IN THE SUPREME COURT OF FLORIDA

KEVIN SINCLAIR,

Appellant,

v. Case No. 82,499

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following is offered to supplement and/or clarify the statement of the case and facts recited by the appellant:

Prior to trial, a hearing was held on the appellant's motions to suppress his statements and the clothes he gave to the police during the interview in his home in the early morning hours of January 21, 1993, (R. 1343). The motions claimed that the interview amounted to a custodial interrogation, and that the appellant had not been advised of his Miranda rights prior to the interview (R. 1585-1588). Palm Bay Detectives Don Bauman and George Santiago were the only witnesses at the hearing (R. 1344, 1384, 1390). According to their testimony, they had developed information establishing the appellant as a suspect during the course of their investigation (R. 1344-1361). Bauman called the appellant's home around 11:00 or 11:15 p.m. on January 20, and the appellant's mother invited them to come to the house and talk with the appellant (R. 1362). When they arrived, she invited them in and Bauman, Santiago, the appellant, and his mother sat around the dining room table (R. 1365, 1385). Although four other officers had come to the house, Bauman and Santiago were the only ones to go inside and the others were waiting in cars down the street (R. 1362-1364).

The atmosphere was relaxed and casual (R. 1366-1368, 1385-1386). The detectives were dressed in plain clothes, Bauman's gun and handcuffs were concealed and Santiago was not carrying a

gun or handcuffs (R. 1366, 1385). They did not give any orders or directives to the appellant or his mother (R. 1367, 1385, 1387). Bauman thanked them for letting him come over so late, and explained what they were investigating and how the appellant's name had come up (R. 1368, 1386-1387). He told them that the appellant was not under arrest, this was a follow up investigation and the appellant did not have to talk to him (R. 1368, 1386).

Bauman completed an interview form, swore the appellant to tell the truth, and had the appellant sign the form (R. 1368). The appellant never expressed any reservations or reluctance to speak with them (R. 1369). Bauman turned on a tape recorder and taped the appellant's statement (R. 1369, 1387). At the end of the statement, Bauman asked if they could see the clothes the appellant had indicated that he'd worn that day (R. 1369-1370, 1387). The appellant said "sure" and walked over to a bathroom, opened a hamper and got out the clothes (R. 1370, 1388). Santiago followed the appellant to the bathroom and the appellant handed the clothes to Santiago (R. 1370, 1388). Bauman asked if they could take the clothes for further examination and the appellant said they could (R. 1371). Bauman filled out a property receipt for the clothes, and the appellant's mother asked if she could see them (R. 1371-1372, 1388). Santiago handed her the clothes, and the mother asked the appellant about a stain that was on the shorts (R. 1371, 1388). The appellant told her that he'd fallen down and got them dirty, and the mother handed the clothes back to Santiago (R. 1372, 1389).

Later that morning, around 9:00 or 9:15, Bauman tried to call the appellant but did not get an answer (R. 1373). He drove to the appellant's house, and asked the appellant if he would mind coming to the police station to answer some more questions (R. 1373). The appellant said he would come, and Bauman asked if he had any transportation (R. 1373). The appellant said he didn't, so Bauman offered him a ride, which he accepted (R. 1373). At the station, the appellant was given his Miranda rights, but waived his rights and made a statement admitting his involvement in the shooting (R. 1373-1374).

Following the detectives' testimony, the trial court made a factual finding that the "overwhelming weight" of the evidence demonstrated that the appellant was not under arrest, and that a reasonable person in the appellant's position would not conclude that he was in custody at the time of the interview in his home (R. 1400-1401). The court specifically noted the unrebutted nature of the testimony, and that there was no restraint on the appellant's movement and no threats or promises made (R. 1401). Thus, the court concluded that Miranda warnings were not necessary, and that the appellant's statements were free and voluntary (R. 1402). The motion to suppress was denied (R. 1402).

A defense motion to continue the trial was filed on April 9, 1993, and the motion was granted and trial was continued to June, 1993, and then reset for August 16, 1993 (R. 1508-1510, 1589). A motion to continue the August 16 trial date was filed, alleging

that "lead" defense counsel Susan Kraus had resigned and been replaced by Ernest Chang, and Chang was not fully prepared for trial (R. 1589). A hearing was held on this motion on August 9, 1993 (R. 1228, 1302).

The defense argued at the hearing that the state's disclosure on August 2, 1993, of two possible witnesses relating to the DNA testing required additional time for preparation (R. 1307-1310). The prosecutor noted that these witnesses would only be used in rebuttal in the event that the defense chose to attack the reliability of the DNA evidence (R. 1312). The DNA expert to be used at trial had been deposed prior to the hearing (R. 1308). There was also a discussion about the DNA testing procedure used in this case (R. 1320-1321). The prosecutor noted that the PCR test used here was an exclusion/inclusion test, which the court found was more like standard blood typing evidence than complex DNA statistical analysis testimony (R. 1320-1321, 1329-1330). The court asked what other scientific or technical evidence would be involved in the trial, and the prosecutor responded that the case was fairly straightforward - there were no eyewitnesses, only the defendant's statements, no weapon so no ballistic analysis, and no blood spatter testimony (R. 1333-1335).

The judge gave serious consideration to the motion to continue, taking a recess to weigh his decision before announcing his ruling (R. 1325-1327). He expressly stated that he was not denying the continuance for convenience or putting his schedule ahead of justice, but noted that the appellant had been sitting

in jail a long time, and that there was no indication that the public defender's workload was going to decrease over the next month or so (R. 1329, 1331, 1332).

The motion to continue was renewed on the morning of trial (R. 1, 8). Defense counsel Chang argued that the state had provided supplemental discovery on Wednesday, August 11, including an FDLE lab report on the bullet that had been recovered from the victim (R. 8-9). The prosecutor indicated that he had just received the report, but there was no new information and it only related to the chain of custody on the projectile (R. 9-10). The defense claimed that the report helped them, because the report indicated that only a fragment was recovered, and the appellant needed time to explore and develope an argument that this fragment supported the defense theory that only one bullet was fired (R. 13-14). However, the defense acknowledged that the surgeon that removed the projectile had characterized it as a fragment, and the property receipts provided to the defense months earlier referred to the "projectile fragment" taken from the victim's head during surgery (R. 44, 46).

The court noted that during the prior hearing for a continuance, Chang had represented that he would be lead counsel, but in reviewing the file the judge had noticed that Assistant Public Defender Douglas Reynolds had been significantly involved in taking depositions and preparing for trial (R. 15). The judge wanted to know why it had not previously been explained to him

that Reynolds had been working on the case, and wanted the record to clearly reflect that Reynolds had been involved from the beginning (R. 15-16). Reynolds admitted that he had been designated lead counsel "all the way through it" and any representations to the contrary had been misstatements (R. 17). After considering all arguments and reviewing the FDLE report, the court specifically found that there was no new information included in the report, and denied the motion for continuance (R. 48).

At trial, the evidence established that the victim in this case, Clarence "Bud" Bartee, responded to the appellant's call for a taxicab in Melbourne, Florida on January 20, 1993 (R. 715-716, 836, 840-842, 894, 921-924, 1034). The appellant testified at trial that he never intended to pay for the cab, but he needed a ride to his mother's house in Palm Bay (R. 1032, 1036, 1051-1052). The appellant gave Bartee the address of a vacant house near his mother's home (R. 1037). When they got to the address, the appellant noticed that it was being cleaned, so he directed Bartee around the corner because he did not want to be caught running from the cab (R. 1037, 1053).

According to the appellant, he took his loaded .22 revolver out of his pocket to discourage Bartee from chasing him (R. 1038). However, he claimed that as he slammed his shoulder into the door of the cab to get it open, the gun "went off" (R. 1039). He explained that the gun was broken and fired automatically anytime the trigger was touched (R. 1043). The appellant

testified that he never pointed the gun at Bartee and he was sure that it only fired one time (R. 1039-1041, 1054). He denied threatening or even speaking to Bartee, claiming Bartee was looking the other way and never saw the gun, and denied that he took any money (R. 1035, 1040). He also claimed that he threw the gun in the canal behind his mother's house (R. 1046).

The evening before Bartee was killed, the appellant's friend, Evette Busby, heard the appellant discussing his money problems (R. 895). Busby said that the appellant was thinking of robbing a cab (R. 896). At trial, the appellant admitted that he had signed checks and presented his mother's driver's license to a bank teller on two occasions, withdrawing a total of $4000 from his mother's account (R. 982-983, 1033-1034, 1050). He had a girl in the car with him that resembled his mother (R. 982-983, 1050). According to the appellant, his friends had suggested the plan, and they got most of the money (R. 1033). However, the appellant denied that getting caught had created a money problem for him, as it had been worked out so that the bank would press charges against him and then his mother could get the money back (R. 1044).

An autopsy clearly revealed that Bartee had been shot twice in the head, and that the separate pathways from the entrance wounds went in different directions within Bartee's head (R. 697). One of the wounds was atypical, with lacerations, due to its location and the presence of bone behind the wound (R. 694-695). Either of the shots could have been fatal (R. 698). In

addition, the heat effect visible near both wounds indicated that both were near contact wounds, "fairly close" to the skin when fired, and the presence of gunshot residue meant the gun was certainly no more than twelve inches away (R. 681, 687, 695-696, 706-707).

Although Bartee had collected over sixty-one dollars in fares, not including tips, there was no money discovered in or around his cab or in the vicinity, despite a thorough search (R. 639, 647, 754-755, 842-845). On his person, Bartee had a little over ten dollars in addition to the three, two-dollar bills and lucky silver dollar he always carried (R. 868, 1011). In addition, the canal behind the appellant's mother's house was searched several times with hand rakes and magnets, and by a dive team on their hands and knees, but no gun was ever recovered (R. 819, 868-869). Nearby canals and vacant lots in the half-mile area between the crime scene and the appellant's mother's house were repeatedly searched as well (R. 756-757, 767, 819-820, 868-869).

The appellant gave several inconsistent and conflicting statements throughout the course of the investigation (R. 787, 796, 815). At trial, the appellant explained that he lied to the police because he didn't want to get caught (R. 1038, 1049).

In the penalty phase, the state relied on the evidence presented during guilt phase to establish the merged aggravator of during the course of a robbery/pecuniary gain (SR. 54). Defense witness Tamara Brookins had known the appellant through

school, and she helped him get a job at Wendy's, where she used to work, by putting in a good word with the manager and filling out his application because he didn't always comprehend very well (SR. 56, 59). She testified that the job didn't work out because the appellant quit going to work (SR. 67-68). He had also quit going to school (SR. 68).

The appellant admitted the he was not working or going to school in the fall of 1992, although he believed he could get a job anytime he wanted (SR. 73, 88, 91-92). He stated that he quit school because he had so many referrals to the dean for being tardy, and that he was at school on time, but late to his classes (SR. 88-89). He also noted that when he was in junior high in New York, he made good grades in the "regular" classes, but when he got down here they put him in the slow learning disabled class (SR. 77). He admitted that after shooting the cab driver, he did not call an ambulance or the police or tell his mother what had happened (SR. 93).

The appellant's mother also testified (SR. 100). Ms. Re has always worked two jobs and has given the appellant a nice place to live and decent food and clothes (SR. 103, 112). She gave him affection as well as material things, and tried to teach him right from wrong (SR. 112).

The appellant's school records were admitted into evidence (SR. 165). The records indicate that the appellant has demonstrated a performance scale IQ of 100 and 104, a verbal IQ of 86, and full scale IQ of 91 and 95, placing him average classification overall (Def. Ex. 1, see SR. 226-227).

In rebuttal, Melbourne Police Officer James O'Berne testified that the appellant had been arrested for obstruction on July 22, 1992 (SR. 154-155, 158). The appellant was riding in a blue Pontiac Firebird that had been reported stolen (SR. 155-156). Samuel Lavender was driving the car and Sedrick Plain was another passenger at the time (SR. 158). When O'Berne tried to stop the car, a chase ensued until the car was crashed into a curb, and the appellant, Plain and Lavender ran from the car (SR. 156-157).

The appellant's mother also testified that, in an unrelated incident, she had reported her own car stolen, but later discovered the appellant had been using it without her permission (SR. 160-161).

SUMMARY OF THE ARGUMENT

Issue I: The trial court properly conducted a Richardson hearing, and determined that no discovery violation had occurred. The judge found that the state had no knowledge of Busby's statement that the appellant had specifically discussed robbing a cab prior to Busby's testifying in court. Since no violation was established, there was no need to determine whether the appellant was prejudiced from the state's failure to disclose the statement.

Issue II: The trial court properly denied the appellant's motions to continue the trial. The lead counsel in the case, Mr. Reynolds, had been involved since the time that the public defender's office was originally appointed. There was no late disclosure of new information to compel any delay for further preparation.

Issue III: The appellant has failed to demonstrate that his death sentence is disproportionate. The circumstances of the robbery in this case, coupled with the lack of significant mitigation, justify the imposition of the death penalty.

Issue IV: The trial court did not abuse its discretion by refusing to accord much weight to the appellant's age as a mitigating factor. The court's findings as to this factor are supported by the record, and the degree of weight to be given to mitigating evidence is for the sentencing judge.

Issue V: The trial court properly rejected the statutory mitigating factor of no significant history of criminal activity where the appellant had a prior arrest as well as additional criminal conduct for which no conviction had been obtained.

Issue VI: The appellant's argument as to the denial of his motions to suppress has not been preserved for appellate review. Even if considered, the trial court properly denied the motions. The evidence adduced at the suppression hearing clearly demonstrates the voluntary nature of the appellant's consent.

Issue VII: The appellant's attack on the validity of the death penalty statute is also not preserved for review. In addition, the appellant has failed to offer any basis to overturn the wealth of case law upholding the constitutionality of Section 921.141, Florida Statutes.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN ADEQUATE RICHARDSON HEARING.

The appellant initially challenges the trial court's ruling following a Richardson[1] hearing, alleging that the hearing was insufficient and that the court should not have permitted Evette Busby to testify that the night before the robbery the appellant had discussed robbing a cab. However, the appellant mischaracterizes the court's holding below as a conclusion "that the discovery violation was not wilful" when, in fact, the court found that no discovery violation had occurred. Furthermore, the appellant's brief recites isolated statements from the hearing and fails to fully apprise this Court of the circumstances leading to this issue.

During Evette Busby's testimony, she stated that the appellant "was thinking about robbing a cab" and defense counsel objected, noting that he had never been provided with such a statement (R. 896-97). The judge excused the jury from the courtroom and noted for the record "we're conducting what is commonly referred to as a Richardson hearing." (R. 898). The judge asked the prosecutor, Mr. Bausch, whether Busby had advised Bausch prior to trial that the appellant had told her he was going to rob a cab (R. 900). Mr. Bausch responded that if the

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[1] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

specific information about robbing a cab had been told to him, he would have included it in the discovery (R. 900). Bausch recalled that Busby had specifically mentioned the appellant discussing robbing convenience stores and stealing cars then selling the parts to get money, statements which were indisputably disclosed to the defense (R. 897).

Ms. Busby had not been deposed, but had spoken to Mr. Bausch and to the defense attorney, Mr. Reynolds, on separate occasions over the phone (R. 899, 901, 903). According to Reynolds, Busby had told him that she never heard the appellant say he was going to rob a cab, only that someone else told her that they had heard the appellant make such a statement (R. 901). Busby told the judge that she had told both Bausch and Reynolds that she heard the appellant discussing robbing a cab (R. 903). After conferring with both attorneys and the witness, the court concluded

> I'm trying to decide now whether I can perceive or locate a discovery violation here in accordance with your objection. And Mr. Bausch has indicated to me that he does not recall this lady specifically telling him about the Defendant's plan to rob a cab, per se, but only that she related to him the Defendant's plan to rob somebody or some people in order to gather money to repay the debt that he owed. And so it's very difficult for me to conclude here today that there's been a willful discovery violation at this point.
>
> I'm of the opinion that had Mr. Bausch been specifically told about the intent of the Defendant to rob a cab, that would have been something that probably would have stuck in his memory bank, he would have included that in the discovery. Clearly, that would

> be evidence that he would want to come out before this jury, and clearly he would know that if he willfully withheld that type of evidence that it would be excluded, and he could be facing a mistrial by not producing it and having it come out in trial as it's done here today.
>
> So there's nothing for me to believe that this information that was just related to him by this witness today wasn't the first time that he heard it.
>
> ....
>
> So I have to first conclude if there's been a discovery violation and then determine whether it has been willful or inadvertent. And if there was a discovery violation in this case, I cannot conclude that it was willful and, at best, that it was inadvertent and I'm confident that Mr. Bausch would have noted in detail any statements by any witness that the Defendant admitted to a plan to rob a cab in particular.
>
> Since he didn't do that, I have to assume that it didn't happen that way and, therefore, I will conclude here today that your motion and your objection and your motion for mistrial should be denied because I cannot find a discovery violation that would be anywhere near classified as willful. And this appears to be one of those situations where information comes out for the first time on the witness stand as it relates to the cab issue.
>
> ....
>
> ... But I don't believe that I can grant a mistrial or otherwise find a discovery violation based on the objection and the matters presented at this point.

(R. 908-912).

Clearly, the trial judge made a factual finding that the state had no knowledge that Busby would testify to having heard the appellant discuss robbing a cab, and therefore no discovery violation occurred. Under these circumstances, it was not necessary to inquire as to any possible prejudice to the

appellant. Smith v. State, 500 So. 2d 125 (Fla. 1986) (purpose of Richardson hearing is to determine if a discovery violation is harmless); Banks v. State, 590 So. 2d 465 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 654 (Fla. 1992). It is clear that no Richardson hearing is required if there is no discovery violation. Bush v. State, 461 So. 2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1986). In Bush, this Court held that the state's failure to disclose a change of testimony by a witness, unlike the failure to disclose the name of a witness, does not amount to a discovery violation so as to require a Richardson hearing. 461 So. 2d at 938. See also, Johnson v. State, 545 So. 2d 411 (Fla. 3d DCA), rev. denied, 551 So. 2d 461 (Fla. 1989); Freeman v. State, 494 So. 2d 270 (Fla. 4th DCA 1986).

It should be noted that a situation similar to what occurred in this case was considered in McCray v. State, 640 So. 2d 1215 (Fla. 5th DCA 1994). In that case, the fifth district reversed for a new trial, finding that there was no evidence to support the trial judge's finding that the state had no knowledge of the evidence. The court noted that prosecutorial statements asserting a lack of knowledge or intent to disclose are not relevant, citing Hickey v. State, 484 So. 2d 1271 (Fla. 5th DCA), rev. denied, 492 So. 2d 1335 (Fla. 1986); Hutchinson v. State, 397 So. 2d 1001 (Fla. 1st DCA 1981); and Taylor v. State, 292 So. 2d 375 (Fla. 1st DCA), cert. denied, 298 So. 2d 415 (Fla. 1974). However, those cases were not applicable because they involved situations where the state had actual or constructive possession

of the evidence. In Hutchinson and Taylor, the police were aware of statements by the defendants, but had not disclosed the statements to the prosecutor; in Hickey, the prosecutor had knowledge of the statements but had not intended to use the statements at trial.

It is respectfully submitted that McCray was wrongly decided. As noted in the dissent, there was no dispute in the trial court as to the state's lack of knowledge. Rather, the defense had contended that *any* witness for the state became a "state agent" and therefore the knowledge of that witness must be imputed to the prosecutor. The district court did not accept that reasoning, and where the only person with knowledge of evidence that was not disclosed to the defense was not a state agent, there is no authority for the apparent holding in McCray that a trial judge must place a prosecutor under oath and accept sworn testimony in order to fulfill the requirements of a Richardson inquiry.

None of the rules of criminal procedure relating to discovery require the state to disclose information which is not in its actual or constructive possession. Rule 3.220(b)(1), (2), Fla.R.Crim.P.; State v. Maier, 366 So. 2d 501 (Fla. 1st DCA 1979). The trial court's factual finding in this case that the prosecutor had no knowledge that Busby heard the appellant discuss robbing a cab is supported by the prosecutor's response to the court. Although Busby believed that she had told the prosecutor, her belief was not persuasive as she also stated that

she had told defense counsel about the appellant's statements, and defense counsel responded that she had not (R. 897, 901, 903).

Finally, it must be noted that the Richardson hearing that was conducted below was adequate. The judge heard from both attorneys and questioned the witness about the discovery of Busby's testimony (R. 896-908). He specifically found that no violation occurred, but even if some violation was evident, it was clearly not wilful (R. 908-911). Defense counsel was provided the opportunity to identify and describe any prejudice, and in fact argued that this testimony went to a very important issue as it directly addressed the appellant's intent to rob the cab, and that defense counsel's conversations with Busby had led him to believe that she had never heard the appellant make this statement (R. 905). Thus, the purpose of the hearing was fulfilled. Smith, 500 So. 2d at 126. The trial court's denial of his objection to this evidence constitutes an implicit finding that there was no prejudice to the defense (R. 912). See, Wilkerson v. State, 461 So. 2d 1376, 1379 (Fla. 1st DCA 1985) (failure to make explicit findings on each Richardson consideration not reversible error).

On the facts of this case, a sufficient hearing was conducted and the trial judge determined that no discovery violation had occurred. Therefore, the appellant is not entitled to relief on this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY DENYING THE APPELLANT'S MOTIONS FOR CONTINUANCE.

The appellant also challenges the trial court's denial of defense motions to continue the trial, alleging that a change of counsel shortly before trial necessitated additional time for preparation. Of course, as acknowledged by the appellant, such a ruling cannot be disturbed on appeal absent a palpable abuse of discretion. Gore v. State, 599 So. 2d 978, 984 (Fla.), cert. denied, ___ U.S. ___, 121 L. Ed. 2d 545 (1992). No such abuse has been demonstrated in the instant case.

In support of his argument as to this issue, the appellant recites from the pretrial hearing on the motion to continue held on August 9, 1993 (R. 1228, 1302). He notes that Douglas Reynolds had been "assisting" the former assistant public defender and would also assist the new assistant public defender, Ernest Chang (Appellant's Initial Brief, p. 24). The appellant fails to mention that Reynolds' role was clarified when challenged by the judge below as the motion for continuance was renewed (R. 15). Specifically, the judge noted that at the prior hearing, Mr. Chang had represented that he was lead counsel in this case, but in reviewing the file the judge observed that Mr. Reynolds had participated in much of the preparation for trial, including taking depositions (R. 15). Chang denied that he had previously stated that he would be lead counsel (R. 16). The court wanted to know why Reynolds had sat quietly through the

last hearing as if he'd had nothing to do with the case, and wanted the record to reflect that Reynolds had been working on this all along from day one (R. 16-17). Reynolds conceded that he had been designated as lead counsel "all the way through it" and stated that any indication by Chang to the contrary was a misstatement (R. 17).

A review of the trial transcript supports the conclusion that Reynolds was lead counsel. Reynolds argued pretrial motions (R. 1266-1302, 1339); conducted voir dire (R. 334-418); represented the appellant's position on such matters as scheduling and the introduction of exhibits (R. 625, 713, 718, 884, 886, 947, 1012, 1067-1068, 1071, 1075-1078, 1211-1212, 1228); cross examined key witnesses, including Dr. Keller (R. 670), Dr. Wickam (R. 700), Det. Bauman (R. 822), Ronald Knight (R. 846), Evette Busby (R. 914), and Irene Wilson (R. 924); made and argued virtually every objection (R. 646, 655-657, 659, 661, 662, 664-665, 683, 684, 744, 749-752, 761, 772, 774, 783, 786, 811, 835-836, 838, 844, 865, 896-912, 985-996, 998, 999, 1009); presented a closing argument (R. 1080-1110); and participated in charge conferences (R. 1161-1165, 1167-1170, 1172-1173, 1210).

Clearly, the appellant's assertion that a delay in trial was warranted because Reynolds' assistant only had a month to prepare for trial is unavailing. This is particularly true when the specific areas identified as requiring further preparation are considered. The appellant suggests that the state's disclosure of the DNA witnesses on August 2 and the FDLE report on August 11

(neither of which involved evidence actually used at trial) should have compelled the granting of a continuance. The DNA witnesses were identified as potential rebuttal witnesses to be used only if the appellant challenged the reliability of the testing procedure (R. 1312). In addition, the trial court thoroughly explored the issue and determined that the DNA procedure used in this case was not as complicated as the usual DNA test, more along the lines of a blood test with less exacting results (R. 1320-1321, 1329-1330). The evidence itself was not prejudicial to the defense, since the appellant admitting having shot the victim, but claimed that the shooting was accidental. In fact, the defense conceded that the DNA expert did not tell the jury anything that the defense didn't already admit (R. 1105).

The FDLE report provided on August 11 did not contain any information which was not already known to the defense (R. 48). The medical examiner had indicated all along that there were two bullet paths, and only one partial projectile had been recovered during the victim's surgery (R. 44, 697). The defense had been aware for months that the bullet recovered from the victim was only a fragment (R. 41, 44, 46). Thus, the defense had more than sufficient time to develope physical or scientific evidence to support the appellant's statement that he only shot the victim one time. The lack of any such evidence at trial does not reflect that the defense did not have adequate time to explore the issue, only that there is in fact no scientific evidence which supports the one bullet theory.

The trial in this case was originally continued for several months, and the judge expressly granted an extended continuance in order to insure that the case could be tried on the August 16, 1993 date (R. 1327). Mr. Reynolds had been representing the appellant from the time the public defender's office was initially appointed (R. 17). There was not an unreasonably short amount of time so as to compel a continuance for further preparation. See, Herman v. State, 396 So. 2d 222 (Fla. 4th DCA), cert. dismissed, 402 So. 2d 610 (Fla. 1981) (continuance for further preparation in first degree murder case properly denied after six months of discovery).

This case is similar to others recognizing that the denial of a continuance at the outset of trial did not mandate relief. See, Robinson v. State, 610 So. 2d 1288 (Fla. 1992) (defense counsel received written DNA results the day before trial; counsel knew results and knew testing was going on; no abuse of discretion in denying continuance), cert. denied, ___ U.S. ___, 127 L. Ed. 2d 553 (1994); Diaz v. State, 513 So. 2d 1045 (Fla. 1987) (defense counsel received notice of intent to call witness one week prior to trial; deposed witness immediately; continuance sought at start of trial to investigate witness' statement properly denied), cert. denied, 484 U.S. 1079 (1988); Loren v. State, 518 So. 2d 342 (Fla. 1st DCA 1987) (any delay in discovery due to defense counsel, not the state; ample opportunity to prepare and no inability to prepare shown). In addition, the appellant's failure to identify any procedural prejudice is fatal

to his plea for a new trial. Bouie v. State, 559 So. 2d 1113 (Fla. 1990) (defendant failed to show prejudice from denial of continuance after witness disclosed during voir dire); Corbett v. State, 602 So. 2d 1240 (Fla. 1992) (disclosure of witness on Friday prior to Monday trial; defendant not entitled to relief where unable to show what additional impeaching evidence could have been presented had continuance been granted).

The time to be given a defendant to obtain counsel and prepare for his defense is within the discretion of the trial court, "controlled by what is fair, right, and reasonable in each particular case." Brown v. State, 116 Fla. 587, 156 So. 606 (1934). On the facts of this case, the trial court's denial of the appellant's motions for continuance was proper and should not be disturbed by this Court on appeal.

ISSUE III

WHETHER THE APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE.

The appellant next disputes the propriety of his death sentence. Specifically, the appellant suggests his sentence is disproportionate since the only aggravating circumstance was the combination during the course of a robbery/committed for pecuniary gain. The appellant's argument also suggests that there was compelling mitigation which outweighed the one aggravating factor, but this claim is merely a plea for this Court to reweigh the factors, and must be rejected. See, Hudson v. State, 538 So. 2d 829 (Fla.) (in making proportionality determination, Court will not reweigh mitigation), cert. denied, 493 U.S. 875 (1989).

The fact that only one aggravating factor was found does not mandate reversal of the death sentence imposed in this case. The appellant claims that the pecuniary gain factor is not particularly compelling as it is a "routine aggravator" present "in a large number, if not most murders" (Appellant's Initial Brief, p. 32). The appellant cites no authority to support this claim. In fact, most murders are committed by someone known to the victim, and are often emotional or sexual rather than financial in nature. Furthermore, the egregious facts of the robbery, committed in order to cover up the appellant's having stolen $4000 from his mother, and the appellant's casual use of a deadly weapon in a totally unnecessary and calculated act of

violence justifies the heavy reliance on this aggravating factor to support the appellant's sentence.

On the other hand, the mitigating evidence to which the trial judge gave "some" weight is sparse and inconsequential. This Court has previously characterized similar mitigation to be "not compelling." See, Freeman v. State, 563 So. 2d 73, 75 (Fla. 1990) (low intelligence, abuse as a child, artistic ability, and enjoyed playing with children was not compelling), cert. denied, 501 U.S. 1259 (1991); Watts v. State, 593 So. 2d 198 (Fla.) (prior convictions, during course of sexual battery, and pecuniary gain outweighed mitigation of defendant's age and low IQ), cert. denied, ___ U.S. ___, 120 L. Ed. 2d 881 (1992). This was obviously not the most mitigated of crimes.

The appellant cites six cases where this Court reversed death sentences on proportionality grounds, and claims the instant case was no more aggravated and at least as mitigated as those cases. A true comparison refutes this claim. In four of the cases, the trial court specifically found the statutory mitigator of no significant criminal history. See, McKinney v. State, 579 So. 2d 80 (Fla. 1991); Lloyd v. State, 524 So. 2d 396 (Fla. 1988); Proffitt v. State, 510 So. 2d 896 (Fla. 1987); and Caruthers v. State, 465 So. 2d 496 (Fla. 1985). In addition, in Caruthers and Proffitt as well as Clark v. State, 609 So. 2d 513 (Fla. 1992), and Rembert v. State, 445 So. 2d 337 (Fla. 1984), the defendants were impaired from drinking alcohol at the time of the offenses.

In McKinney, there was "substantial" mitigation in addition to the lack of a significant criminal history, including mental deficiencies and alcohol and drug abuse. The Proffitt Court noted that the defendant was nonviolent, happily married, a good worker and responsible employer; there was no evidence of intent such as advance procurement of a weapon; and following the murder, Proffitt left another victim alive at the scene, ran home, confessed, and surrendered to the police. The trial court in Caruthers also found as nonstatutory mitigation that the defendant was remorseful, had voluntarily confessed, was devoted to his younger brother, had mutual love and affection for family and friends; there was also evidence about Caruthers' church activities and favorable school record. Clark also involved compelling mitigation about Clark being subjected to abuse as a child and suffering from emotional disturbance. In Rembert, this Court noted there was "considerable" nonstatutory mitigating evidence offered, although the evidence is not outlined in the opinion of the case. Clearly, each of these cases involved much more mitigation than that present in this case.

A case which is truly comparable to the one at bar for proportionality purposes is Hayes v. State, 581 So. 2d 121 (Fla.), cert. denied, ___ U.S. ___, 116 L. Ed. 2d 468 (1991). Hayes was also an eighteen year old defendant convicted of shooting a cab driver during the course of a robbery. The trial court in that case also found as mitigating that Hayes had low intelligence, was developmentally learning disabled, and was the

product of a deprived environment. This Court rejected Hayes' proportionality challenge to his death sentence, finding that this cold-blooded murder during the course of a robbery outweighed the mitigation found. 581 So. 2d at 127. See also, Smith v. State, 19 Fla. L. Weekly S312 (Fla. June 9, 1994) (cab driver shot and killed during course of a robbery; trial court found statutory mitigator of no significant criminal history and several nonstatutory mitigators relating to background, character and record; death sentence not disproportionate); Eutzy v. State, 458 So. 2d 755 (Fla. 1984) (lack of any reasonable mitigation justified trial court in overriding jury recommendation of life in premeditated shooting of cab driver, where defendant had prior felony conviction), cert. denied, 471 U.S. 1045 (1985).

The appellant also argues that the court below improperly rejected as nonstatutory mitigating factors that the appellant was remorseful, rehabilitable, pleasant and polite, and experienced emotional problems. In addition, he asserts that the court did not give sufficient weight to the fact that he cooperated with the police. A review of the sentencing order in this case clearly demonstrates that the trial judge gave careful consideration to all of these mitigating factors (R. 1700-1714).

Following the killing of the cab driver in this case, the appellant ran home and went with his mother to an appointment at her bank (R. 980-981; SR. 93). He was on the phone that evening talking to a friend when the police arrived to talk to him (R. 717). He acknowledged that after leaving the scene of the

shooting, he never called for an ambulance or alerted the police (SR. 93). The trial court noted that the only evidence of remorse was the appellant's affirmative responses to leading questions, that the appellant was cool, calm and unemotional on the witness stand, and that the appellant had declined the opportunity to speak and perhaps express remorse prior to sentencing (R. 1450-1451, 1711). Despite these facts, he suggests that his remorse should be deemed to mitigate this crime. There is no evidence that the appellant displayed an ounce of remorse prior to having been discovered as the perpetrator. This is certainly not like Proffitt, where the defendant fled from the scene of the murder to confess to his wife and voluntarily surrender to the police. Thus, the facts herein support the trial court's conclusion that the appellant was only sorry for the situation he was in rather than for the acts he committed.

The purported mitigation that the appellant could be rehabilitated is similarly unpersuasive. The appellant claims to have established this factor by his own testimony that he acted mature, spoke clearly on the witness stand, had tried to initiate a GED program from his jail cell, and expressed an overall desire to better himself. As noted by the trial court, however, prior to this murder the appellant "made little effort to improve his station in life" (R. 1711). He had quit school and a job at Wendy's, and continued to associate with Lavender and Plain despite having been arrested with them over a year earlier (SR.

73, 88-89, 92, 158). The judge specifically found that the appellant's past record of performance did not demonstrate the willingness to work hard and respect the lives and property of others to accomplish rehabilitation (R. 1712). Thus, he found this mitigating circumstance was not proven by the greater weight of the evidence (R. 1712).

As to the emotional problems, the trial court specifically found that this mitigator was not proven by the greater weight of the evidence (R. 1712). The school records did not support this circumstance, and there was no expert testimony presented on the issue (R. 1712). The court also noted that the appellant's testimony reflected that he performed well in stressful situations (R. 1712). The mere fact that the appellant had been depressed and contemplating suicide after being caught stealing from his mother's bank account does not establish that he suffered "emotional problems" so as to mitigate this crime.

The trial judge rejected the appellant's being "close" to his mother and "pleasant and polite" as mitigating the facts of this case (R. 1713). The judge also found that the speech impediment was slight, and that the appellant was capable of clearly articulating while testifying in the trial (R. 1713).

Finally, the appellant suggests that his "cooperation" with the police was entitled to more weight than that proscribed by the trial judge. This is from a defendant that took the stand and admitted to having repeatedly lied to the police in an effort to conceal his guilt (R. 1038). Providing inconsistent and

conflicting statements to the police is not the type of cooperation that deserves great weight as a mitigating factor. Thus, the trial court did not err in assigning little weight to this circumstance.

Of course, a proportionality determination is not made by the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). In Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 385 (1993), this Court rejected a proportionality claim where the trial court found one aggravating factor, and fifteen mitigating factors.[2] A review of the aggravating and mitigating circumstances established in this case clearly demonstrates the proportionality of the death sentence imposed. The pecuniary gain aggravating factor, in the context of this case, outweighs the mitigating evidence presented, and therefore this Court should affirm the death sentence.

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[2] Reliance on three of the mitigating factors was struck on appeal.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ACCORDING LITTLE WEIGHT TO AGE AS A MITIGATING FACTOR.

The appellant also claims that the judge did not allocate sufficient weight to the statutory mitigating factor of age. However, once a mitigating circumstance has been established, the relative weight to be given to the factor is within the province of the sentencing judge. Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990).

Although the appellant attacks the trial court's reasons for allocating little weight to age as a mitigating factor, the court's findings are supported by the record. In assessing this mitigating circumstance, the trial court noted

> This Court has had the opportunity of observing the defendant on the witness stand. Clearly, there can be no better place to test the maturity and emotional stability of a person than on the witness stand in a first degree murder trial. This is especially true when the person on the stand giving testimony is the accused. The defendant responded very well to all questions on direct and cross. He was articulate, clear thinking, and calm. The defendant demonstrated average intelligence and maturity.
>
> A review of the defendant's school records reflects the fact that the defendant's I.Q. falls within the low average intelligence level. He reads, writes and does math at an elementary school level of performance. The defendant was assigned to several special education classes when he was in school. However, the records also show a lack of effort on the part of the defendant to achieve. In high school the defendant was habitually late for classes even though, in many cases, he was on the school premises. This tardiness caused the defendant to miss

> much class work, homework and tests. He was thus terminated from school.
>
> The evidence presented does not demonstrate any significant emotional problems which would reduce the defendant's emotional maturity level below his chronological age.
>
> The record fails to disclose any significant psychological problems existing at the time of the murder which would tend to lower the defendant's emotional age below his chronological age.
>
> Clearly, the defendant was "street smart" at the time of the crime. The defendant was able to devise a plan to remove $4000 from his mother's bank account. The defendant used a female accomplice who looked like defendant's mother in order to gain access to the funds.
>
> The defendant was able to live in a high crime area of Melbourne, without a job. When he needed a gun for self protection and/or robbery, he was able to locate one and purchase ammunition.
>
> Lastly, the defendant was able to devise a plan to isolate a cab driver in a sparsely populated section of Palm Bay, and commit the crime of Armed Robbery and Murder.
>
> Thus, the age of the defendant is given little weight by this Court in mitigation of the crime charged.

(R. 1708-1710).

The appellant's claim that the judge should not consider a defendant's courtroom demeanor to determine the weight to give mitigating evidence has previously been rejected by this Court. Johnson v. State, 442 So. 2d 185 (Fla. 1983), cert. denied, 466 U.S. 963 (1984). The facts relied on by the judge in evaluating the extent that the appellant's age mitigated his offense are supported by the testimony and school records. (See, R. 1030-1057; SR. 72-93 [testimony]; Defense Exhibit 1 [school records]; SR. 88-89 [admitted quit going to school because he had too many

suspensions for being late to class, although he was at school on time]; R. 1033 [admitted stealing from bank account]; R. 894, SR. 91-92 [lived with Busby in Melbourne during Fall, 1992, and was not working or going to school]; R. 1035; SR. 62 [obtained a gun for self protection]; R. 1039, 1043 [appellant's loaded gun used to kill victim]; R. 776, 853, 1053 [had cab driver take him to remote location, and changed destination when realized that there was cleaning van at first destination]).

The appellant cites Ellis v. State, 622 So. 2d 991 (Fla. 1993), as authority for his assertion that since he was only five weeks into adulthood at the time of this offense, there is a strong presumption that the statutory mitigator of age must be given weight. Furthermore, he claims that, since there was no evidence of unusual maturity, the mitigator was entitled to more than the little weight allotted in this case. However, Ellis supports the sentencing order in this case since age was found as a mitigating factor, and Ellis expressly recognizes that the assignment of weight to be given the factor is in the trial court's discretion. 622 So. 2d at 1001.

In Deaton v. State, 480 So. 2d 1279 (Fla. 1985), this Court upheld the trial court's rejection of age as a mitigating factor for an eighteen year old defendant. The trial court therein noted that Deaton had been living on his own, and was an adult at the time and capable of understanding his actions. Similarly, the trial court's rejection of age as mitigation for a nineteen year old defendant was affirmed in Peek v. State, 395 So. 2d 492

(Fla. 1980), cert. denied, 451 U.S. 964 (1981). In contrast, in the instant case, the court found the factor to apply but diminished its weight due to the appellant's maturity and ability to plan and execute this murder. Finally, in LeCroy v. State, 533 So. 2d 750 (Fla. 1988), cert. denied, 492 U.S. 925 (1989), the trial court allocated "great weight" to the defendant's age (17), but noted that the mitigation was outweighed by the aggravating circumstances, noting that LeCroy was mentally and emotionally mature and understood the distinction between right and wrong and the consequences of his actions.

The above cases all demonstrate that the trial judge's evaluation of the defendant's age as a mitigating factor was entirely reasonable and well within his discretion. On these facts, the appellant has failed to offer any basis to disturb the conclusion that the statutory mitigating factor of age, while present in this case, was not entitled to much weight. Therefore, this issue does not warrant reversal of the death sentence imposed herein.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN REJECTING THE MITIGATING FACTOR OF NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY.

The appellant also claims that the judge failed to properly find and weigh the statutory mitigating factor of no significant criminal activity. Of course, it is the trial court's duty to decide if mitigating factors have been established, and when there is competent, substantial evidence to support a trial court's rejection of mitigators, that rejection must be upheld. Johnson v. State, 608 So. 2d 4, 12 (Fla. 1992), cert. denied, ___ U.S. ___, 124 L. Ed. 2d 273 (1993).

In this case, the trial judge rejected a lack of criminal history as mitigation due to the appellant's involvement in criminal offenses for which no conviction had been obtained. The appellant concedes that there was competent evidence of criminal activity in his prior arrest for obstructing law enforcement and his actions in carrying a concealed weapon. However, he faults the trial court for relying upon the appellant's having committed forgeries in withdrawing $4000 from his mother's bank account, suggesting that there was no competent evidence that any criminal activity was involved.

Of course, when the appellant testified at trial, he admitted that the situation had been resolved satisfactorily in that the bank was going to bring criminal charges against him so they could replace the money in the account (R. 1044). Also, the

appellant's suggestion that the money was taken from a joint account the appellant maintained with his mother is not supported by the record. Although the appellant stated that, at one time, he had his own account at the bank, and his mother's name was on that account, there is absolutely no indication that this was the account from which the appellant took the $4000 (SR. 78).[3] To the contrary, the appellant admitted that he forged his mother's signature on checks, went through the drive-thru at the bank with a woman in his car resembling his mother, and provided his mother's driver's license to the bank in order to get this money (R. 1050). This seems like a lot of trouble to get money from your own account. The appellant also told Evette Busby prior to the robbery/murder that he needed money to replace what he had taken from his mother's account (R. 895). Thus, his assertion to this Court that these transactions demonstrate "poor judgment" but no criminal activity is not convincing.

The appellant's brief cites cases wherein the no significant criminal history mitigator was found, claiming that those cases demonstrate the factor applied here as well. In four of those cases, there are absolutely no facts in this Court's opinion indicating the extent of criminal history, if any, involved. See, Mordenti v. State, 630 So. 2d 1080 (Fla.), cert. denied, ___ U.S. ___, 129 L. Ed. 2d 849 (1994); Valentine v. State, 616 So.

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[3] During closing argument, defense counsel submitted that the account from which the money had been taken was in the mother's name, "in trust for Kevin Sinclair" (SR. 242).

2d 971 (Fla. 1993); Ponticelli v. State, 593 So. 2d 483 (Fla. 1991), vacated, ___ U.S. ___, 121 L. Ed. 2d 5 (1992), affirmed, 618 So. 2d 154 (Fla.), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 316 (1993); and McKinney, 579 So. 2d at 80. In all of the cases cited, this Court merely recognized that the trial court had found the statutory mitigator to apply. None of the cases involved situations where the trial court had rejected this factor, and this Court found the rejection to be an abuse of discretion. Therefore, reliance on these cases is misplaced.

A review of relevant cases demonstrates that the court below was within its discretion in rejecting this mitigating factor. Sochor v. State, 619 So. 2d 285 (Fla.) (factor rejected based on prior assault on ex-wife), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 596 (1993); Walton v. State, 547 So. 2d 622 (Fla. 1989) (trial court did not find factor based on discussion of prior marijuana sales), cert. denied, 493 U.S. 1036 (1990); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) (trial court properly rejected factor based on one prior assault that had been reduced to misdemeanor).

The trial court in this case properly weighed the appellant's prior record, as well as the evidence of other criminal activity presented, and determined that the extent to which the appellant had lived within the law did not extenuate or reduce the degree of moral culpability for his crime (R. 1706). The appellant has failed to establish any abuse of discretion in this finding, and therefore he is not entitled to relief on this issue.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTIONS TO SUPPRESS.

The appellant also challenges the denial of his motions to suppress, alleging that his agreement to speak with the detectives was not voluntary. It must be noted initially that this argument has not been preserved for appellate review. To the extent the appellant is challenging the denial of his motion to suppress the clothes he provided to the officers, any argument has been waived since the appellant did not object at the time the clothes were admitted into evidence (R. 884, 886). Correll v. State, 523 So. 2d 562 (Fla.) (even where pretrial motion has been denied, failure to object to evidence when introduced waives issue), cert. denied, 488 U.S. 871 (1988).

Furthermore, the appellant's entire argument on appeal offers a different basis for suppression than that argued to the trial court. Although the appellate argument claims that the appellant's consent to speak to the detectives was not voluntary, the allegation presented to the trial court was that the interview amounted to a custodial interrogation and suppression was required due to the lack of Miranda warnings (R. 1390-1393, 1585-1588). Since the argument on appeal is not the same specific contention presented to the trial judge, it is not preserved for review. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Even if this argument is considered, however, the appellant is clearly not entitled to relief. Although the appellant frames this issue and alleges generally that his consent to "search his residence" was involuntary, no such search was conducted. The undisputed testimony from the suppression hearing established that the appellant agreed to speak with the detectives after his mother invited the detectives to her home and after the appellant was advised that he was under no obligation to talk to the detectives (R. 1362, 1368). The appellant then made a statement denying any involvement in the shooting (R. 1369). Following the statement, the detectives asked if they could see the clothes the appellant had been wearing (R. 1369-1370, 1387). The appellant said they could, and walked to a bathroom across the hall, retrieved the clothes from a hamper, and gave them to the detectives (R. 1370, 1388). Thus, the clothes were not discovered in any search but were voluntarily surrendered by the appellant.

The appellant recites six factors from United States v. Lopez, 911 F. 2d 1006, 1010 (5th Cir. 1990), to consider in determining the voluntariness of consent, but fails to evaluate those factors in light of the evidence in this case. The factors are: (1) the voluntariness of the defendant's custodial status (the appellant herein was not in custody); (2) the presence of coercive police procedures (none have been alleged); (3) the extent and level of the defendant's cooperation (the appellant agreed to speak with the detectives, and voluntarily retrieved

the clothes); (4) the defendant's awareness of his right to refuse consent (the appellant was told that he did not have to talk to the detectives); (5) the defendant's education and intelligence (no evidence of this presented at the suppression hearing); and (6) the defendant's belief that no incriminating evidence will be found (no evidence presented at the hearing).

The appellant alleges that because he was not given his Miranda rights, was questioned by police in bullet-proof vests (although there is no evidence that he was aware of this), and was 18 years old with "low" IQ (facts not disclosed at the suppression hearing), his sitting around the dining room table with the detectives and his mother should be seen as a "coercive environment equal to an interrogation room of police headquarters" (Appellant's Initial Brief, p. 84). This assertion is not persuasive or rational, and this Court should reject it.

Finally, it must be noted that any error in the trial court's ruling on the admission of this evidence would clearly be harmless. The statements sought to be suppressed amounted to the appellant denying any involvement, one of several contradictory statements which the appellant admitted during his testimony (R. 787, 815, 1038, 1049). Furthermore, since the appellant admitted shooting the victim, the evidence relating to the clothes he supplied can not be considered prejudicial.

On these facts, the appellant has clearly failed to demonstrate any error in the trial court's denial of his motions to suppress. This Court should specifically find this issue to be procedurally barred and reject this claim.

ISSUE VII

WHETHER SECTION 921.141, FLORIDA STATUTES, IS CONSTITUTIONAL.

The appellant's final claim involves an attack on the constitutionality of Florida's death penalty statute. The appellant does not indicate where or when these constitutional challenges were presented to the trial court, and, for the most part, they never were. The appellant filed one conclusory motion attacking the constitutionality of Section 921.141, Florida Statutes, and briefly argued to the trial judge that this motion was filed "for the record" and was based on the constraints in the statute on mitigating evidence (R. 1281-1282, 1551-1555). None of the appellant's current complaints about the adequacy of counsel, the ambiguous role of the trial judge, the alleged discriminatory nature of Florida's judicial system, or the lack of adequate appellate review were included in the motion or argument to the trial court. In fact, the only two arguments now asserted on appeal that were included in the motion filed below were (1) the lack of unanimity in the sentencing recommendation and (2) the lack of a special verdict indicating which aggravating and mitigating circumstances were found by the jury (R. 1551-1555).

In addition, this Court has consistently and repeatedly rejected these claims. See, Wuornos v. State, 19 Fla. L. Weekly S503, S506 n. 5 (Fla. October 6, 1994); Ponticelli, 593 So. 2d at 487, n. 4. The United States Supreme Court has similarly

rejected many of these challenges, including the two minimally presented to the trial judge. See, Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989); Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984); Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976).

The appellant has failed to offer any valid reason to overturn the well established case law upholding the constitutionality of this statute. He is clearly not entitled to relief on this issue.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to GEORGE D. E. BURDEN, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32114, this 29th day of November, 1994.

CAROL M. DITTMAR

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