IN THE SUPREME COURT OF FLORIDA

FILED

NOV 19 1982

SID J. WHITE
CLERK SUPREME COURT
By [illegible]
Chief Deputy Clerk

THEODORE ROBERT BUNDY,

Appellant,

v.

CASE NO.

STATE OF FLORIDA,

Appellee.

REPLY TO APPELLANT'S SUPPLEMENTAL BRIEF

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ISSUE A

THE TRIAL COURT DID NOT IMPROPERLY FIND THAT APPELLANT COMMITTED HIS MURDER WHILE HE WAS UNDER SENTENCE AND THAT HE HAD BEEN PREVIOUSLY CONVICTED OF ANOTHER CAPITAL OFFENSE OR OF A FELONY INVOLVING THE USE OF THREAT OR VIOLENCE TO SOME PERSON.

Appellant argues that the trial court improperly "doubled" two aggravating circumstances [conviction of murder while under the sentence of imprisonment and that he had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person] because both of these circumstances involve the same factual predicate.

In Provence v. State, 337 So.2d 783, (Fla. 1976), this Court found that the trial court improperly "doubled" two aggravating factors: commission of murder in the course of a robbery and commission of murder for the purpose of pecuniary gain. This Court apparently felt that the imposition of both of these aggravating circumstances unfairly penalized the defendant because under the circumstances of Provence, one of the circumstances was an integral facet of the other.

Under State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L. Ed.2d 715 (1980), and Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), multiple punishments (or here, aggravating circumstances) may be imposed if

the test in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) is met. In Blockburger, the same act violates two statutes if each statutory provision requires proof of a fact which the other does not. Id. at 304, 52 S.Ct. at 182.

Here, §921.141(5)(a) and §921.141(5)(b) each require proof of a fact that the other does not. The former requires that the capital felony be committed by a person under sentence of imprisonment, which the latter does not. The latter requires that the defendant be previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, which the former does not. (The nature of the crime for which a person is imprisoned is irrelevant to this circumstance; what counts is the fact that the defendant was imprisoned at the time that he committed his capital felony.) Under the Blockburger test, the facts involved under each circumstance are irrelevant; a reviewing court may only look to the aggravating circumstances as outlined in the statute.

Moreover, Appellant misapprehends the purpose of §921.141(5)(a). The object of this aggravating circumstance must either be to provide the ultimate punishment for those who would murder while imprisoned and for whom no other punishment might provide deterrence, or to provide punishment because the rehabilitative process is an obvious waste of time for such an individual, or both. At any rate, there lacks in these circumstances the "one-to-one" correspondence that exists between someone penalized for both robbery, a violent

crime, and a crime for pecuniary gain, which robbery is and must be. The distinction is, of course, that the crime of robbery is always a crime committed for pecuniary gain, and the two are inextricably related, while the commission of Appellant's capital murder while under the sentence of imprisonment is in no way dependent upon the nature of Appellant's previously committed violent crimes.

The trial court did not err in imposing both aggravating circumstances.

ISSUE B

THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT'S MURDERS WERE HEINOUS, ATROCIOUS AND CRUEL.

Appellant argues that the trial court improperly found that his murders were heinous, atrocious, and cruel because they were not especially so.

Appellant's two murder victims were assaulted while asleep in their beds, beaten severely about the head with a blunt object, and strangled. Lisa Levy was disfigured with bite marks and she was sexually assaulted prior to her death. (R-7223; 7299;7796;7802;8-12).

These circumstances are more than sufficient to uphold the trial court's finding that the murder was heinous, atrocious, and cruel. Alvord v. State, 322 So.2d 533 (Fla. 1975) and Jackson v. State, 366 So.2d 752 (Fla. 1978) [strangulation], Alford v. State, 307 So.2d 443 (Fla. 1975), and Goode v. State, 365 So.2d 381 (Fla. 1978) [sexual assault]; King v. State, 390 So.2d 315 (Fla. 1980) [bludgeoning].

The trial court did not err in finding that Appellant's murders were heinous, atrocious, and cruel.

ISSUE C AND D

THE EVIDENCE WAS SUFFICIENT TO SUBSTANTIATE THE TRIAL COURT'S FINDING THAT APPELLANT'S CAPITAL FELONIES WERE COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF THE CRIME OF BURGLARY.

Appellant argues that there was no evidence in this record to support that his entry into the sorority house was non-consensual.

There was ample circumstantial evidence presented to support the trial court's finding that Appellant's capital felonies were committed while he was engaged in the commission of the crime of burglary. Non-consent was shown by the testimony of Nancy Dowdy and Nita Neary that the Chi Omega was a sorority house in which thirty-nine girls resided (R-7157), that the girls entered the sorority house by a combination lock late at night through the back door (R-7160), that no man (Ronnie Eng [the houseboy], or otherwise) could be upstairs after the hour in which Appellant was in the building (R-7180), and that Appellant was heard coming down the stairs from the upper floor (R-7190;8475-8476) where he had no business to be, and that he was observed in the foyer at the bottom of the steps with a club in his right hand. (R-8478). If the foregoing circumstances do not constitute a non-consensual entry into a building, no burglary could ever be proven by circumstantial evidence.

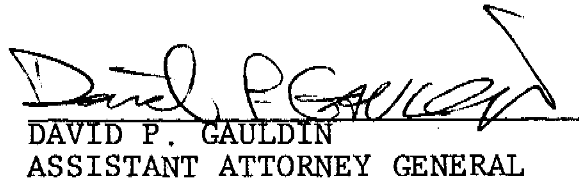
This issue is clearly without merit.

CONCLUSION

Based on the foregoing arguments and authorities, Appellant's sentence should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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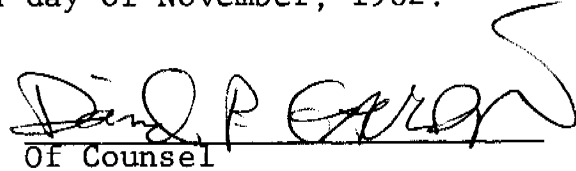
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply to Appellant's Supplemental Brief has been forwarded to Mr. Robert Augustus Harper, Jr., 308 East Park Avenue, Post Office Box 10132, Tallahassee, Florida 32302 by U. S. Mail this 19th day of November, 1982.



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