.

POINT 9

THE COURT CORRECTLY FOUND THE FOR PECUNIARY GAIN AGGRAVATOR.

Marquard argues that the trial court should not have found the section 921.141(5)(f) "for pecuniary gain" aggravating circumstance. However, the trial court's sentencing order clearly indicates that the court properly treated the "during a robbery" and the "for pecuniary gain" aggravating circumstances as a single aggravator. (R. 538). This claim is without merit for the reasons discussed at pp. 14-15, above.

POINT 10

THE COURT PROPERLY FOUND THE COLD, CALCULATED AND PREMEDITATED AGGRAVATOR.

Marquard argues that the cold, calculated and premeditated aggravating factor should not have been found to exist. Apparently, Marquard claims that there was insufficient support for this aggravator, and that it is unconstitutionally vague. Those claims were not raised by timely objection at trial, and are therefore procedurally barred. See, e.g., Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993). Neither of those claims has merit. The trial court accurately summarized the evidence supporting this aggravating circumstance as follows:

> Before Marquard and Abshire left North Carolina, they discussed killing Stacey Ann Willets. Marquard brought it up again while in South Carolina and had tried to persuade Abshire to find a place on the way to Florida to kill her. Marquard, Abshire and Stacey had been in St. Augustine for a few days. Marquard and Abshire went to rent a room for two. On the way back to their motel, they made their final plans to lure Stacey into the woods and kill her. There is overwhelming evidence that the idea of killing Stacey originated with Marquard. The afternoon before she was actually killed Marquard and Abshire carefully concocted a story to lure her into an isolated area. Such planning is proof beyond reasonable doubt of the heightened premeditation required by this aggravating circumstance.
>
> There is no proof at all of any moral or legal justification. The three identifiable motives are: (1) to get rid of her because she was a burden; (2) to take her property, and (3) to experience killing a human being. None could conceivably qualify as a pretense of moral or legal justification.

(R. 540). In the face of this evidence, which unequivocally establishes that this murder was discussed over a period of days, planned over a span of several hours, and carried out by means of an elaborate and rehearsed scenario, Marquard contends that the heightened premeditation required by this aggravator does not exist. This case demonstrates far more calculation and planning than necessary to support this aggravator. See, e.g., Durocher v. State, 596 So. 2d 997, 1001 (Fla. 1992). In fact, the extreme premeditation present in this case equals, and perhaps exceeds, that found in Fotopoulous v. State, 608 So. 2d 784 (1992). See, also, Shere v. State, 579 So. 2d 86 (Fla. 1991); Slawson v. State, 619 So. 2d 255 (Fla. 1993).

To the extent that Marquard claims that "the murders [sic] were 'planned' to allow Marquard to use the car" and therefore "the planning" aspect overlaps impermissibly with the "pecuniary gain" aggravator, that claim is specious. See, e.g., Durocher v. State, 596 So. 2d at 1001. To the extent that Marquard claims that "the murders [sic] were simply done from an impulse of his personality disorder", there is nothing to even suggest that the murder of Stacey Willets was impulsive. No such evidence was presented, and the facts of this case clearly establish the level of premeditation required to prove this aggravator. This claim is utterly meritless.

POINT 11

THE "ERRORS" WHICH MARQUARD CLAIMS HAD THE CUMULATIVE EFFECTIVE OF DENYING A FAIR TRIAL WERE NOT ERRORS AT ALL.

Marquard identifies five errors which, according to him, "have the cumulative effect of denying Happ [sic] his constitutional right to a fair trial." For the reasons discussed below, no error occurred, and Marquard's claims are without merit.

A. Denial of judgment of acquittal. In his brief before this Court, Marquard argues for the first time that without the testimony of his co-defendant the state's case was entirely circumstantial. For this reason, Marquard argues, his motion for judgment of acquittal should have been granted. However, that reason was not advanced at trial (R. 1368), and Marquard failed to preserve the issue he now raises.

Moreover, even if Marquard's trial objection had been the same one advanced on appeal, it would make no difference. The fact that inculpatory evidence was elicited through a co-defendant does not render that evidence inadmissible. The credibility of the co-defendant's testimony is a jury question, and that credibility determination should not be disturbed on appeal.

B. The photographic and physical evidence. Marquard contends that it was error to allow the introduction of evidence of a photograph of the victim, a facsimile of the knife used in the murder, and two items of the victim's clothing. Insofar as the photo of the victim is concerned, it is specious to suggest

that the jury is not entitled to know what the victim looked like before she was murdered. See, e.g., Payne v. Tennessee, 111 S. Ct. 2597 (1991). To the extent that Marquard claims that the photo depicted signs of "Down's Syndrome", there is no evidence to support the claim that Stacey Willets suffered from Down's Syndrome. (R. 1091-1092). Regardless, that would not render the photograph inadmissible; the victim is certainly relevant to the trial, and no claim to the contrary can credibly be made. As the Payne court noted, "'murder is the ultimate act of depersonalization.' Brief for Justice for All Political Committee, et al. as Amicus Curiae 3. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is unique about the person. The constitution does not preclude a state from deciding to get some of that back." Payne v. Tennessee, 111 S. Ct. at 2612 (concurring opinion of O'Connor, J., joined by White and Kennedy).

The items of clothing at issue were recovered at the scene of the murder, and their relevance cannot reasonably be questioned. To the extent that Marquard claims that the kukri knife introduced into evidence did not sufficiently resemble the weapon used in Stacey's murder, the evidence at trial established that the knife was an exact copy of the knife owned by the defendant. (R. 1149).

C. The prosecutorial argument claim. Marquard argues that the prosecutor improperly attempted to bolster the credibility of Michael Abshire during the state's guilt phase closing argument.

Marquard has waived the objection advanced in his brief because he did not object on these grounds at trial. Florida's regularly-enforced contemporaneous objection rule bars consideration of this claim on appeal. See, e.g., Correll v. State, 523 So. 2d 562, 566 (Fla. 1988). Moreover, even if Marquard's objection had been sufficient to preserve the issue for review, he would not be entitled to relief because the argument complained of was a legitimate reply to the defendant's closing argument in which he attacked Abshire's credibility. (R. 1393-1394; 1398-1401; 1403; 1405-1408). What Marquard claims was improper was actually a response to Marquard's own argument. He is entitled to no relief.

D. The sequestration of the mental state expert claim. Marquard's entire strategy concerning the presentation of expert mental state testimony was to prevent the state's expert from evaluating the defendant. Marquard succeeded in preventing an evaluation, and now complains that the state's expert should not have been allowed to observe a portion of the trial. Marquard's successful avoidance of an evaluation by anyone other than his hand-picked expert is inconsistent with the truth-seeking function of the court. The position Marquard takes in his brief stands reason on its head.

No one can question the basic premise that the purpose of a criminal trial is to find the truth. However, Marquard's position throughout these proceedings has been inconsistent with that principle, at least as far as the mental state testimony is concerned. In fact, Marquard objected to any use by the State of

any mental state expert. (R. 701). In raising a mental state defense and avoiding an evaluation by the state's expert, Marquard received a benefit to which he was not entitled. Marquard now seeks a reversal because the field was somewhat leveled. What Marquard fails to recognize is that he was free to allow his hand-picked expert to observe the proceedings as well. The fact that he did not make those arrangements does not entitle him to relief. Moreover, there can be no question that the testimony heard by the state's expert was properly considered by him in reaching his opinion. See, e.g., § 90.904, Florida Statutes. Likewise, there is no suggestion that Marquard's expert did not have access to that information, as well as all of the information gathered during his face-to-face evaluation of the defendant. Marquard cannot identify any prejudice because there is none; he received a windfall and should not be heard to complain. See, e.g., Burns v. State, 609 So. 2d 600 (Fla. 1992).

Marquard's claim that he was denied fundamental fairness is no more than hyperbole. The state should have been allowed to obtain its own evaluation of the defendant and, in fact, no federal court to address the issue has held that the state cannot obtain an evaluation when the defendant puts his mental state at issue. See, e.g., Isley v. Dugger, 877 F. 2d 47 (11th Cir. 1989); United States v. Byers, 740 F. 2d 1104 (D.C. Cir. 1984) (en banc); United States v. Cohen, 530 F. 2d 43 (5th Cir. 1976); United States v. Albright, 388 F. 2d 719 (4th Cir. 1968). Moreover, the Supreme Court has noted that "it may be unfair to the state to permit a defendant to use psychiatric testimony

without allowing the state a means to rebut that testimony." Powell v. Texas, 109 S. Ct. 3146 (1989).

In this case, the state's ability to rebut Marquard's psychiatric evidence was severely restricted. Speaking to another issue, the Eleventh Circuit held that "[t]he constitution does not require one-sidedness in favor of the defendant." Davis v. Kemp, 829 F. 2d 1522, 1528 (11th Cir. 1987). Marquard has no basis for complaint because he received far more than he should have. This claim is specious.

E. The opinion evidence claim. Marquard complains that the state's mental state expert should not have been permitted to testify that many incarcerated individuals are diagnosed as having antisocial personality disorder. To the extent that Marquard claims that that testimony lacks reliability, that claim is incorrect. See, Diagnostic and Statistical Manual Third Edition, Revised, at p. 343.

Likewise, Marquard's claim that this testimony lacked relevance is also without merit. The state's expert also testified that many incarcerated individuals have personality disorder not otherwise specified, which is the diagnosis made by Marquard's hand-picked expert. (R. 1704-1705). That testimony is relevant to the jury's determination of aggravation and mitigation, and was properly admitted. Of course, antisocial personality disorder is not mitigating. Harris v. Pulley, 885 F. 2d 1354, 1381 (9th Cir. 1988). Contrary to Marquard's claim, he is a common criminal, and he is not entitled to relief.

POINT 12

SECTION 921.141 IS CONSTITUTIONAL.

On pp. 77-93 of his brief, Marquard raises a number of boiler-plate challenges to the constitutionality of the death penalty statute. To the extent that Marquard challenges the heinous, atrocious and cruel and the cold, calculated and premeditated aggravating circumstances, those claims are addressed above. See, pp. 25-26, 28-29, above. To the extent that Marquard raises a Caldwell claim, that claim is not preserved for review. Rutherford v. State, 545 So. 2d 853 (Fla. 1989).

To the extent that Marquard raises claims concerning counsel (p. 81), the trial judge (p. 81-82), the Florida Judicial System (p. 82-85), "procedural technicalities" (p. 88), and "other problems with the statute" (p. 89-93), those claims are barred because they were not raised by timely objection. See, e.g., Rutherford v. State, supra.

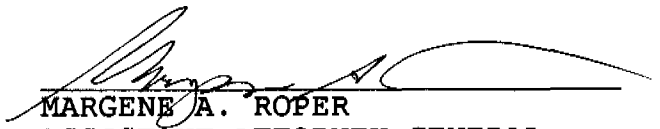
To the extent that Marquard raises a claim concerning the Tedder rule and the hindering governmental function aggravating circumstance, those claims are not present in this case. To the extent that Marquard challenges this Court's review, that claim is meritless.

CONCLUSION

For the reasons discussed above, this Court should affirm the conviction and death sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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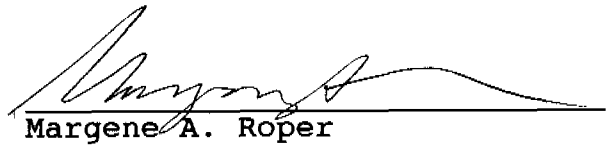
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by hand delivery to the Public Defender's box at the Fifth District Court of Appeal to George D. E. Burden, Assistant Public Defender, this 16th day of December, 1993.



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