IN THE SUPREME COURT OF FLORIDA

JAMES FRANKLIN ROSE, Appellant,	)	
vs.	)	CASE NO. 63,996
STATE OF FLORIDA, Appellee.	)	

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This is an appeal from a sentence imposing the death penalty from the Seventeenth Judicial Circuit, in and for Broward County, Florida. The parties will be referred to as they appear before this Honorable Court, except that Appellee may also be referred to as the State.

The following symbols will be utilized in the brief:

"R"	Record on Appeal.
"OR"	Record from trial and original sentencing proceeding.
"AB"	Appellant's initial brief.

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE

Appellee accepts the Statement of the Case as found on pages two and three of Appellant's initial brief.

STATEMENT OF THE FACTS

Appellee accepts the Statement of the Facts as found on pages four through seven with the following clarification. This court in its opinion did not hold that the "tie vote" mentioned in the note to the trial judge at the original jury sentencing proceeding was a recommendation for life imprisonment. Rose v. State, 425 So.2d 521, 525 (Fla. 1983). If this court had determined that, the case would not have been remanded for a new sentencing proceeding. What this court did say was that "if seven jurors do not vote to recommend death, then the recommendation is life imprisonment." Id. When the original jury did vote, it was for death (OR 107).

POINTS INVOLVED ON APPEAL

POINT I

WHETHER APPELLANT'S JURY SENTENCING PROCEEDING WAS FAIR AND IMPARTIAL AND THE STATE PROPERLY EXERCISED ITS RIGHT TO PEREMPTORY CHALLENGES?

POINT II

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST THAT THE JURY BE INSTRUCTED ON THE ALTERNATIVE DEFINITIONS OF FIRST DEGREE MURDER?

POINT III

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST THAT THE JURY BE INSTRUCTED ON CIRCUMSTANTIAL EVIDENCE WHERE THE PROSECUTOR DID NOT REFER TO CIRCUMSTANTIAL EVIDENCE IN HIS OPENING STATEMENT?

POINT IV

WHETHER THE PROSECUTOR COMMITTED REVERSIBLE ERROR DURING HIS OPENING STATEMENT?

POINT V

WHETHER THE TRIAL COURT EXERCISED ITS DISCRETION PROPERLY BY ALLOWING INTO EVIDENCE PHOTOGRAPHS SHOWING INJURIES TO THE VICTIM?

POINTS INVOLVED ON APPEAL

(Continued)

POINT VI

WHETHER THE TRIAL COURT ACTED PROPERLY IN ALLOWING INTO EVIDENCE A CERTIFIED COPY OF A PAROLE CERTIFICATE WHERE APPELLANT KNEW PRIOR TO TRIAL OF THE STATE'S INTENTION TO RELY ON THE AGGRAVATING CIRCUMSTANCE THAT APPELLANT WAS ON PAROLE AT THE TIME THE MURDER WAS COMMITTED?

POINT VII

WHETHER THE TRIAL COURT PREJUDICIALLY ERRED IN SUSTAINING THE STATE'S OBJECTION TO A QUESTION POSED BY APPELLANT'S COUNSEL TO ONE OF HIS WITNESSES?

POINT VIII

(Consolidating Appellant's Issue XVI)

WHETHER WHERE THIS COURT REMANDED THIS CAUSE FOR A NEW SENTENCING PROCEEDING, IT HAS ALREADY DECIDED THAT ALTHOUGH THE FIRST JURY RECOMMENDATION OF DEATH IS NOT CONTROLLING, A LIFE SENTENCE WAS NEVER RECOMMENDED AND IS NOT MANDATED?

POINT IX

WHETHER THE COURT ERRED PREJUDICIALLY BY SUSTAINING A STATE OBJECTION TO A HYPOTHETICAL QUESTION POSED BY APPELLANT TO HIS EXPERT WITNESS?

POINTS INVOLVED ON APPEAL

(Continued)

POINT X

WHETHER THE TRIAL COURT ACTED PROPERLY WITHIN ITS DISCRETION BY APPOINTING A MEMBER OF THE FLORIDA BAR TO REPRESENT APPELLANT?

POINT XI

WHETHER THERE IS ANY REQUIREMENT THAT A PRESENTENCE INVESTIGATION REPORT BE ORDERED IN CAPITAL CASES?

POINT XII

WHETHER APPELLANT HAS FAILED TO PRESERVE FOR APPELLATE REVIEW CERTAIN COMMENTS MADE BY THE PROSECUTOR DURING CLOSING ARGUMENT WHERE APPELLANT FAILED TO OBJECT TO THESE COMMENTS AND WHERE THESE COMMENTS DO NOT CONSTITUTE FUNDAMENTAL ERROR?

POINT XIII

WHETHER THE TRIAL COURT ACTED PROPERLY IN DENYING APPELLANT'S SECOND MOTION FOR CONTINUANCE MADE ON THE DAY OF TRIAL?

POINTS INVOLVED ON APPEAL

(Continued)

POINT XIV

WHETHER THE TRIAL COURT ACTED PROPERLY BY INSTRUCTING THE JURY THAT IF A CRIME IS COMMITTED WHILE A DEFENDANT IS ON PAROLE, THE CRIME IS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT?

POINT XV

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THREE AGGRAVATING CIRCUMSTANCES?

POINT XVI

(Consolidated with Point VIII)

POINT XVII

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE INTRODUCTION OF A CERTIFIED COPY OF AN INFORMATION AND JUDGMENT AND SENTENCE FOR THE CRIME OF BURGLARY WITH THE INTENT TO COMMIT RAPE, WHERE THE PRIOR CONVICTION WAS RELEVANT TO SHOW THAT APPELLANT HAD PREVIOUSLY BEEN CONVICTED OF A CRIME INVOLVING THE THREAT OF VIOLENCE TO THE PERSON?

ARGUMENT

POINT I

APPELLANT'S JURY SENTENCING PROCEEDING WAS FAIR AND IMPARTIAL AND THE STATE PROPERLY EXERCISED ITS RIGHT TO PEREMPTORY CHALLENGES.

Appellant argues that the State prejudiced him by using one of its peremptory challenges to excuse Ms. Marcus. The State maintains that the exercise of its challenge was proper and there was no prejudice to Appellant.

Appellee would first point out that Appellant's objection to Ms. Marcus' excusal has not been preserved for appellate review. Appellant did not object to her excusal at the time the State exercised its challenge. Failure to object at trial waives the right to consideration on appeal. Maggard v. State, 399 So.2d 973 (Fla.) cert. denied 454 U.S. 1059 (1981).

Ms. Marcus admitted during voir dire that her mind was made up regarding the death penalty, and that she could not vote for it. The following dialogue is from the voir dire:

MR. RAY (The Assistant State Attorney): Mrs. Marcus. You have been sitting out there this morning listening to all the questions we've been asking, do you have a feeling regarding capital punishment one way or the other?

MS. MARCUS: Yes, I do.

MR. RAY: Would you please explain your feeling to us?

MS. MARCUS: I don't think I could ever vote for it.

MR. RAY: Okay. Do you feel that whatever the circumstances of the case and whatever the law the judge gives you to follow, do you feel that you could not follow the law and the facts as they were elicited?

MS. MARCUS: In certain circumstances I think that I could follow the law, but I have a feeling about this already and I wouldn't be able to.

MR. RAY: Do you feel - let me ask you, have you already prejudged what your vote would be?

MS. MARCUS: Yes. (R 208-209)

It is clear that Ms. Marcus was not qualified to sit as a juror in the instant case since she would be unable to vote for the death penalty. §913.13, Fla. Stat. (1981); Foster v. State, 369 So.2d 928 (Fla. 1979), cert. denied 444 U.S. 885 (1979).

The State, as well as an accused, is entitled to an impartial jury. Where a prospective juror has a bias against the death penalty which would prevent him from considering the punishment issue, he is not impartial and a challenge is proper. Witherspoon v. Illinois, 391 U.S. 510, 520 (1968); Williams v. State, 228 So.2d 377, 379 (Fla. 1969). In a similar case, this court has previously held that where the State did not exhaust all of its peremptory challenges, the fact that one prospective juror was eliminated from the panel for the reason that he was against capital punishment did not result in the denial of a fair trial to a defendant convicted of first-degree murder.

Barlow v. State, 238 So.2d 602 (Fla. 1970).

Accordingly, there was no denial to Appellant of a fair and impartial jury sentencing procedure.

POINT II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST THAT THE JURY BE INSTRUCTED ON THE ALTERNATIVE DEFINITIONS OF FIRST DEGREE MURDER.

Appellant's conviction has been upheld by this Honorable Court. This case was remanded not for a redetermination of guilt or innocence, but merely for a new sentencing proceeding before a jury. Rose v. State, 425 So.2d 521, 525 (Fla. 1983). Guilt was not an issue at the new sentencing proceeding.

Appellant claims that the denial of his request for the instruction prejudiced him since the "jury had no adequate basis to measure greater or lesser culpability or the relative weight of the aggravation" (AB 13). Appellant's argument fails however since the jury was not instructed on, and the court did not rely on, the aggravating circumstance that the murder was heinous, atrocious and cruel. Therefore, the theory on which the conviction may have been based was irrelevant to the sentencing proceeding.

Appellant also argues that prejudice resulted since "the jury that did know of the definition of murder voted six to six on the question of penalty" (AB 13). However, the six to six vote referred to was during the pendency of the original jury deliberations. The final vote was for death (OR 107).

The instruction requested by Appellant was irrelevant to the sentencing proceeding, and the trial judge properly denied Appellant's request. There was no prejudice to Appellant.

POINT III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST THAT THE JURY BE INSTRUCTED ON CIRCUMSTANTIAL EVIDENCE WHERE THE PROSECUTOR DID NOT REFER TO CIRCUMSTANTIAL EVIDENCE IN HIS OPENING STATEMENT.

Appellant's request to the trial court for a jury instruction on circumstantial evidence was predicated on a misconception. The same misconception has been repeated here. Appellant, without citation to the record, boldly asserts that "[d]uring the prosecutor's opening statement to the jury .... [he] emphasized that the circumstantial evidence was sufficiently strong to support a verdict of guilty to first-degree murder" (AB 14). The lack of record citation was for good reason; in fact, the prosecutor made no such statement. (The State's opening statement can be found at R 236-247). The prosecutor merely set out the evidence as he expected it would be shown to the jury. It was Appellant's trial counsel who brought up the term "circumstantial" evidence (R 248).

Again, as in Point II, Appellant argues that the denial of the request for an instruction prevented a fair trial since "the jury was denied the opportunity to be aware of the significance of the circumstantial evidence rule in its evaluation of the aggravated or less aggravated nature of the capital offense for which they were charged with the responsibility of making a solemn recommendation" (AB 15). This argument is as misplaced as it was in Point II, since the nature of the crime was not being used as an aggravating circumstance. The

sentencing proceeding was solely for the purpose of having the jury consider the statutory aggravating and mitigating circumstances and for the jury to make a recommendation regarding a sentence to the trial court. An instruction on circumstantial evidence was unnecessary and would have been irrelevant. There has been no violation of either Lockett v. Ohio, 438 U.S. 586 (1978) or Songer v. State, 365 So.2d 696 (Fla. 1978) since the denial of the request for instruction in no way prevented Appellant from setting forth evidence of mitigating factors. Appellant presented witnesses on his behalf.

The trial court acted properly in denying Appellant's request that the jury be requested on the nature of circumstantial evidence.

POINT IV

THE PROSECUTOR COMMITTED NO REVERSIBLE ERROR DURING HIS OPENING STATEMENT.

Appellant argues that the assistant state attorney committed fundamental error by making the following statement while discussing aggravating circumstances during his opening statement to the jury.

> Another aggravating circumstance that may exist is that the crime was cold, calculated, premeditated, an act with no moral or legal justification.
>
> The State does not feel necessarily it can prove that the act was cold, calculated, premeditated without legal or moral justification because only one person knows for sure exactly how this crime was committed and that's the accused.

Appellee maintains that the comment was not an improper comment on Appellant's right to remain silent. Even if the comment were improper, the comment would not rise to the level of fundamental error, and cannot be considered on appeal where it was not objected to at trial.

It is now quite clear in Florida, that in order for the propriety of a comment on an accused's right to remain silent to be preserved for appellate review, the comment must be objected to at trial. A comment on the right to remain silent

is not fundamental error. Clark v. State, 363 So.2d 331 (Fla. 1978). There was no objection to the prosecutor's statement made at any time during the trial. Thus, it cannot be considered here.

Appellant argues that since this is a capital case, this court has a duty to review the prosecutorial comment despite Appellant's failure to object at trial. However, this is not the case. This court has held that where a defendant failed to object at trial to a prosecutor's comments during a sentencing proceeding, the defendant cannot raise the argument for the first time on appeal. Jones v. State, 411 So.2d 165 (Fla.), cert. denied, ___U.S. ___, 103 S.Ct. 189, 74 L.Ed.2d 153 (1982). Jones was also a death case, and most control the case at bar.

Mullaney v. Wilbur, 421 U.S. 684 (1975), cited by Appellant, is readily distinguishable from the circumstances in the case at bar. Mullaney involved a Maine statute which shifted the burden of proof to a defendant. Here, where the comment was most likely not susceptible of being viewed by the jury as a comment on Appellant's right to remain silent, as the State maintains, Appellant has not had the burden of proof shifted to him.

There has been no reversible error caused by the comment of the prosecutor, and Appellant has not been denied a fair proceeding. The death sentence must be affirmed.

POINT V

THE TRIAL COURT EXERCISED ITS DISCRETION PROPERLY BY ALLOWING INTO EVIDENCE PHOTOGRAPHS SHOWING INJURIES TO THE VICTIM.

Appellant contends that the prejudice to him from the admission of the photographs outweighed their relevancy. Appellee maintains that the photographs were properly admissible as relevant, and that Appellant suffered no undue prejudice.

Appellant admits that the testimony by medical examiner Fatteh was properly admissible to show the factual history of the case (AB 18). Photographs are relevant and admissible to corroborate the testimony of a medical examiner. Zamora v. State, 361 So.2d 776 (Fla. 3d DCA), cert. denied, 372 So.2d 472 (Fla. 1978); Rodriguez v. State, 413 So.2d 1303 (Fla. 3d DCA 1982). The basic test for admissibility of photographs is relevance and not necessity, and relevance to a material issue can be to corroborate other evidence. Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022 (1981), rehearing denied, 454 U.S. 1165 (1982). The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient to constitute reversible error. If the photographs are relevant to any issue, they are admissible. Jackson v. State, 359 So.2d 1190, 1192 (Fla. 1978), cert. denied, 439 U.S. 1102 (1979).

Admission of photographs is within the discretion of the trial court, and such a ruling will not be reversed unless there is a clear showing of abuse. Wilson v. State, 436 So.2d 908 (Fla. 1983). An abuse of discretion occurs where no reasonable

person would take the view of the trial judge. Matire v. State, 232 So.2d 209, 211-212 (Fla. 4th DCA 1970). Appellant asserts that the trial judge did not balance relevance against prejudice prior to admitting the photographs, and cites to the record at pages 65-67 and 255 (AB 19). However, balancing is a mental process and failure of the judge to articulate his thought processes on the record does not give rise to an assumption that he did not weigh the photographs' relevance to the sentencing proceeding against the possible prejudice to Appellant.

It is unclear what prejudice could have resulted to Appellant where the jury was not instructed on the aggravating circumstance of the atrocious nature of the murder. The photographs should have been considered by the jury only to understand the expert medical testimony. Moreover, where the trial court found three aggravating, and no mitigating circumstances, the most any error could be in this case would be harmless error.

POINT VI

THE TRIAL COURT ACTED PROPERLY IN ALLOWING INTO EVIDENCE A CERTIFIED COPY OF A PAROLE CERTIFICATE WHERE APPELLANT KNEW PRIOR TO TRIAL OF THE STATE'S INTENTION TO RELY ON THE AGGRAVATING CIRCUMSTANCE THAT APPELLANT WAS ON PAROLE AT THE TIME THE MURDER WAS COMMITTED.

Contrary to Appellant's position, the State contends that there was no prejudicial error in admitting into evidence the parole certificate. First of all, the State is under no duty under the discovery rule or §921.141, Fla. Stat. (1981) to inform Appellant either which aggravating circumstances it intends to rely on, or that it intends to introduce a parole certificate. Ruffin v. State, 397 So.2d 277 (Fla.), cert. denied 454 U.S. 882 (1981). Secondly, had there been a duty, there would have been no prejudice to Appellant where he had notice prior to trial that Appellee intended to rely on the aggravating circumstance that Appellant was on parole at the time he murdered Lisa Berry. Thirdly, there was an inquiry by the trial court sufficient to meet the requirements of Richardson v. State, 246 So.2d 771 (Fla. 1971).

On June 30, 1983, the State furnished Appellant with a supplemental answer to demand for discovery which listed the name and address of a representative from the probation and parole office (R 913). At the pretrial conference, Appellant indicated that he was aware of the significance of the witness' name being listed, since he moved that the State be precluded from relying on any additional aggravating circumstances than were relied on at the first sentencing proceeding (R 63-65).

The introduction of the parole certificate was certainly relevant, but served only to corroborate the testimony of the probation and parole officer so could not have been prejudicial to Appellant.

A Richardson hearing need not be labelled as such to fulfill the requirements of the hearing. It is sufficient for the court to make an inquiry into the circumstances of the State's alleged failure to properly comply with discovery. Shrum v. State, 401 So.2d 941 (Fla. 5th DCA 1981). The key question is prejudice to the defendant. Wilcox v. State, 367 So.2d 1020 (Fla. 1979). A review of pages 708-709 of the record shows that the judge, after discussion with counsel, ruled that there was no prejudice to Appellant where he had prior knowledge of the State's intent to rely on his parole status at the time of the crime. Therefore, had there been a discovery violation, proper inquiry was made, with the court determining that no sanctions were necessary.

The State takes issue with Appellant's interpretation of the statement made by the assistant state attorney on page 36 (AB 21). The following dialogue occurred:

> MR. ENTIN (Defense Counsel): So there's no other witnesses you would call, except Judy Schilling.
>
> MR. RAY (Assistant State Attorney): Well, if I find them, I would certainly give them to you. I have no problem with that.
>
> (R 36-37)

It is clear that the assistant state attorney only assured defense counsel of his willingness to comply with discovery by updating his list of witnesses. The assistant state attorney had specifically stated that he was not required to supply Appellant with a list of the aggravating circumstances on which he intended to rely (R 36).

This court has held previously in a capital case that admission of evidence that a defendant was on parole was proper. Tafero v. State, 403 So.2d 355, 360 (Fla. 1981). Accordingly, there was no error committed by admitting the parole certificate.

POINT VII

THE TRIAL COURT DID NOT PREJUDICIALLY ERR IN SUSTAINING THE STATE'S OBJECTION TO A QUESTION POSED BY APPELLANT'S COUNSEL TO ONE OF HIS WITNESSES.

The State would first point out that this court is precluded from considering this issue on appeal where Appellant made no proffer of what Mr. Templeton's testimony regarding Appellant's priof conviction may have been. Bennett v. State, 405 So.2d 265 (Fla. 4th DCA 1981); Miller v. State, ___So.2d ___, (Fla. 4th DCA Nov. 2, 1983) [8 FLW 2664]. The questions objected to are at pages 723 and 724 of the record.

Moreover, even had this issue been properly preserved, any possible error caused by the trial court's exercise of its discretion must be harmless in light of the totality of the proceeding. The State would remind this court that the trial court found three aggravating circumstances and no mitigating circumstances in imposing the death penalty. This finding of a lack of mitigating circumstances was despite Appellant putting on eight witnesses on his own behalf. Considering the proceeding as a whole, even had Appellant properly proffered the testimony, its exclusion would be harmless error.

POINT VIII

(Consolidating Appellant's Issue XVI)

WHERE THIS COURT REMANDED THIS CAUSE FOR A NEW SENTENCING PROCEEDING, IT HAS ALREADY DECIDED THAT ALTHOUGH THE FIRST JURY RECOMMENDATION OF DEATH IS NOT CONTROLLING, A LIFE SENTENCE WAS NEVER RECOMMENDED AND IS NOT MANDATED.

Appellant's argument is founded upon a misconception: that a note with a jury question to the trial judge during the first sentencing proceeding was a recommendation for life imprisonment. Appellee maintains that this is clearly not the case, and this court has already decided the issue against Appellant's contentions.

The note passed to the trial judge by the original sentencing jury read: "We are tied six to six, and no one will change their mind at the moment. Please instruct us." Rose, supra at 525 (OR 1303). This was certainly not an advisory sentence sufficient to meet the requirements of §921.141(2), Fla. Stat. (1981). This court has so held when it remanded this case for a new sentencing proceeding. Id. As such, this court's interpretation is the law of the case, and cannot be changed now. The trial judge correctly interpreted the meaning of the note although not the law. He stated: "If they had told me definitely they were unable to arrive at an advisory sentence, then I would of course, have to dismiss the panel ..." (OR 1303).

Harich v. State, 437 So.2d 1082 (Fla. 1983), cited by Appellant, involved a situation where during the instructions to the jury, the trial judge gave an inconsistent instruction.

Although he gave the correct instruction from Florida Standard Jury Instructions (Criminal) Penalty Proceedings - Capital Cases, (rev. June 1981) correctly indicating that "if by six or more votes the jury determines that the defendant should not be sentenced to death, your advisory sentence will be: The jury advises and recommends to the court that it impose a sentence of life ...", but also said: "[w]hen seven or more of you are in agreement as to what sentence should be recommended to the court ..." Id. at 1086. In Harich, this court found that under the facts peculiar to that case, where the vote was nine to three for death, there was no prejudice to the appellant. However, Harich adds nothing new to the consideration of the instant case where although we know that the original jury voted by a majority for death, we do not know the exact vote. Therefore, a new sentencing proceeding was proper. The second jury recommended the death penalty by a vote of eleven to one.

Appellant's reliance on case law to support the proposition that a trial court should not make findings contrary to that of a jury is also misplaced. In the case at bar, there was no recommendation of life imprisonment. Nor are there any constitutional problems with a death sentence in this case.

Appellant again argues that the second jury proceeding was improper where the jury was not instructed on the elements of homicide. Where guilt was not at issue, and there was no reliance on the aggravating circumstance of premeditation there was no need for the instruction. See Issue II, supra.

There has been no violation of the double jeopardy clause for a new sentencing proceeding to have taken place. Where a defendant takes an appeal from a judgment and sentence, he waives his claim of double jeopardy. State v. Cappetta, 395 So.2d 283 (Fla. 3d DCA 1981). Failure to raise the issue below waives the right to present it on appeal. Bell v. State, 262 So.2d 244 (Fla. 4th DCA 1972). §921.141(1), Fla. Stat. (1981) allows for a new jury to be impaneled under Chapter 913, Fla. Stat. (1981) if the original jury panel is not available to make a sentencing recommendation. This certainly contemplates the situation where, as here, a case is remanded for a new sentencing proceeding after review by this court.

The new sentencing proceeding was proper, and the jury's recommendation of the death penalty, reflected in the trial court's findings of fact must stand.

POINT IX

THE COURT DID NOT ERR PREJUDICIALLY BY SUSTAINING A STATE OBJECTION TO A HYPOTHETICAL QUESTION POSED BY APPELLANT TO HIS EXPERT WITNESS.

Appellant argues that he was prejudiced by the lower court sustaining a State objection to the hypothetical basis of a question from Appellant's counsel to an expert witness (AB 30). Once again, the State would point out that Appellant's failure to request a proffer of the excluded testimony precludes consideration of the issue on appeal. Bennett v. State, supra; Miller v. State, supra. This court has no basis for deciding the magnitude of any alleged error where it has no knowledge of what the excluded testimony would have been. Appellant mentions in his brief that he has proffered what the testimony of Dr. Wright would be at his motion for continuance (AB 30). Apparently, Appellant is referring to Appellant's trial counsel's statement on page 53 of the record: "[t]o proffer what I think he would say is that that injury could not have been caused from a hammer." However, it is apparent from counsel's statement immediately preceding the above statement, at the time trial counsel made this representation to the court, Appellant's counsel had never even seen the photographs upon which he made the representation, and Dr. Wright had not seen them for many years (R 53). This earlier representation to the court is not sufficient as a proffer to preserve this issue on appeal.

Even had this issue been properly preserved, it is doubtful that Dr. Wright could have testified to anything so significant as to change the outcome of the jury recommendation. The jury did not even consider the aggravating circumstance of the nature of the homicide, and was not determining guilt.

Appellant, citing to the record at pages 803-804, makes the statement that "Dr. Wright's opinion was that there was no forehead injury, or laceration, and that the decomposition of the area of the forehead was caused by enzyme activity which occurs postmortem in an area where there is a skin abrasion." (AB 30). Appellant's statement is not supported by the record. In fact, Dr. Wright testified that he could not say whether or not there were any head injuries to the victim or not (R 803). Dr. Wright's testimony was based on his review of photographs of the victim's body and a review of Dr. Fatteh's autopsy report. He was not present at the autopsy itself (R 796).

It is also unclear how Dr. Wright could testify, where he had not observed any head injuries, as to what type of object could have caused these supposed injuries. It is logical to assume that if he had been allowed to respond that his response would necessarily have been nonresponsive.

Moreover, any supporting testimony which Dr. Wright may have been able to give would only have served to corroborate what was already before the jury through the testimony

of Dr. Davis (R 772-773). Thus, any improper exclusion must be considered harmless. There has been no reversible error.

POINT X

THE TRIAL COURT ACTED PROPERLY WITHIN ITS DISCRETION BY APPOINTING A MEMBER OF THE FLORIDA BAR TO REPRESENT APPELLANT.

Appellant seems to think that he has the option of choosing exactly whom the court shall appoint to represent him. Such is not the law.

First of all, the trial court failed to reappoint Mr. Bush, who represented Appellant during his first two trials, because Appellant told the court, regarding Mr. Bush, "the man is in favor of the death penalty, that's why I have my reservations" (R 21).

Secondly, the trial court did not have the authority to appoint an assistant public defender from another circuit to represent Appellant. Appellant refers to § 27.53(3)(b), Fla.Stat. (1981) (incorrectly cited in Appellant's brief as "Section 27.523(3)(b)) as authority for the court to appoint a public defender to represent an indigent in a conflict situation (AB 36). However, Chapter 27, Fla. Stat. (1981), dealing specifically with the duties of a Public Defender refers to §925.035, Fla. Stat. (1981) for capital cases. The State maintains that it is § 925.035(1), Fla. Stat. (1981), dealing specifically with the unique nature of appointment of counsel in capital cases which must be controlling. It states:

> If the public defender appointed to represent two or more defendants found to be insolvent de-

> termines that neither he nor his staff can counsel all of the accused without conflict of interest, it shall be his duty to move the court to appoint one or more members of The Florida Bar, who are in no way affiliated with the public defender in his capacity as such or in his private practice, to represent those accused.

The above statute does not provide for the appointment of an Assistant Public Defender from another circuit.

Appointment of counsel is certainly within the discretion of the trial court. The trial judge was not familiar with Mr. Carres and was understandably hesitant to appoint him, even had he the power to do so (R 12). The court could have simply appointed the Public Defender, but at Appellant's request held a hearing to consider private counsel (R 5-25). He should not be heard to complain now.

An indigent has only three representation options: (1) accept the Public Defender as counsel; (2) retain private counsel at their own expense; or (3) represent themselves after waiving appointment of counsel. Mansfield v. State, 430 So.2d 586, 588 (Fla. 4th DCA 1983). He does not get to pick which assistant or special Public Defender will be assigned to his case, although a court could certainly take an accused's request into consideration, as the court did in Costello v. State, 260 So.2d 198 (Fla. 1972).

Messer v. State, 384 So.2d 644 (Fla. 1980) is distinguishable from the case at bar. In that case, this court

specifically stated that "during the pendency of an appeal ... [where] such hearing is a part of the appellate process ... it is proper for appointed appellate counsel to represent the appellant at such hearing." Id. at 645. This is certainly different from this case where the appeal had been completed.

Appellant alludes that he had ineffective assistance of counsel. The State maintains that such a claim is entirely unfounded, but even if it had merit it cannot be considered on direct appeal.

Appellant was properly represented by private counsel at his own request, and there was no prejudice in failing to appoint a specific individual requested by the accused where the court did not have the power to appoint him. The court properly exercised its discretion of appointment.

POINT XI

THERE IS NO REQUIREMENT THAT A PRESENTENCE INVESTIGATION REPORT BE ORDERED IN CAPITAL CASES.

Appellant argues that he was prejudiced by the trial court's failure to order a presentence investigation report. The State contends that there is no requirement that such a report be ordered, and Appellant was not prejudiced.

The committee note to Fla. R. Crim. P. 3.710, Presentence Report, states: "Of course, no report is necessary where the specific sentence is mandatory, e.g., the sentence of death or life imprisonment in a verdict of first degree murder." Thus, no report was necessary in the case at bar.

This court has repeatedly held that the ordering of a presentence report is discretionary in a capital case, and the trial court's failure to do so does not constitute reversible error. See e.g., Thompson v. State, 389 So.2d 197 (Fla. 1980); State v. Purwin, 405 So.2d 970 (Fla. 1981); Harich v. State, 437 So.2d 1082, 1086 (Fla. 1983).

Where the trial court has no discretion beyond imposing the death penalty or life imprisonment after a conviction of first degree murder, a presentence report would be unnecessary since the judge should really be basing his decision on the information obtained through the jury sentencing proceeding. Hargrave v. State, 366 So.2d 1 (Fla. 1978). The information provided in a presentence investigation report is

for the purpose of determining alternatives to incarceration, § 921.231 (1)(k), Fla.Stat. (1981). There was no alternative in the instant case.

Appellant's trial counsel would have been reimbursed for any reasonable costs he incurred while investigating mitigating circumstances. § 925.036, Fla. Stat. (1981). Thus, it was not necessary for Appellant's counsel to rely on a presentence investigation report. There has been no error.

POINT XII

APPELLANT HAS FAILED TO PRESERVE FOR APPELLATE REVIEW CERTAIN COMMENTS MADE BY THE PROSECUTOR DURING CLOSING ARGUMENT WHERE APPELLANT FAILED TO OBJECT TO THESE COMMENTS AND WHERE THESE COMMENTS DO NOT CONSTITUTE FUNDAMENTAL ERROR.

Appellant alleges that the prosecutor's closing argument contained certain improprieties that are grounds for reversal.

Appellee maintains that Appellant has failed to preserve this issue for appellate review since Appellant failed to object at any time to any part of the prosecutor's closing argument. "When there is an improper comment, the defendant . . . has the obligation to object and . . . [i]f the defendant fails to object . . . his silence will be considered an implied waiver." Clark v. State, 363 So.2d 331, 335 (Fla. 1978); State v. Cumbie, 380 So.2d 1031, 1033 (Fla. 1980).

Appellee also maintains that none of the portions of the prosecutor's closing argument to which Appellant objects reach "to the very heart of the proceeding" so as to constitute fundamental error. Appellee maintains that when viewed, as they must be, in the context in which they were made, the prosecutor's comments were proper and reasonable and were not prejudicial or inflammatory. White v. State, 415 So.2d 719, 720 (Fla. 1982); Nelson v. State, 416 So.2d 899, 900 (Fla. 2d DCA 1982). As stated in Johnson v. State, 348 So.2d 646,

647 (Fla. 3rd DCA 1977), it is not presumed that jurors are led astray to wrongful verdicts by counsel's impassioned eloquence. There is certainly no indication of the jury's being so led in the case sub judice. The prosecutor's comments here were not improper and, even if they were, were not so irradicably prejudicial that any error could not have been waived by Appellant's failure to object. Joiner v. State, 382 So.2d 1357, 1359 (Fla. 1st DCA 1980).

Even had these comments been properly preserved, they would not have constituted reversible error. The first comment complained of was a proper comment based on the evidence. Delaney v. State, 342 So.2d 1098, 1099 (Fla. 3rd DCA 1977).

The second comment complained of could not possibly have prejudiced Appellant where his guilt had already been determined at the first trial. This court affirmed his conviction in Rose, supra. Therefore, the prosecutor's comment was entirely appropriate, when the prosecutor was only saying that he agreed with the jury verdict.

When the comments complained of were not preserved for appellate review, and did not rise to the level of fundamental error, there has been no reversible error in the instant case.

POINT XIII

THE TRIAL COURT ACTED PROPERLY IN DENYING APPELLANT'S SECOND MOTION FOR CONTINUANCE MADE ON THE DAY OF TRIAL.

Appellant contends that the trial court abused its discretion by denying his second motion for continuance made on the day of trial. Appellee maintains that when trial counsel had been appointed almost three months prior to the date set for the new sentencing proceeding, the trial court did not abuse its discretion by denying Appellant's motion.

This court has recently reiterated the principle that the granting or denial of a motion for continuance is within the discretion of the trial court, even where the death penalty is of issue. Williams v. State, 438 So.2d 781, 785 (Fla. 1983). Eleven weeks notice is adequate time to prepare for both the trial and sentencing phases of a death case. Valle v. State, 394 So.2d 1004, 1008 (Fla. 1981). Here, it was only necessary to prepare for the sentencing phase.

Appellant was in no way prejudiced in the preparation of his defense where he had three months to prepare for the sentencing proceeding. It is Appellant's counsel's own fault that he waited until the week before trial to contact some witnesses in the case. Moreover, one of the two witnesses with whom he wished for more time to prepare, testified at the trial anyway.

The trial court did not abuse its discretion in

denying Appellant's second motion for continuance. There has been no prejudice.

POINT XIV

THE TRIAL COURT ACTED PROPERLY BY INSTRUCTING THE JURY THAT IF A CRIME IS COMMITTED WHILE A DEFENDANT IS ON PAROLE, THE CRIME IS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT.

Appellant complains that the jury instructions precluded the jury from evaluating whether or not his parole status was equal to being under a sentence of imprisonment (AB 48-49). The State maintains that the jury instructions were completely proper, and no prejudice has resulted.

After advising the jury that its advisory sentence should be based on the evidence presented to them in listing possible aggravating circumstances, the judge stated: "The crime for which the defendant, James Franklin Rose, is to be sentenced was committed while he was under sentence of imprisonment. If a crime is committed while the defendant is on parole, the crime is committed by a person under sentence of imprisonment." (R 866). The first sentence of the instruction is directly from Fla. Standard Jury Instructions in Criminal Cases (1981 edition) at p. 78. The second sentence is a correct reflection of the law. Aldridge v. State, 351 So.2d 942 (Fla. 1977). Therefore, the instruction was completely proper. The instruction did not preclude the jury from making the determination whether the evidence presented supported a finding that Appellant was on parole at the time the murder was committed.

Appellant's reliance on the principle that the court could not find an additional aggravating circumstance is misplaced. There is no violation of the double jeopardy clause where Appellant was originally sentenced to death, but the sentence was arrived at after a procedural error. The double jeopardy clause of the Fifth Amendment does not preclude the government from retrying a defendant whose conviction is set aside because of an error in the proceedings leading to the conviction. A corollary of the power to retry a defendant who has succeeded in getting his conviction set aside is the power upon his reconviction to impose whatever sentence may be legally authorized, whether or not the sentence is greater than the sentence originally imposed. North Carolina v. Pearce, 395 U.S. 711, 720 (1969). In the instant case, not only was there no more severe sentence imposed, but there was certainly no "announced practice" of imposing a more severe sentence upon reconviction. Id. at 724. Thus, Pearce is not applicable.

The case at bar is also distinguishable from Bullington v. Missouri, 451 U.S. 430 (1981) and Arizona v. Rumsey, ___U.S.___, 33 Crim. Law Reptr. 4165, since in both of those cases the original sentence was for life, unlike in this case where the original sentence was for death.

The application of an additional aggravating circumstance is not the same as imposing a more severe sentence.

The application of an additional aggravating circumstance is not the same as imposing a more severe sentence. In both the original jury sentencing proceeding, and the second proceeding, there was a recommendation of the death penalty. In neither proceeding were any mitigating factors found. Thus, even if this instruction were improper, it would have been harmless error since there were two other aggravating circumstances present which the jury relied on in reaching its recommendation that the death penalty be imposed. Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982).

The jury instructions were proper.

POINT XV

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THREE AGGRAVATING CIRCUMSTANCES.

Appellant argues that he was harmed by the trial court's failure to instruct on all statutory aggravating circumstances (AB 51-52). The State would first point out that Appellant did not request that instructions regarding all the aggravating circumstances be given the jury, nor did he object to the court's failure to do so. The charge conference is at pages 825-836 of the record. Secondly, instruction on only some of the circumstances is entirely proper.

Failure to object to jury instructions at a sentencing proceeding precludes consideration of the issue on appeal. Vaught v. State, 410 So.2d 147, 150 (Fla. 1982). Instructing the jury regarding only a limited number of aggravating circumstances is proper. Ruffin v. State, 397 So. 2d 277, 283 (Fla.), cert. denied 454 U.S. 882 (1981). Fla. Standard Jury Instructions in Criminal Cases (1981 edition) states at page 78, "[g]ive only those aggravating circumstances for which evidence has been presented."

Cooper v. State, 336 So.2d 1133 (Fla. 1976), cited by Appellant, contrary to his representation held that "we do not believe it was error for the trial judge to instruct the jury on every aggravating and mitigating circumstance listed in Section 921.141, in the absence of trial counsel's acquiescence to the omission of one or more circumstances." Id. at

1140. At the charge conference in the case at bar, it is quite clear that there was acquiescence on the part of the trial counsels to the omission of the rest of the aggravating circumstances. Cooper stands for the proposition that giving instructions on all aggravating circumstances may cause error in certain circumstances. It does not require giving instructions on all aggravating circumstances.

There was no error in the jury instructions.

POINT XVI

(Consolidated with Point VIII)

POINT XVII

THE TRIAL COURT PROPERLY ALLOWED THE INTRODUCTION OF A CERTIFIED COPY OF AN INFORMATION AND JUDGMENT AND SENTENCE FOR THE CRIME OF BURGLARY WITH THE INTENT TO COMMIT RAPE, WHERE THE PRIOR CONVICTION WAS RELEVANT TO SHOW THAT APPELLANT HAD PREVIOUSLY BEEN CONVICTED OF A CRIME INVOLVING THE THREAT OF VIOLENCE TO THE PERSON.

Appellant argues that it was improper for the trial court to admit the "introduction of evidence of prior convictions" and "error to find that Appellant had been convicted of a prior crime involving violence." (AB 56). The State contends that there was no error.

During the course of the sentencing proceeding, the State introduced a certified copy of the information, judgment and sentence in case no. 71-17071, where Appellant was convicted of burglary with the intent to commit rape. (R 698-700). During the course of the direct examination of Mrs. Daniels, from the probation and parole service board, it was elicited that Appellant was on parole for one other crime at the time of the murder of Lisa Berry. The nature of the second charge was never brought out, however. (R 706).

The admission of testimony regarding the second conviction complained of was clearly relevant to support the aggravating circumstance that Appellant was on parole at the time of the homicide. The first conviction was also admissible for the same purpose. See Point XIV, supra.

Moreover, the first conviction was admissible to

show that Appellant had previously been convicted of a crime involving the use of or threat of violence. §921.141(5)(b), Fla. Stat. (1981).

Mann v. State, 420 So.2d 578 (Fla. 1982) supports the admission of testimony regarding Appellant's previous conviction. Mann is factually distinguishable to the extent that in Mann there was no prior conviction of the crime of burglary with the intent to commit rape, but the defendant was merely convicted of burglary. Id. at 580-581. In the instant case, Appellant's prior conviction, on its face, was for burglary with the intent to commit rape. This court in Mann held, "[h]ad [the defendant] been convicted of that sexual battery, the aggravating factor would apply." Id. at 581. By extension, the aggravating factor was correctly applied here. Rape is a violent crime.

This case is unlike Maggard v. State, 399 So.2d 973 (Fla. 1981), cited by Appellant, in that Maggard involved "extensive evidence" being admitted solely to rebut a mitigating circumstance which the defendant had agreed not to rely on. Id. at 977. Here there was little evidence admitted properly to prove relevant matters.

Williams v. State, 386 So.2d 538 (Fla. 1980) is also distinguishable because in Williams the State relied only upon a presentence investigation report, rather than a certified copy of a judgment and sentence of the conviction to show the prior conviction. The proper method was used in

the case at bar.

Even were this court to find that this aggravating circumstance should not have been applied, the death sentence can be justified on the two remaining aggravating circumstances. Even where this court has decided that two of three aggravating circumstances recited by the trial judge were inapplicable, this court was not required to remand for resentencing but could, instead, affirm the sentence on the one aggravating circumstance which was properly found since there were no mitigating circumstances. Armstrong v. State, 429 So.2d 287 (Fla. 1983).

The aggravated circumstance that Appellant had previously been convicted of a crime involving the use of or threat of violence was properly applied in this case. The death sentence must be affirmed.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, Appellee respectfully requests this Honorable Court to affirm the sentence below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to LOUIS G. CARRES, ESQUIRE, Assistant Public Defender, 15th Judicial Circuit, 224 Datura Street, 13th Floor, West Palm Beach, Florida, by courier, this 5th day of January, 1984.

Joan Fowler Rossin
Of Counsel