IN THE SUPREME COURT OF FLORIDA

GERALD EUGENE STANO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 64, 687

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The symbols to designate the record and the supplemental record on appeal which the Appellant has utilized will also be used by the Appellee for sake of clarification. They are:

"R" - Record on Appeal.

"SRA" - Supplemental Record on Appeal filed May 21, 1984, consisting of transcripts of Appellant's statements.

"SRB" - Supplemental Record on Appeal filed June 1984, consisting of the evidence introduced

STATEMENT OF THE FACTS

Initially the Appellant, Gerald Eugene Stano, was brought to trial on September 26, 1983 for the offense of first degree premeditated murder. A mis-trial was declared when a jury was unable to reach a verdict (R 1314-1613).

A new trial commenced on the same charge on November 28, 1983 (R 1).

During voir dire questioning a Ms. Erb was questioned about newspaper articles that she had seen regarding the Appellant. She indicated that she had seen the Appellant's name in the paper a number of times but usually skipped over those stories regarding him. She knew that one of the cases involved murder and also was aware that Clarence Zacke was also mentioned. The trial judge then asked her if anything that she had read gave her a preconceived opinion to which she replied in the negative (R 26). The following colloquy between the court and Ms. Erb then took place:

> The court: Do you believe despite what you may have read that you could be a fair and impartial juror?
>
> Mr. Erb: I would try very hard to be impartial. I am terrified at the moment, but I'll try to be very impartial. (R 26).

The court then asked her if she could make a decision based upon the evidence and testimony to which she responded "Yes." (R 126-127). Upon further questioning Ms. Erb indicated that she had seen Appellant's name in the paper approximately six months ago. Again she reiterated that she saw his name but did not read the article. (R 127). She testified that she was more interested in the community affairs section of the

newspaper (R 127).

The prosecutor, Mr. Robinson, asked Ms. Erb what the real reason was that she did not read the articles. She replied that it was because the articles were repetitious. She also explained that her refusal to read the articles was not because of the subject matter necessarily. She again stated she knew that the defendant had been tried before but did not know what the accusation was (R 128). Again the veniremen indicated that with the prior factors in mind she could give a free and impartial decision in the case (R 129). Mr. Robinson then directed her attention to her emotions (i.e. Ms. Erb indicated earlier that she was terrified at the moment R 126). She indicated that her emotions would not affect her so that she would not be able to make a judgment as a juror (R 129-130). Again, later on during the examination Ms. Erb indicated she had knowledge of Appellant in that he was accused of murder and that he had been convicted of a felony but she did not know what type of a felony he was convicted for (R 131-132).

Mr. Russo, the defense counsel below for Appellant, asked Ms. Erb to explain why she was terrified. She indicated that she took these proceedings very seriously and was concerned about the repercussions there could be for a guilty verdict on a first degree murder charge (R 133).

Mr. Russo then questioned Ms. Erb about her reaction to the newspaper articles regarding the Appellant to which she replied:

> Well, I don't necessarily believe everytthing I read in the paper. I just kind of lock away the name. I didn't really have a reaction to that, because I really didn't know, like I said, what he was convicted of. I didn't bother to read that far.
>
> Mr. Russo (Appellant's defense counsel)

Okay. So, you're saying you had no reaction to these stories?

Ms. Erb: Yes. (R 134).

At this point the defense counsel asked how the venireman was going to make provisions for blocking the articles out of her mind when she deliberated as a juror. The court at this point interjected and disallowed that question. Mr. Russo, the defense counsel, then argued that he wanted to know if and how Ms. Erb was going to be able to deal with the fact that she's read the newspaper articles and then be able to deliberate. The court explained that the venireman had already answered the question regarding if she was able to deal with the newspaper articles and would not allow the question of how she would deal with such articles when she was deliberating (R 135). Again the defense attorney tried to ask the same question and the court explained that defense counsel had a right to ask questions as to the intensity of the knowledge. But the court explained that questions would be restricted to pre-trial publicity and its possible affect of prejudice. (R 138). This witness was not challenged for cause (R 595).

Defense profferred the testimony of a Dr. Fernando Stern, a psychiatrist. Dr. Stern told the court that there are people who confess to crimes that they did not commit for publicity (R 1786). But he also testified that he did not know whether the Appellant was one of these types of people (R 1786). Dr. Stern did not listen to the taped confession in the case at bar (R 1787). He also maintained that even if he did listen to the tape he could probably not tell if the Appellant was lying or not (R 1787-1788). When asked whether he could reascnably testify to a medical certainty that the Appellant had the capacity to

falsely confess to the crime in this case, the doctor stated, "I could not testify on this case in particular, because I don't know anything about this case." (R 1793).

The next witness that defense proffered was Detective James Kappel, a detective from St. Petersburg, Florida. He interviewed Appellant regarding a homicide in Pinnellas County at which time the Appellant confessed. (R 1798). Kappel told the judge that since the facts of the homicide differed with the facts of Appellant's confession he became suspicious that Appellant was not the perpetrator. (R 1798-1799). Although the Appellant was able to take the detective to the murder scene and tell the cause of death he failed to describe the clothes or jewelry of the victim. (R 1802-1803). The Appellant did initially deny any knowledge of the murder whatsoever (R 1804). Later on the Appellant, after confessing, finally recanted his confession and indicated that his confession was a lie. (R 1811).

Dr. Raul Molina, a pathologist, was the first witness to testify on behalf of the state (R 611). He was summoned to investigate the discovery of the victim's partially decomposed body and remains (R 620). He saw that the victim had been lying in an unusual position, that her legs were spread underneath her thighs, that is the calves were underneath the thighs towards the sides. (R 621). The vitim was wearing a tank top shirt with a red blouse with yellow stripes; she had blue jeans rolled to mid calf. She had no shoes. The side of the body was stained with a brownish soft substance similar to blood (R 622). The autospy revealed the victim was approximately aged 20, about 5'2", 110 pounds and was a white female. The body had been at that site from 4 to 8 weeks. (R 623).

Dr. Molina did not rule out stabbing as a cause of death especially in lieu of the fact that the body was in a very unusual position and that blood had apparently appeared on the palmetto leaves which were found on the victim and the ground around the victim's body. (R 625-626). The doctor testified the blood definitely would have flowed prior to the death since a cadaver does not bleed (R 626-627).

On cross-examination the doctor maintained the shirt of the victim was blue, yellow, and red with stripes. The zipper on the victim's pants was closed (R 630-631). The victim's hair was light brown (R 633). The doctor testified that natural death could not be ruled out completely but it was not likely because a lot of blood was found in the top part of the body and the surrounding area and the unusual position of the body. (R 635). The doctor maintained that the bleeding factor was a major event in the death and although he did not rule out drug overdose completely he said the bleeding was a major factor. He again asserted that the victim's death was not a natural death (R 635-636). Dr. Molina also testified that it would also be possible to turn a knife so that it would go right between the ribs and not nick the rib bone at all (R 648).

Dennis Farrell testified he was hunting on January 19, 1974 and discovered the victim's body on Merritt Island Cape Refuge which was a dirt road. He was on foot at the time. The body was in what he described as a ditch. (R 653-657).

Dr. Stanton Bass a dentist testified on behalf of the state and when tendered as an expert in the field of dentristry, defense counsel below stipulated to his expertise (R. 669). The court without objection then found that the witness was an expert in the field of dentistry, identification of teeth, and ability to identify fillings and that the doc-

tor was entitled to express an opinion thereon.(R 669). The doctor then testified that the victim, Kathy Scharf, was a patient of his (R 669). The doctor had seen the victim approximately fifteen times (R 671) and did some restoration work to her permanent teeth (R 672). After testifying to all the work that the doctor did on the victim's teeth, the doctor then testified that he compared the teeth of the skull of the victim with the dental chart of Kathy Scharf (R 678). On cross-examination the doctor did state that the skull he examined did not have any of its baby teeth. (R 683). However, the last time the doctor saw Kathy Scharf she was approximately ten years old and it was back in July of 1967 (R 682-683). Doctor Bass explained that even though he had seen the victim at the time when she had twelve baby teeth she still had twelve permanent teeth and he was able to make a comparison based upon those permanent teeth (R 684).

Loren Sylvia testified as a lay witness for the state. He found the victim's wallet in the Harbor Oaks area between New Smyrna and Port Orange. The wallet was found about a quarter of a mile north of Marko's Restaurant. The wallet was in poor condition. (R 686-692).

At this point in the trial the assitant state attorney proffered the evidence of a trial clerk. The purpose of this clerk testifying would be to clarify identification numbers on evidence obtained at the initial trial (which resulted in a mis-trial). (R 694). The state attorney also proffered the evidence of a court reporter to authenticate the transcript of the victim's parents (R 695). Both these witnesses were allowed to testify over defense objection.

Steve Kindrick of the Brevard County Sheriff Department testified that he responded to the crime scene where the victim's body was first discovered (R 750-751). He decribed the area as heavily dense type

of vegetation with a lot of trees, undergrowth and brush. Close by was an orange grove. (R 751). The closest house was two miles north (R 752). Marko's Restaurant was thirty miles from the crime scene. (R 754). The victim's body was covered with 8 to 10 palm fronds. From the waist down the victim's body was in water. The water was described as "murky". (R 758-760). Initially the deputy recovered two rings on the left hand of the victim (R 762). One of these rings was described as an Indian head ring. The third ring was found in the canal underneath the body (R 763). Kindrick testified it was difficult to find the dirt road which lead to the area of the victim's body (R 773). There was an extensive search for shoes and a purse which produced nothing (R 774-775). Kindrick observed an area where the skin was gone and the ribs were exposed beneath the shirt (R 802).

Charles Evans, a neighbor of the victim, testified that on December 15, 1973 he saw the victim walking south on route 1 by herself. She was wearing jeans and a short coat (R 806). She did not seem to be in any physical distress (R 807). Evans testified at this point the victim was about two to three miles from Marko's Restaurant and that she was walking towards that Restaurant which would also be towards the direction of her home. These events happened approximately 9:00 a.m. on a Saturday (R 809)

W.J. Patterson another Brevard County Sheriff Deputy testified that he saw the victim's body initially. The body was covered with palm fronds and vegetation. In his opinion the palm fronds looked like they had been deliberately placed over the body due to the distance of the body from the closest palm tree and due to the uniform pattern (R 826,834).

Paul Crow, of the Daytona Beach Police Department testified

that he interviewed the Appellant. After giving the Appellant his Miranda rights the Appellant maintained that he had picked up a young white female hitch-hiking in the Port Orange area off of route 1. He then told Detective Crow that he stopped at a skating rink and continued towards the Titusville/Merritt Island area. (R 870). The defendant said the victim was in her early teens, had a multicolored shirt, was wearing blue jeans, and had a ring with a gold design. He confessed that he either stabbed her or shot her but he did not remember which. He also told Crow that he took the victim from his car; carried her to a small pond with no water in it or very little water in it and layed the body down and covered it with some small palm fronds (R 866). The interviewer himself was not aware of the details of the crime (R 866). The Defendant went on to tell Mr. Crow that he stabbed the victim in the chest area (R 874). It was disclosed during the trial that newspaper articles did mention the palm fronds. But these articles did not mention the location of the body, the jewelry or the instrument used (R 875). This interview occurred on March 6, 1981 (R 866).

David Hudson was also present at the interview with Detective Crow when the Appellant initially confessed. He remembered the Appellant describing the clothing of the victim as follows; blue jeans, multicolored top. He also recalled that Appellant maintained he threw the victim's purse out the window of the car (R 879). Appellant dumped the body in a canal with a small amount of water in it and covered the body with palm fronds. (R 879). Significantly, the Appellant maintained that he recalled a type of jewelry with an Indian design (R 880). Hudson described the interview as a non-direct interview that is, it was not question and answer but the Appellant was encouraged to give a narrative (R 880).

Clarence Zacke testified that he had talked to Appellant while the two were in jail about July of 1983 (R 889). Appellant told Zacke that he had picked the victim up while she was hitch-hiking and took her to the woods in Merrit Island. He said he turned off the main road at which time he told the victim that it was time for her to pay. An argument ensued. He told the victim that he wanted "pussy." (R 893). He then divulged to Zacke that he first beat the victim, stabbed her a few times but not very deeply, and then he choked her. He choked the victim and then let her come to and rechoked her. (R 894,895). The total process took over an hour (R 894). He maintained that he played with the victim like "a cat would a mouse" (R 895). He told Zacke he dragged the victim under some palm fronds and covered her with palm fronds, brush and limbs (R 896).

Johnny Mannis of the Daytona Beach Police Department testified he interviewed the Appellant on August 11, 1982 (R 968). At this confession Appellant stated he remembered picking up the victim near the holidays on route 1. They then continued South on route 1 and were then on route A1A. They turned left into an orange grove where he stabbed her and carried her body back and placed it on the canal bank. He described the hair color of the victim as blondish brown. (R 973). He told Mannis that the victim was wearing a multicolored blouse, that she had some type of Indian jewlery. He also stated he probably threw the victim's purse out of his car on the way back to Daytona (R 974). Appellant also stated there was an old Stuckey's or Horne's a few miles from the crime scene. (R 975).

Mannis conducted a taped interview on the next day with Appellant. At this interview Appellant stated that he was not very good

on estimating the victim's age (R 986-987). He described the victim's shirt as a tie-dyed blouse. Again he mentioned his location (R 985-986) and the fact that the victim had some Indian type jewlery (R 988). He could not recall if the jewlery was a ring or a necklace (R 988). Again he gave the same dirction of the route with the victim, that is that they turned from State road AlA to go East in an area where there were canals and swamps. He stated that they ended up on a little dirt road with orange trees nearby (R 990). Again, he reiterated that he used a knife on the victim (R 992). He told Mannis that he layed the victim in a stagnant pond and that he had to carry her from the car. He walked through "mucky" water and almost ruined a pair of his shoes (R 993). He maintained that he put branches over her (R 993). He also stated that not much blood was on him but that he did clean up at a gas station on route 1 (R 995). Again, Appellant told Mannis that this crime occurred around a holiday in November or December or January 1 (R 997).

On November 3, 1983 the state filed a motion to compel the testimony of Mr. And Mrs. Scharf (R 1765). Both parents testified under no conditions would they testify in a second trial. They testified because of the emotional trauma they would be unable to testify again. Both indicated they would refuse to testify in spite of fines or imprisonment (R 1766-1774). The defense joined in the motion to compel their testimony which was granted (R 1778). On November 14, 1983 the state filed a motion to declare the parents unavailable (R 1615). Again, the parents reiterated the same testimony that they would refuse to testify in spite of a court order to do so and in spite of fines or imprisonment or both (R 1617-1627). Defense counsel objected and suggested that the court wait till the time of trial to make the determination and exhort

the witnesses to testify short of jailing them or imposing bond (R 1639-1640). The trial court denied the motion as premature (R 1640).

On the day of trial, right before the jury was chosen, another hearing was held and the trial court this time determined that the parents' testimony from the former trial would be admitted because the parents persisted in their refusal to testify in spite of the court order and the sanctions which could arise therefrom (R 1-26). The parents' testimony was read from the trial transcript at the first trial. The parents told the jury there relationship to the victim, the last time they saw her, and told the jury that Dr. Bass was the victim's dentist. Mrs. Scharf also identified jewelry of the victim that was found at the murder scene. (R 2123-2159).

PENALTY PHASE

At the penalty phase the state initially introduced six prior judgment and sentences for six capital homicides (S.R.B. 37 - 62) Additionally the state introduced two judgments of two other capital homicides (S.R.B. 63 - 72).

Sargeant Paul Crow testified regarding Appellant's prior convictions for the murder of Mary Carol Maher. He testified that the body was discarded in a dump, there were puncture wounds in the body, and the body was partially covered with pine branches (R 1172). Four slides were shown to the jury of the victim's body (R 1181). Additionally the confession regarding Ms Maher was discussed. Particularly the Appellant identified Ms. Maher and also stated he stabbed her (R 1187,1189).

Sargeant Jessie Blitch of the Gainesville Police Department testified regarding two of the prior murder convictions by Appellant of Ann Arceneaux and Jenine Ligotino (R 1194). Photographs of the crime scenes

were shown to the jury. It was revealed both victims had stabbed wounds (R 1195). Again the confession regarding both was admitted, as well as autospy reports (R 1199).

Frank Carrera III, a psychiatrist (admitted as an expert without objection) testified regarding his examinations of Appellant and his conclusions (R 1203-1207). He examined the Appellant three times both for the trial and the penalty phase. He found the Appellant competent to stand trial and legally sane at the time of the commission of the crime (R 1209). Additionally, according to the doctor, Appellant needed no psychiatric hospitalization or treatment. The state attorney asked Dr. Carrea a hypothetical question summarizing the facts based upon the trial evidence and the defendant's confessions (R 1210). The doctor concluded the Mr. Stano did have the capacity to appreciate the criminality of his conduct and the conform his conduct to the requirements of the law (R 12-12). The doctor contrary to Dr. McMillens report admitted into evidence for the Appellant (R 1265), that he found no signs of paranoia, schizophrenia (R 1214). Again, contrary to Dr. McMillen's report he found no signs of neurological impairment (R 1214). He diagnosed Appellant's condition as an anti-social personality disorder. Specifically Appellant's behavior was described as unsocialized, aggressive in his earlier years based upon his history of truancy, lying, stealing, fighting, defying authority, and lack of friendships (R 1216). The doctor explained that Appellant's disorder involved a lack of empathy for others (R 1217). The doctor also concluded that the type of child abuse that Appellant suffered in his infancy and his younger years would not necessarily mean that he would become a murderer (R 1218).

Appellant objected to the cumulative testimony of Dr. Barnard

but his objection was overruled and Dr. Barnard, another psychiatrist testified on behalf of the state (R 1236). Again Dr. Barnard was admitted as an expert in psychiatry without objection (R 1236). Like his colleague, Dr. Carrera, Dr. Barnard did not see any signs of paranoia, schizophrenia or neurological impairment in Appellant (R 1240). Dr. Barnard was confronted with the facts in the case and Appellant's confession similar to the question asked Dr. Carrera. (R 1210,1241). Dr. Barnard reached the same conclusions as Dr. Carrera (R 1212, 1243).

Appellant then had an opportunity to present his case. He initially admitted Dr. McMillen's report which was received into evidence (R 1265) (S.R.B. 92 - 103). Dr. McMillen's report described the childhood of Appellant. The report indicated that the Appellant was sufferring from paronoid schizophrenia and had neurological impairment. The report also indicated that given Appellant's condition and history, murder was a logical rather than a illogical consequence.

The only other witness to testify was Appellant. Appellant was asked to comment about how he felt in lieu of all the prior convictions of the murdered young women and the doctors testimony admitted into evidence. He answered he was a victim of circumstance and that he needed psychiatric help (R 1821). Mr. Stano was then asked if his convictions for all the past murders were due entirely to his confession to which he replied "yes." (R 1821-1822). He also indicated that he confessed because he needed psychiatric help. (R 1822). He also maintained that he did have emotions contrary to the expert testimony (R 1822). Appellant told the jury that he believed he had a psychiatric disorder from the age of six months until his late twenties and that he should not be executed but be spared to receive psychiatric treatment (R 1823).

On cross-examination it was revealed that the Appellant was seeing a psychiatrist for his marital problems but did commit some murders during that time (R 1823-1824). Appellant also admitted that he was more concerned with the cleanliness of his car and his shoes than the victims' lives (R 1824). Appellant continued to deny the murder of Kathy Lee Scharf, the victim in the case at bar, but did admit to committing the other murders for which the convictions had been introduced into evidence initially in the penalty phase (R 1825). Appellant admitted to stabbing some of the victims and covering them up (R 1826). It was also revealed that Appellant stabbed one of his victims fifty times (R 1828). Appellant acknowledged that he also killed Nancy Heard but did not remember how (R 1829). Appellant confirmed that he had either shot, strangled or stabbed eight women (R 1829). Appellant's plea to these murders were discussed (R 1830).

The state attorney then discussed another victim, Barbara Bower. Appellant indicated that he first met Barbara Bower because she was having car problems (R 1831). He did not remember how he had killed Barbara Bower (R 1832). He also indicated that he did not confess to the Tony VonHaddick murder case until much later after he had confessed to the Mary Carol Maher case (R 1832). Appellant indicated that he did not bury any of his victims. He refused to divulge what he did with the knives and the guns used to commit these murders. He did, however, admit to disposing of purses and shoes by throwing them out of his car onto back roads.

The state attorney then questioned Appellant regarding his pleas to the murders and specifically asked Appellant if he believed that there was a possibility that he could get the death penalty in Volusia County for subsequent murders that he plead to and the Appellant responded

"yes." (R 1835). Then Appellant was asked if he planned to collaterally attack the competency of his lawyer. At this point the defense interposed an objection but the court overruled the objection. Appellant responded "yes." (R 1836). Next the state attorney inquired if the Appellant were going to appeal his cases by attacking the competency of his lawyer and Appellant indicated that he would (R 1837).

On redirect examination the Appellant did confirm that he had received two death penalties from the last two murders that he plead (R 1839). Again, Appellant reiterated that he did not commit the murder of Cathy Lee Scharf (R 1839). On recross-examination the state attorney asked Appellant if he was denying the murder of Cathy Scharf so that there would be a better chance that the Supreme Court would not affirm the death penalty in the case at bar if, indeed, the Appellant did receive the death penalty (R 1840).

POINT I

THE TRIAL COURT WAS CORRECT AND WITHIN HIS DISCRETION IN LIMITING APPELLANT'S VOIR DIRE EXAMINATION OF THE VENIRE WHERE SUCH EXAMINATION WAS UNNECESSARY ARGUMENTATIVE, AND DID NOT ADDRESS THE QUESTION OF THE VENIRE'S PARTIALITY.

ARGUMENT

A trial court has wide latitude in the exercise of his discretion with respect to qualification of jurors. The trial court may reasonably control voir dire examination in the interest of orderliness and in the dispatch of trials. This principle was announced in Barker v Randolph, 239 So.2d 110, 112 (Fla. 1st DCA 1970). Furthermore after a verdict, all presumptions of law are in favor of the jurors' competency and the burden of proof is upon one who attacks it. The latter principle was announced in Crosby v. State, 90 Fla. 381, 106 So. 741 (Fla. 1925) in affirming a convicion based upon the contention that jurors were biased or prejudiced because of their relationships with an interested party, or the personal disability as a juror. An issue regarding a potential jurors' partiality is a mixed question of fact an law. An Appellant must demonstrate manifest error by the trial court in order to have a verdict set aside. These principles were announced in Blackwell v. State, 101 Fla. 997, 132 So. 468, 470 (1931).

The threshold question in such an issue is whether the juror has indicated that he had an expressed opinion on the issues to be tried. If so, the court then must decide if the opinion will raise a presumption of partiality. See, Blackwell, supra. In the case at bar the Appellant has not met this threshold question. Ms. Erb indicated that she had no preconceived opinion regarding what she had read in the newspapers. (R 126).

She also told the court that she could make a decision based upon the evidence and the testimony in the courtroom. (R 126-127). She did indicate that she was aware of Appellant's prior case as well as his name but did not read the articles specifically (R 127, 128). She also testified that her emotions would not affect the verdict (R 129-130). In any event her emotions were not due to the preconceived notions regarding the newspaper articles but the fact that she was a juror in a first degree murder case and the ramifications of a guilty verdict based upon first degree murder (R 133). Appellee would submit that if the juror had indicated she had developed an express opinion of prejudice against the Appellant due to the newspaper articles then there would be an issue. But this was not the case.

In Lamb v. State, 90 Fla. 856, 107 So. 530, 535 (1926) it was held that a person called as a juror could have formed an opinion based upon newspaper statements. But where a venireman has expressed no opinion as to the truth of the newspaper statements he would still be qualified as a juror if he states that he could fairly and impartially render a verdict. Under these circumstances the court "shall be satisfied with the truth of such statement." id 132 So. at 470. In the case at bar since the potential juror indicated that she had not formed a fixed opinion based upon the newspaper articles then the court was correct in not allowing the further questioning and being satisfied with the truth of her statement. Furthermore Appellant has not alleged that any of the jurors had formed fixed opinions. In Jeffcoat v. State, 103 Fla. 466, 138 So. 385 (Fla. 1931) certain venirement indicated they had read paper accounts of the offense that the defendant was presently charged with. But they also indicated that they did not remember the newspaper accounts.

One venireman indicated that the papers did influence his opinion but he did not know if the newspaper article was true or not. He also asserted he would base his verdict on the evidence only. The other veniremen said that although he had read the newspaper account he could give the defendant a fair and impartial trial as if he had never read the articles in question. Both veniremen were challenged for cause. The trial court denied these challenges. The review court upheld the trial court's ruling because the opinions were not fixed but rather the opinions were such that would naturally spring from public rumor or newspaper reports. The review court went on to hold that if a jurors' mind is open to the impressions it may receive from the evidence so that such opinion will readily yield to the evidence in the law then that juror is competent. id 138 So. at 387. The review court's affirmance was re-enforced by the fact that the trial court had an opportunity to personally observe the demeanor and statements of the veniremen. Ms. Erb never vacilated and stated affirmatively that she had no fixed opinion regarding the Appellant because of the newspaper articles. Since the trial court had an opportunity to view and see the demeanor of Ms. Erb as well as the other veniremen and there is no indication of a fixed opinion then the trial court's rulings regarding the limitation of voir dire should be sustained.

In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) there was substantial media coverage regarding various aspects of a first degree murder case on the radio and television. The United States Supreme Court held that qualified jurors need not be totally ignorant of the facts and the issues involved. Extensive knowledge in the community of either the crimes or the alleged perpetrator would not be

sufficient to render the trial unconstitutional. Furthermore the mere existence of preconceived notions would not indicate impartiality. It would be sufficient if a juror could lay aside his opinion and render a verdict based upon the evidence presented at trial. id at 432 U.S. 301-304, 97 S.Ct. 2302-2303.

In Smith v State, 253 So.2d 465 (Fla. 1st DCA 1971), it was held improper for a state attorney to ask on voir dire whether or not a juror would convict the defendant based upon the testimony of a person who had been granted immunity if the state proved the case beyond a reasonable doubt. The First District reversed for a new trial because this was an improper question. The question called for a verdict in advance. Appellee would submit that if it is improper to propose a question which ask a juror to predecide his vote, then in the case at bar, it should likewise be improper to ask by what means or how a juror would deliberate. Appellant's defense counsel below asked the question as follows:

> How do you plan to make provisions for blocking out of your mind what you do already know about this case when you deliberate? (R 135).

Appellee submits that the latter question is tantamount to asking how a juror plans to deliberate which would be prohibited just as the question regarding what verdict the juror will deliver should be prohibited.

The trial court also has control to limit repetitious or argumentative voir dire questioning. This principles is announced in Jones v State, 378 So.2d 797 (Fla. 1st DCA 1980). In the case at bar the question propounded to Ms. Erb regarding how she would block out the "opinions"

she had formed when she deliberated was clearly argumentative. The trial court certainly had the discretion and was correct in limiting this type of questioning. In Murphy v State, 252 So.2d 385 (Fla. 3d DCA 1971) the defendant argued that the trial court erred in denying a motion for a change of venue and likewise for not excusing all the veniremen for cause based upon local newspaper articles about past crimes of the defendant. In affirming the conviction the Third District indicated that most of these reports were factual accounts. The defendant in Murphy had not demonstrated that the reports were highly colored or inflammatory. The Third District also noted that the defendant did not present any authority for his statement that knowledge of a prior conviction disqualifies a juror. id 252 So.2d at 387. In the case at bar there has been no showing that these newspaper articles were highly colored or inflammatory. As in Murphy the Appellant in the case at bar does not present any authority for his assertion for his knowledge of a prior conviction disqualifies a juror and therefore the questions propounded to Ms. Erb and tender for subsequent veniremen was improper.

Based upon the answers given by Ms. Erb and subsequent veniremen regarding the affect of newspaper reports, Appellee submits that even if there were any error demonstrated by the Appellant it would certainly be harmless error to disallow the question of how the juror would put aside the past newspaper accounts when the juror was deliberating. Any answer to such a question even if it could be conceivably probative would certainly add nothing to what had already been established in the voir dire.

POINT II

THE TRIAL COURT WAS CORRECT IN RESTRICITING APPELLANT'S PRESENTATION OF EVIDENCE AT BOTH PHASES OF THE PROCEEDINGS WHERE SUCH EVIDENCE WAS HEARSAY AND IRRELEVANT AND, IN ANY EVENT, ANY PUTATIVE ERROR WOULD BE HARMLESS FOR BOTH PHASES OF THE PROCEEDINGS.

ARGUMENT

Appellant contends that the trial court committed error because he disallowed Appellant to present evidence from third parties regarding an alleged false conviction that he made to a collateral crime.

Dr. Stern, during the proffer, testified that there are people who confess to crimes they did not commit and that Appellant could be one of these peoples. The doctor stated clearly that he did not know if Appellant fell into this class of people; only that he could (R 1786). The doctor did not listen to the taped confession of Appellant (R 1787). Even if the doctor did, he testified, he would not be able to determine whether the Appellant was lying or not for the confession in the case at bar (R 1787-1788). Dr. Fernando testified that he could not offer an opinion regarding whether the confession was false or not because he did not know anything about the case (R 1793). It is clear from this proffer that Dr. Fernando had no personal knowledge whatsoever of this case. Accordingly pursuant to § 90.604 he should not have testified even if some of the testimony offered could arguably have been admissible if it had come through other witnesses. It is significant to note at this juncture that the defense counsel below never proffered any evidence that the Appellant himself was maintaining that the confession in the case at bar was false or that he actually lied regarding the confession.

Detective James Kappel testified on proffer that he interviewed the Appellant regarding a collateral homicide in Pinnellas County. He testified that the facts of the homicide differed with the facts that were obtained from Appellant in his confession (R 1796-1799). In order for Detective Kappel to give this testimony he would have had to relate what Appellant said. Since this evidence is offered as exculpatory it can not be said that the evidence was against the interest of Appellant. Therefore this proffered evidence is hearsay and inadmissible pursuant to § 90.802, Fla. Stat. (1981). See, McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980) where states' witnesses were allowed to testify to what the victim had told them regarding a rape, burglary, and robbery and where the victim also testified at trial and where the review court reversed for a new trial because of the inadmissible hearsay.

Notwithstanding the above reasons for the inadmissibility of the proffered testimony, Appellee submits that this type of evidence is collateral, not probative, and irrelevant to the issues tried in the present case. Appellant cites a number of cases to support his proposition, among them being State v. Smith 377 S.W.2d 241 (Missouri 1965). This case is readily distinguishable from the present case because the evidence proffered in Smith related to a defense of the crime itself, not a collateral crime. In any event, the court in Smith maintained that:

> ...the general rule is that evidence of prior acts is not available for proof of the doing of an act in issue. (id at 245).

Appellee submits that this type of evidence would fall under the general rule quoted above. Commonwealth v. Graziano, 331 N.E.2d 808 (Mass. 1975) was another case cited by Appellant to support his contention. Again,

this case can be readily distinguished because the proffered evidence was used to impeach the probabilty of the state's main prosecuting witness and to also show a defense to the crime itself in that the state's prosecution witness was alleged to have been the perpetrator rather than the defendant in Graziano. But in the case at bar the evidence is not being introduced to test anyones credibility. Even if Appellant contended that it was used for impeachment it is not allowable to impeach your own witness pursuant to § 90.608(1) and (2), Fla. Stat. (1981).

In Hitchcock v. State, 413 So.2d 741 (Fla. 1982) a defendant was convicted of first degree murder based partially on a confession. At trial the defendant repudiated his confession and maintained he did the confession to "cover up" for his brother who was the real perpetrator of the crime. The defendant then proffered evidence to show past acts of violence by his brother. The trial court rebuffed the defendant and the appellate court affirmed the conviction. The testimony was only to show the bad character of the brother and otherwise was too remote to be relevant. This Honorable Court maintained that a defendant would have a right to present witnesses in his own defense but must comply with established rules of procedure and evidence designed to assure both fairness and reliabilty. Clearly in the case at bar the proffered evidence would not comply with any procedural rules or evidence and would certainly not be reliable.

In Marino v. State, 418 So.2d 1223 (Fla. 3d DCA 1982) the Third District maintained that the statute codifying the rule that evidence of collateral crimes could be used at a trial, was to show and prove the relevancy of the crime in issue and not to show the bad character of the defendant. Specifically Marino held that the "Williams Rule" evidence

(§ 90.402, Fla. Stat. 1981) could only be used by the state against the defendant in a criminal trial.

In Palmes v. State, 397 So.3d 648 (Fla. 1981) the defendant was convicted of first degree murder. The defendant contended that the court erred in not instructing the jury on the crime of being an accessory after the fact to murder since that was the essence of Palmes' defense. This Honorable Court held that a person committing another crime other than the one that he is charged with is not a legal defense and does not require a jury instruction. Appellee submits that in the case at bar the same type of reasoning should apply. The false confession to a collateral offense is not the issue being tried and should not be admitted. The proffered evidence of Appellant in the case at bar would reflect that the Appellant committed the offense of giving a false report to a law enforcement officer (§ 817.49, Fla. Stat. 1981) or possibly had committed the offense of perjury (§ 837.012, Fla. Stat. 1981). Yet as in Palmes these offenses should not be a defense to the charge of first degree murder especially when they relate to a collateral issue.

In Phillips v. State, 422 So.2d 968 (Fla. 1st DCA 1982) the defendant was convicted for battery on a law enforcement officer and aggravated battery. Defendant contended the trial court erred when he refused to allow an expert to testify regarding defendant's mental blackout condition due to chronic alcoholism during the commission of the offense. In rejecting defendant's contention the First District held that the admission of such evidence is doubtful absence and insanity plea. In any event, the First District held, that the expert did not give an opinion that the defendant was incapable of forming a specific intent to the assault on the police officer. In the case at bar Dr. Fernando's

should have been rejected on both of the enumerated grounds in Phillips, especially because the doctor was unable to give an opinion regarding the truthfullness of Appellant's confession in the case at bar.

Appellant attempted to distinguish the case of Grove v. State, 365 S.W.2d 871 (Tenn. 1963) on the basis that the false confessions to collateral crimes were proffered to show that the confession in the case at bar were coerced. This distinction is one of form only and not valid. In both the Grove case and the case at bar the collateral confessions are being used to impeach the confession to the crime charged. In any event, looking at the case of Grove v. State, 45 A.2d 348 (Md. 1936), those facts are analogous with the facts in the case at bar and do not hinge on any coercion issue. In the Grove case arising out of Maryland there was no contention that the confession was made out of fear or any promises or inducements. The defendant wanted to admit confession of three other arsons to show that they were false thus casting doubt on the confession for the arson for which he was on trial. The Maryland court in rejecting this claim maintained that the practical effect would be to try other cases for which the defendant was not on trial. The latter conclusion is equally applicable to the case at bar. The court in State v. Humphrey, 128 P. 824 (Ore. 1912) rejected the same type of evidence and labeled this type of evidence second hand hearsay with respect to another witness's statement as self serving declarations.

When the Appellant's confession is compared to the other testimony of the witnesses, it can be seen that there is overwhelming evidence that the details of the confession coincide with the other testimony. Therefore even if there were any error it certainly would be harmless error. Appellant testified the victim was wearing a multicolored shirt. (R 866);

another witness testified the victim had a red with yellow stripe tank top shirt (R 622). Appellant described the victim's hair as blondish brown (R 973). Another witness testified that the victim had light brown to dark blonde hair (R 633).

Witnesses testified that they discovered the body at the Merritt Island Cape Refuge off a dirt road (R 654-657). The witnesses described this area as having heavy growth with trees, undergrowth and an orange grove nearby (R 751). The defendant in his confessions stated that he drove the victim towards Titusville/Merritt Island area (R 866, 870). He told law enforcement officers he took the victim to the woods in Merritt Island. He turned off the main road on to a dirt road (R 893). He also disclosed that there were orange trees or some type of citrus trees nearby (R 990).

Witnesses said the body was discovered in a ditch (R 657) or also described as a canal (R 763). Appellant in his confessions said he carried the victim to a small pond which had little or no water in it (R 866). He also confessed that he dumped the body in a small canal which had a small amount of water in it. (R 879).

The victim's wallet was found in the harbor oaks area between New Smyrna and Port Orange which was a quarter mile north of Marko's Restaurant (R 688-692). Appellant Stano testified that he probably threw the purse out on his way back to Daytona (R 974). Witnesses testified that the victim's body was covered with palm fronds (R 758,826). Appellant confessed that he covered the body with palm fronds (R 866). A police officer testified he found an Indian head ring on the body (R 763). Appellant likewise confessed that he noticed the victim had an Indian design type jewelry (R 880).

The victim was last seen on December 15, 1973 on U.S. route 1 heading south toward Marko's Restaraunt (R. 805-809). Appellant stated that he picked the victim up on U.S. route 1 in the Port Orange area (R 866). He also confirmed that this happened around a holiday; sometime in November, December, or January 1 (R 997).

In light of the overwhelming similarities between the confession and the actual circumstances of the homicide the evidence in the proffer certainly would have made no difference whatsoever.

PENALTY PHASE

Appellant also contends that the proffered evidence of Dr. Fernando, Stern and Detective James Kappell should have been allowed during the sentencing stage. As discussed supra, Dr. Stern had no personal knowledge of the case at bar and could not say if Appellant was the type to confess falsely or not. In any event Dr. Stern's testimony was not proffered for the penalty phase and therefore has not been preserved for appeal.

Dr. George Bernard, testifying at the penalty phase on behalf of the state, did maintain that the Appellant had anti-social traits which included lying. He maintained that lying was part of the characterlogical problem that was present in Appellant (R 1247,1249). The Appellant represented the report of Dr. Ann McMillin in mitigation at the penalty phase. She also confirmed that Appellant's history of lying and that this character was part of his abnormal personality. (SRB 93-94,95). Stern's or Kappel's testimony would have added nothing to what the experts had already testified about.

Section 921.141(1) states:

> ...evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant...

Certainly the evidence proffered by Appellant cannot be relevant to the nature of the crime because it is collateral. Likewise it is not relevant to the character of Appellant or if it is it shows only that he has lied and attempted to thwart law enforcement officers in their investigations of crimes. This evidence could hardly be relevant to any mitigating evidence.

Appellant cites the case of Tofero v. State, 406 So.2d 89,95 (Fla. 3d DCA 1981) to support his proposition. Tofero is distinguishable because the defendant was attempting to introduce evidence that would mitigate a past crime used as an aggravating factor in this sentence. The evidence proffered by Appellant would certainly not mitigate any of his past crimes but would in all likelihood be more of an aggravating circumstance.

Appellant also relies on Perry v. State, 395 So.2d 170, 172 174 (Fla. 1981). In Perry the trial court at the penalty phase excluded defendant's mother's testimony. She would have testified regarding the defendant's background and upbringing. This court held that it was error because a defendant should not be precluded from offering as a mitigating factor any aspect of his character. Again, Appellee submits that the confession to a collateral crime is not a mitigating factor relating to his character. This evidence could not logically be considered to justify a reduction of a death sentence to life in prisonment.

Even if this evidence could be considered a non-statutory mitigating circumstance which should have been admitted, its preclusion

was harmless error. In Goode v. Wainwright, 704 F.2d 593 (11th Cir. court of appeal 1983), rehearing denied 709 F.2d 716 the defendant claimed that the instruction to the jury in a penalty phase were erroneous because the instructions limited the jury to just statutory mitigating factors. Goode attempted to introduce non-statutory mitigating evidence to the effect that he was cooperative with the police and the prosecution. The Eleventh Circuit held that Goode failed to show prejudice and therefore the error was held harmless. The Eleventh Circuit also cited the case of Ford v. Strickland, 696 F.2d 804,812 (11th Cir. 1982) which found that the preclusion of non-mitigating factors was harmless error where the defendant in Ford wanted to emphasize his beligerant and alcoholic father, and his assumption of parental duties and support of his family.

In Washington v. State, 362 So.2d 658 (Fla. 1978) this Honorable Court held that the trial court was in error by not considering in mitigation that the defendant surrendered to the police. But like the Eleventh Circuit, this Honorable Court held that the error was harmless and that some of the mitigating aspects of this tendered evidence were speculative. In light of the other aggravating circumstances the death penalty in Washington was affirmed. Likewise, in the case at bar where the trial court has found four aggravating circumstances and no mitigating circumstances (R 1309,1311, 2230-2236,) the error, if any, in not allowing this type of evidence to be heard by the jury in the penalty phase would certainly be harmless.

POINT III

THE TRIAL COURT WAS CORRECT IN PERMITTING THE STATE TO INTRODUCE THE TESTIMONY OF THE VICTIM'S PARENTS FROM THE FIRST TRIAL TO BE READ TO THE JURY AT THE SECOND TRIAL.

A. FAILURE TO PRESERVE

On November 3, 1983 the state filed a motion to compel the testimony of the victim's parents (R 1675). The parents maintained that they were so upset that under no circumstances would they testify. They stated that they would be in contempt of court rather than testify. The parents maintained that they would persist in refusing to testify in spite of fines or imprisonment. It was revealed that Mrs. Scharf was under medication and both were emotionally upset from the trauma of the trial. (R 1766-1778). The defense joined in the motion to compel their testimony and the motion was granted (R 1778).

On November 14, 1983 the state filed a motion to declare the parents unavailable (R 1615). Again the parents reiterated that they were adamant in not testifying under any circumstances and no sanctions would deter them from their decisions (R 1617-1639). At this point in time the defense made three objections to the motion: (1). The witnesses should be confronted at the time of trial; (2). The witnesses should be exhorted to testify short of having to put them in jail or impose a bond upon them; and (3). The court should not declare them unavailable based upon an anticipatory refusal. The court denied the motion as premature. (R 1639-1640).

On the day the trial was to commence the state renewed their motion to have the parents declared unavailable as witnesses (R 1). The parents refused again, to testify (R 1-23). The court addressed the fol-

lowing comment to the defense attorney after hearing the parents' refusals:

> ...in regard to these witnesses is there anything different in the trial posture of this proceeding from the prior proceedings?...the state has listed some additional witnesses,...the additional witnesses would have no impact on the Scharfs' prior testimony. But I'd like your comments on that if you have any.(R 25-26).

Defense counsel replied:

> We choose not to disclose any at this time, judge. (R 26).

Defense counsel offered no objection to the admission of the parent's transcript from the first trial during the judgment of acquittal argument (R 1007-1010). Prior to the statements being admitted at trial defense counsel's only objection relating to the substance of the testimony was "for those objections already noted..." (R 697). The only objections already noted pertained to the November 14, 1983 motion to declare the parents unavailable (which was denied as premature). (R 1639-1640). These objections simply stated that the motion of November 14, 1983 was premature. No objections were interposed by defense counsel for the motion to have the parents declared unavailable on the day of trial (November 28, 1983) (R 26). In fact at this pre-trial hearing of November 28, 1983 the court specifically asked defense counsel if there would be anything different in the trial posture regarding the parents' testimony, to which defense counsel replied that it did not wish to disclose any information at that time (R 25-26). Subsequent to the comment defense counsel never imposed any specific objection to admitting the testimony at trial nor did he disclose any reason for prejudice. Given the limited testimony of the parents, there was no prejudice in admitting their prior

transcripts but in any event the defense counsel did not impose any trial objection nor disclose any possible prejudice to his client by having these transcripts admitted.

In McGriff v. State 232 So.2d 454 (Fla. 2d DCA 1970) defense counsel failed to object to a father identifying the body as his son in a murder trial. In Simpson v. State, 211 So.2d 862, 867 (Fla. 3d DCA 1968) a defense counsel failed to object to the admission of a confession because the written statement had not been read to the defendant nor had the defendant adopted it. In Migliore v. United States, 409 F.2d 786, 788 (5th Court of Appeals 1969) where two co-defendants were convicted of selling narcotics a defense counsel failed to object to the statement of a co-defendant implicating or prejudicial to his client. In all three cases the points on appeal were raised for the first time. In all three cases and in the case at bar, there has been a failure to preserve the objection below and therefore there is no appeal remedy. Given the limited testimony of the parent and the fact that there is no conceivable prejudice to the Appellant, in the case at bar, any alleged error would not be fundamental.

B. MERITS

Appellant maintained that the witnesses should have been called at trial before they were declared unavailble (See, Appellant's initial brief at page 29). The second motion to declare the witnesses unavailable occurred on the day of trial, right before the jury was to be chosen (R 1-26). Appellee submits that it would make no difference whether the parents refused to testify right before proceedings or whether they were called after the jury had been impaneled. In United States v. Zappola, 646 F.2d 48, 54 (2d Court of Appeals 1981) the court held that the pro-

per procedure under the evidentiary rule to declare a witness unavailable should include an issuance of an order, outside the presence of the jury directing the witness to testify. In the case at bar this is the procedure that was followed. Since this procedure needs to be done outside of the presence of the jury it should make no difference whatsoever whether this procedure happens right before the jury is picked or right after the jury is picked; the time element is inconsequential.

Appellant also argues that the judge should have exercised his discretion by imposing a fine or sentence against the recalcitrant witnesses. (See, Appellant's initial brief at page 30). The motion to declare the parents unavailable on November 14, 1983 defense counsel specifically stated that he did not want the court to have the parents put in jail nor to have the court impose a bond upon them (R 1638). Although this suggestion was specifically waived by defense counsel below, Appellee submits that this is not required under § 90.804(1)(b), Fla. Stat. (1981). In Zappola, supra the second procedure needed to declare a witness unavailable was that a warning that continued refusal to testify despite the court's order would be punishible by contempt. It should be noted that § 90.804(1)(b), Fla. Stat. (1981) has the identical language of and is based upon Fed. R. Evid. 804(a)(2). Neither the statute nor the rule nor the holding of Zappola require that the trial court actually impose the sanctions before declaring a witness unavailable. In United States v. Bizzard, 674 F.2d 1382, 1387 (1982) the government was allowed to use a transcript of a witness from a first trial. The record showed the court's conversation with the witness in an out of jury hearing at the second trial. The court held the record was sufficient to meet the order requirement of Fed. R. Evid. 804(a)(2). The facts in the case at

bar are analogous to Bizzard and as such no error was committed.

In Outlaw v. State, 269 So.2d 403 (Fla.4th DCA 1972) the review court held that the responsibility for evaluating the adequacy of a showing of non-availability rest with the trial judge and that his determination would not be disturbed unless an abuse of discretion clearly appears. id at 404. When the court made the determination that the parents were unavailable right before the trial the court noted that it had observed the parents and their demeanor and emotional state. The court explained that these observations could not be readily apparent to an appellate court. (R26) It is this type of discretion that rest with the trial court and should not be disturbed upon review.

Appellant cites United States v. Johnson, ___ F.2d ___ (6th Court of Appeal 1984 35 Crl. 2226) to support his contention. This case is not apropos since it merely construes the federal statute regarding holding a witness in contempt prior to trial. The case focuses on the rights of the witness; not on the defendant being tried. There was no discussion of the issue of whether a trial court had abused his discretion by not actually imposing a fine or incarceration upon a witness that refused to testify.

C. HARMLESS ERROR

The parents' testimony at the first trial consisted of their relationship to the victim, when they last saw the victim, identifying the dentist of the victim, and identifying certain jewlery found on the victim at the murder scene (R 2123-2159). When asked by the trial court what impact the admission of the parents' testimony from the first trial would have on his defense, defense attorney replied that he did not wish to disclose any impact (R 26). Defense counsel never did and never could

show any prejudice. In view of the other overwhelming evidence and in view of the lack of significance of the parents' testimony, any admission of the transcripts would be harmless error. Appellee would note that their is an identity of issues, parties, and even the same defense attorney. In McClain v. State, 411 So.2d 316 (Fla. 3d DCA 1982) the defendant argued that a witness should not have been declared unavailable where his non-appearance at trial was due to his wife's illness. Even though this was error the review court held it was harmless error since the sole issue was identity and this witness's testimony did not relate to that issue. Therefore the conviction was affirmed. In Simpson, supra it was held that any alleged error regarding the admission of a confession would be harmless since there was other sufficient, competent evidence to sustain the finding of guilt. Under the circumstances in the case at bar any alleged error would certainly be harmless.

POINT IV

THE TRIAL COURT WAS CORRECT IN OVERRULING APPELLANT'S OBJECTION TO THE TESTIMONY OF AN EXPERT BECAUSE AN EXPERT MAY TESTIFY TO AN ULTIMATE ISSUE AND THE ISSUE HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW.

PRESERVATION

Appellant maintains that the trial court committed error by permitting Dr. Bass (who was tendered as an expert in dentistry and accepted by Appellant without objection (R 668-669) to testify to an ultimate conclusion, i.e. the skull of the victim was that of Kathy Scharf. (See Appellant's initial brief at page 35). The defense counsel for trial objected to the following question:

> Dr. Bass, Do you have an opinion, sir, with -- whether or not the teeth in the mandible and the skull were those of Kathy Scharf? (R 684).

At this point the defense counsel objected that Dr. Bass had been qualified as an expert in dentistry but not in forensic denistry (R 684). Then Dr. Bass answered, " There is no doubt in my mind that the skull is that of Kathy Scharf. (R 684). No objection was interposed to this answer.

Appellee submits that the objection interposed by the defense counsel below to the question is not the same objection that has been argued by Appellant in the brief pursuant to Dr. Bass' testimony regarding the ultimate conclusion that the skull of the victim was that of Kathy Scharf. Additionally the objection interposed by defense counsel below does not specifically state that the answer of Dr. Bass was an issue beyond his expertise. Rather the defense counsel below stipulated or did not object to Dr. Bass testifying as an expert in dentistry and identification of teeth (R 668-669).

In North v. State, 65 So.2d 77, 82 (Fla. 1952), in a first degree murder conviction, this Honorable Court held that Appellant was confined to the specific objection to the introduction of evidence made below and any other grounds argued for the first time on appeal would not be considered. Likewise in the case at bar because the objection pertained to the question propounded to Dr. Bass and not his answer and because the issue argued on appeal is different from that objection below the issue should not be considered for review.

MERITS

Immediately after Dr. Bass said, "there is no doubt in my mind that the skull is that of Kathy Scharf.", the following colloquy ensued:

> Q: (by the assistant state attorney) Based on the teeth?
>
> A: Based on the teeth. (at this point the doctor explained comparison of the the teeth and skull of his records)

It is clear that Dr. Bass immediately qualified his answer that the skull was the same as that of Kathy Scharf by predicating that conclusion solely on his dentistry expertise. Under these circumstances, Dr. Bass was surely entitled to give his opinion based upon his field of expertise.

Section 90.703, Fla. Stat. (1981) states:

> Testimony in the form of an opinion otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

In North v. State, 65 So.2d at 87-88, supra, it was held that a pathologist testifying as an expert could give his opinion as to how and what caused the injuries on a victim in a murder case. This Supreme Court

held that the unmistakable trend of authority was not to exclude expert opinion testimony merely upon the ground that it would amount to an opinion upon ultimate facts. This Court concluded that it was more important to seek the truth of the matter as oposed to quibbling over the distinctions in such an issue which are in may cases impracticable.

Sarino v. State, 424 So.2d 829, 836 (Fla. 3d DCA 1982) also held that a narocotics police agent testifying as an expert could tell the jury that the language he overheard between the defendant and a conspirator in a drug case should be interpreted as a cocaine conspiracy. Defendant's contention that the opinion was inadmissible because it was based upon an ultimate issue of fact was rebuffed.

Appellant relies upon the case of Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977). That case premised its holding primarily upon the reasoning that the medical examiner's inferences were not inconsitent with the inference that the injuries caused to the victim could have arisen from the defendant's lawful behavior as well as his unlawful behavior. The Wright case turns upon circumstantial evidence. In the case at bar there is no such issue. In any event the cases of Johnston v. State, 423 So.2d 614, 615 (Fla. 1st DCA 1982) and Herzog v. State, 439 So.2d 1372, 1378 (Fla. 1983) both allowed testimony of a pathologist to testify regarding the cause of death since their testimony would be consistent with the other facts in the case. In the case at bar, likewise, the testimony of Dr. Bass is consistent with the testimony of the victim's parents. Edith Scharf, the mother, testified that she took the victim to see Dr. Bass (R 2138). She also was able to identify the victim's jewelry found at the crime scene, her wallet found in the general vicinity of the crime scene later on, as well as the victim's clothing. (R 2145,

2147, 2149).

Because Dr. Bass qualified his answer by saying his conclusion was based upon his examination of the teeth and because this evidence is consistent with testimony of other witnesses Appellee would submit that if there were any error it certainly would be harmless error pursuant to § 924.33, Fla. Stat. (1981).

POINT V

THE TRIAL COURT WAS CORRECT AND HAD THE DISCRETION TO EXCUSE THE DEPUTY CLERK FROM THE RULE OF SEQUESTRATION AND THE CLERK'S TESTIMONY REGARDING MINISTERIAL MATTERS WOULD NOT MAKE THE TRIAL COURT APPEAR IMPARTIAL.

Julie Black, the deputy clerk was called as a witness by the state to identify prior court exhibits from the first trial. She testified for the jury regarding these identification procedures (R 705-713). Defense counsel objected on the ground that the clerk's testimony would make the trial court look impartial (R 698) and because the clerk (Julie Black) would be in violation of the rule of sequestration (R 701).

Kathryn Jimenez was an official court reporter who read the testimony of the victim's parents to the jury. (R 720-747). Defense counsel objected to the procedure of having the state attorney ask questions and having the court reporter read the answers and suggested that the jury receive the bound transcripts and review them in print (R 696). Appellant's contentions address the issue of the clerk's testimony only; not the testimony of the court reporter.

The cases of Williams v. State, 143 So.2d 284 (Fla. 1962) and Rockett v. State, 262 So.2d 242 (Fla. 2d DCA 1972) which Appellant relies upon deal with judicial comments; not court personnel testifying in a merely ministerial capacity and as such are not germane.

In West v. State, 149 Fola. 436, 6 So.2d 7 (Fla. 1942) the trial court in a purjery trial sequestered all witnesses except a county judge, an attorney, and two deputies to remain in the court room and testify after other witnesses. The burden was on the defendant to show reversible error and since he had not meant this burden there was no abuse

of discretion. The conviction was affirmed. In Ratliffe v. State, 256 So.2d 262, 265 (Fla. 1st DCA 1972) it was held that there was no error to allow a policeman to stay in the courtroom during a manslaughter trial since that witness was disinterested. In the case at bar the clerk formed a mere ministerial function and certainly was a disinterested witness, even more so than a police officer.

In Rhone v. State, 93 So.2d 80,81 (Fla. 1957) during a first degree murder conviction a sheriff who also acted as a bailiff testified for the state. His testimony was limited to identification and exlpanation of photographs of the crime scene as well as a collateral statement by the defendant. Since the sheriff was not a material witness it was held his testimony was not prejudicial to the defendant and the conviction was affirmed. Likewise, in the case at bar the deputy clerk certainly is not a crucial witness and the presentation of her testimony is in no way prejudicial to Appellant.

Appellant could have requested a curative instruction. see Wallace v. State, 221 So.2d 759 (Fla. 3d DCA 1969) where a trial court explained the admission of objectional testimony and the review court held that it was cured by such explanation. Such objections are not fundamental and if there were error could have easily been cured by a curative instruction.

Appellee submits that any error in allowing the deputy clerk to testify would be harmless pursuant to § 924.33, Fla. Stat. (1981). see, Salvatore v. State, 366 So.2d 745, 751 (Fla. 1978) where it was held that the error was harmless in a capital case where the prosecution negligently lost a tape and Palmes v. State, 397 So.2d 648, 653 (Fla. 1981) where it

was held the error was harmless in not allowing the defendant to explain the circumstances of his confession in lieu of the overwhelming evidence.

POINT VI

THE TRIAL COURT WAS CORRECT IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THERE WAS PRIMA FACIE EVIDENCE OF CORPUS DELICTI TO SHOW THAT THE CAUSE OF DEATH WAS THE CRIMINAL AGENCY OF ANOTHER.

Appellant contends that the evidence was insufficient to establish a corpus delicti, i.e. the death was caused by the criminal agency of another and therefore the confessions of Appellant should have not been admitted into evidence. In Fraser v. State, 107 So.2d 16 (Fla. 1958) the defendant's murder conviction was upheld despite the same contention that Appellant is now asserting in the case herein. Fraser maintained that evidence to sustain a corpus delicti could be either direct or circumstantial. In Fraser the victim's body was found in a river, death was caused by drowning, and the circumstantial evidence (groceries left in the victim's car, footprints, trampled ground, and a piece of the victim's dress found torn on a fence) was admitted into evidence prior to the confession. The evidence constituted a prima facie showing of a criminal agency to establish a corpus delicti.

In State v. Allen, 335 So.2d 823, 825-826 (Fla. 1976) the defendant contended that his convictions for D.U.I. manslaughter and culpable manslaughter were invalid since the corpus delicti had not been established on which to base his confession where the defendant admitted being the driver of the automobile and where the passenger was killed. Defendant's claim was rejected. This Honorable Court maintained that the state must bring forth substantial evidence of corpus delicti but that standard would not require that the proof be uncontradicted or overwhelming. The evidence of the defendant seen entering the driver's side of the car

five to ten minutse before the accident and the placement of the bodies at the accident scene was held to be sufficient to establish a corpus delicti. Jones v. State, 360 So.2d 1293 (Fla 3d DCA 1978) made the same finding as the court in Allen and relied on the Allen decision. The Third District in Jones maintained that the nature of proof required to establish corpus delicti would be that the state need establish only the prima facie showing of all the elements. 360 So.2d at 1298. The Jones opinion quoted from Allen as follows:

> Circumstantial evidence, by its very nature, is not free from alternate interpretations. The state is not obliged to rebutt conclusively every possible variation, however, or to explain every possible construction in a way which is consistent only with the allegation against the defendant. Where those requirements placed on the state for these purposes, circumstantial evidence would always be inadequate to establish a preliminary showing of the necessary elements of a crime. (360 So.2d at 1299).

The holdings and reasoning of both Allen and Jones would refute Appellant's contention that:

> The state's proof... must exclude the reasonable possibility of suicide or natural or accidental death. (See, Appellant's initial brief at page 41).

Dr. Raul Molina, the medical examiner, testified that he saw the body at the crime scene (R 620). The body was in an unusual position, the legs were spread and underneath the thighs. The calves were underneath the thighs, toward the side (R 621). No shoes were present or found. The doctor testifed, "the whole place was pretty much sustained by a brownish soft substance similar to the collection of blood." There was also staining on the lawn and limbs of a tree close by (R 622,626). The doctor did

not rule out stabbing as a cause of death (R 624-625). He also maintained that in determining a cause of death he would consider the facts and circumstances under which he found the remains (R 625). Dr. Molina did say that natural death could not be ruled out but he also explained that natural death was an unlikely cause because alot of the blood was on the top part of the body and because of the surrounding area and because of the unusual position in which the body rested. Although drug overdose could not be ruled out altogether the doctor explained that the bleeding factor was the major event of the death. Again the doctor maintained that the death was not a natural one (R 635-636). The doctor also maintained that it would be possible to turn a knife so that it would go right between the ribs and not nick the ribs at all (R 648).

Dr. Molina was not the only witness to establish cause of death as asserted by Appellant. (See, Appellant's Initial Brief at page 41). Appellee would submit the testimony of Dennis Farrell, the hunter that discovered the body, would be circumstantial evidence of a homicide. The body was discovered in a remote dirt road in an area of thick woods with lots of palmettos and scrub oak. The body was lying in a ditch with water. From where Farrell was standing the ditch was about fifteen feet wide. There was no bridge or crossing from where the witness was standing to where the body was in the ditch (R 653-657, 664). Lawrence Sylvia found the victim's wallet in an area called Harbor Oaks which was between New Smyrna and Port Orange, Florida. This area was between the victim's home and the murder scene (R 686-692).

Steve Kindrick, from the Brevard County Sheriff's Department responded to the murder scene (R 750). He described the area as heavily dense typy foliage with a lot of trees and undergrowth and brush. The

closest house was two miles north of the area. There were no other houses at all in the general area. The body was discovered thirty miles north of Marko's Restaurant which was a restaurant close to the victim's home. (R 750-754). From the waist down the victim's body was in water (R 759). Two rings were recovered from the victim's body (R 762) but one ring was found in the canal water under the body (R 763). Kindrick described the dirt road as very difficult to find because the area was all woods and very dense. It was also hard to walk in the area and he lost a shoe while investigating (R 773). Kindrick could not find the shoes or purse at the scene (R 774-775). All this prior testimony would be evidence that the victim was killed and her body deposited in a deserted area. Appellant argued, however, that from the evidence of the extreme mass of vegetation in the areait would be easy to assume that loose palm fronds could have fallen or blown on top of the body. (See, Appellant's Initial Brief at page 42). The testimony of W.J. Patterson, a police investigator, at the time (R 820) refutes this latter contention. Patterson testified that the body was covered with palm fronds and vegetation. He also told the jury that in his opinion the palm fronds and vegetation had been placed over the body deliberately. He later explained that this opinion was based upon the distance of the body from the closest palm frond that would have fallen naturally and based upon the uniform pattern. Other palm fronds were close by but not immediately overhead so that it was unlikely the palm fronds could have fallen in the pattern and in the number they did after the body had been placed there (R 826-834). In addition Patterson also testified that when the body was discovered the blouse of the victim was raised to just under her armpits or up to her breast are (R 824). Again this testimony shows, along with the position

of the body, that there was prima facie evidence of a murder and an attempt to hide the body and thus avoid detection.

Other evidence would refute the possibility of suicide or sudden chronic illness. Charles Evans was a neighbor of the victim and her parents (R 804-805). He was the last one to have seen the victim. He saw her walking in a southernly direction on U.S. Route 1 by herself. She did not seem to be in physical distress and he noticed nothing out of the ordinary (R 806-807). The victim was about two to three miles from Marko's Restaurant walking towards that restaurant (which was also the direction of her home)about nine or ten in the morning on a Saturday (R 809). Certainly at this point the State had presented a prima facie case that the victim was murdered as opposed to the extremely unlikely event that she would walk or somehow get transportation to a remote deserted area and either die from natural causes or commit suicide in such an unusual position.

The testimony of the victim's parents would again refute the contention that the victim suffered a suicidal, natural, or accidental death. John Scharf described his daughter on the last day that he saw her (December 9, 1973) as, "just like any other kid. She was excellent, there wasn't nothing wrong with her." He had not seen any emotional changes in her and he described her as an ordinary girl. (R 721-722). Mrs. Scharf testified that she saw her daughter for the last time on December 14, 1973 (R 726). At the time the victim was working at a restaurant as a busgirl (R 727). She testified the victim had no physical defects or impairments of any kind (R 729). Mrs. Scharf told the jury the victim's state of mind was very good and that she was not depressed. Her daughter never stayed away from home for extended periods of time. She also did not have

her own car and she could not have used the family car because the muffler did not function (R 730-731). Mrs. Scharf had good communication with her daughter in November and December of 1973 and the daughter did not confide or express any significant personal problems to her mother (R 737). The victim planned to be a cosmetologist (R 738). She took her purse and last night she left home as was her habit (R 739). Mrs. Scharf confirmed that the victim did not report to work on Saturday as she was supposed to (R 774). Mrs. Scharf also confirmed that she, her husband, and the victim lived only two blocks from the Marko's Restaurant (R 737). All this latter evidence would refute any remote possibility that the victim's demise was caused by accident, suicide or natural death.

Appellant attempts to distinguish the case of Bassett v. State, 449 So.2d 803 (Fla. 1984) on the basis that the skeletol remains found had a fractured jaw and an injured rib. Although the injuries according to the pathologist in Bassett occurred at the time of the death, they were not the fatal injury. This Honorable Court noted that the bodies had decomposed while fully clothed, with one skeletol remain almost on top of the other. There was no identification, wallet, shoes and belts. In the case at bar there was likewise no shoes nor identification items. The victim was fully clothed (albeit her blouse was drawn up just below her armpits) and the body was in a very unusual position. The fact that one of the skeletons had a fractured jaw and a broken rib would certainly not distinguish Bassett from the present case. The defendant in Bassett could have argued that there was likewise no corpus delicti established because these injuries were non-fatal and were not related to the death of the victims. But in both the present case and Bassett the surrounding circumstances would at the very least support a prima facie case of a death by

a criminal agency.

In Stone v. State, 378 So.2d 765, 771 (Fla. 1980) a defendant convicted of murder raised the same issue. The victim had left her work at midnight under ordinary circumstances and would habitually arrive home one half hour later. She had a good work record and there was no evidence indicating or implying she would not have come home on the night of the murder. She was found drowned in a river in the middle of the night, naked from the waist up. Scuffle marks were discovered around her car. There was a broken key chain found on the floor board. This Honorable Court held that the evidence of foul play was sufficient to show her death was caused by the criminal agency of another. Appellee would submit that the facts in the case at bar are likewise sufficient to show the death was caused by the criminal agency of another. In McElveen v. State, 72 So.2d 785 (Fla. 1954) this Supreme Court held there was enough evidence to show a crime was committed by the criminal agency of another. To support this conclusion the court referred to the position of the victims' bodies when discovered by the police, the condition of those bodies, the nature of the clothing, and the location in a secluded spon at one or two o'clock in the morning. All these latter factors are present in the case at bar and Appellee submits that there is more than suffcient evidence to support a prima facie showing of corpus delicti so that the confession of the Appellant were correctly admitted into evidence.

POINT VII

THE TRIAL COURT WAS CORRECT AND WITHIN HIS DISCRETION IN CONDUCTING CERTAIN PORTIONS OF THE PROCEEDINGS WITHOUT THE PRESENCE OF THE APPELLANT AND ANY ALLEGED ERROR WOULD BE HARMLESS ERROR IN ANY EVENT.

Appellant first contends that prejudicial error was committed by not having the Appellant himself attend two pretrial proceedings prior to the first trial which resulted in a mistrial. The first proceedings involved a motion by the state to compel the defense to supply addresses of two potential defense witnesses. (R 1741). Although the motion was granted this was a mere ministerial proceeding in which it certainly would not be necessary to have the Appellant present. More importantly these witnesses were never utilized in Appellant's second trial so prejudice could not result.

The second motion involved the state's motion to have the Appellant undergo a mental examination for a possible penalty phase to determine his capacity to appreciate the criminality of his conduct (R 1741-1742). The court specifically deferred ruling on this motion so that defense counsel would have an opportunity to discuss the motion with the Appellant (R 1743-1744). The court also told defense counsel to make arrangements to have Appellant present if he felt it was necessary (R 1744). By deferring his ruling, the trial gave the Appellant an opportunity to participate in this motion and therefore no prejudice ensued.

For both of the above pretrial motions, prior to the first trial it is inconceivable that Appellant could argue there was prejudice. The remedy for this type of alleged error would be a new trial. Frances v. State, 413 So.2d 1175 (Fla. 1982). The first trial resulted in a mis-

trial. Appellant received a second trial and therefore should not complain about any alleged errors in the first trial.

While the jury was deliberating they requested a tape player, a list of evidence and a color photo (R 2249). The state inquired as to whether the Appellant himself should be present but defense counsel specifically waived the presence of Appellant. (R 1132-1133). Appellant argues that answering the request of the jury without Appellant's presence, in spite of the waiver by the defense counsel, is fundamental error. In State v. Melendez, 244 So.2d 137, 139 (Fla. 1971) the Supreme Court reversed a district court and held that a defendant in a non-capital felony case had the power to ratify jury selection done in his absence when he was not notified as to the time of trial. He was represented by counsel for the jury selection and the jury was sworn only after the defendant ratified or consented to the acts of his counsel. The Supreme Court held that the above events constituted constructive notice to the defendant himself who ratified the actions of his defense counsel. Just before the jury was initially released to deliberate, after the instructions had been read (and with the Appellant present) the trial court told the jury he would give them the instructions, the verdict form, and a copy of the indictment. The court then stated, "a few moments later I will send all the exhibits back to the jury room for your consideration." (R 1126). The request by the jury (R 2249) was only a follow-up to that latter statement. Appellant himself was aware that the jury would obtain all the evidence and exhibits. Therefore he has ratified or consented to the action of his defense counsel and later on waiving his presence. Appellant should also be estopped to usurp any error when he initially assented to what is now being contested as error. Both Simmons v. State, 334 So.2d 265 (Fla. 3d

DCA 1976) and Frances v. State, 413 So.2d 1175, 1177 (Fla. 1982) held that it was error not to have a defendant present during essential or fundamental parts of the trial unless the defendant had voluntarily waived the right himself. In Frances the defendant was not present during jury selection; certainly a fundamental trial stage. In the case at bar the jury request was a mere ministerial act. The defendant, as well as his counsel, were present when the judge announced, at the close of his jury instruction, that he would send the exhibits back to the jury. Florida Rule Criminal Procedure 3.180 lists the portions of the trial where the defendants presence is essential or fundamental. The request for evidence is not contained in the rule. Therefore the procedure should not be considered as requiring a defendant's presence.

Florida Rule Criminal Procedure 3.410 states that if jurors request additional instructions or testimony read to them, the defense counsel must be notified. The rule does not encompass notification to the defendant himself. In any event the rule also is discretionary with the court so that any possible objection by the defendant or his counsel would not affect the court's ruling.

Appellant relies on the case of Ivory v. State, 351 So.2d 26 (Fla. 1977). The holding in Ivory was based on three factors not present in the case at bar. First, the defendant's counsel was not notified as well as the defendant; a crucial distinction pursuant to Fla. R. Crim. P. 3.410. Secondly, as pointed out above, the rule is discretionary with the court and defendant's presence would or could not effect the court's ruling. Third, as pointed out above, the trial court had already decided to let the jury see the evidence and exhibits while defendant, as well as defense counsel were present. (R 1126).

The case of Holzapfel v. State, 120 So.2d 195 (Fla. 1960) (where a bailiff answered a jury inquiry regarding an instruction on an element of grand theft) held that the defendant himself (as well as his counsel) must be present where additional instructions are given. Although Holzapfel expands the requirements of Fla. R. Crim. P. 3.410, it does so only in regard to additional instruction request; not request to review exhibits. (Appellee does not concede that even Fla. R. Crim. P. 3.410 applies since the court had already decided to give the evidence and exhibits to the jury when the defendant and his counsel were present prior to the jury retiring for deliberation.) Since the case at bar did not regard any request for additional instructions, Appellee would submit that the implication of the Holzapfel case is that only Appellant's counsel need be present when a jury request evidence to be read to them.

Appellee would submit that harmless error should be a consideration in the review of this type of issue. This Honorable Court in Frances did consider the issue of harmless error but considered defendant's absence during jury selection fundamental. This Honorable Court also held in Frances that this type of issue need not be distinguished on the basis of a capital or non-capital case. id at 1178. In McGee v. State, 433 So.2d 66 (Fla. 4th DCA 1983) where the trial court considered and rejected a proffer made by the state in the absence of the defendant, the review court found such action was in error. But the Fourth District maintained that this error was harmless. In the case at bar Appellee submits that the court cannot, based upon Frances, ignore the harmless error doctrine as Appellant desires. Appellant implies that the issues raised in Defendant's absence are non-crucial. (See Appellant's Initial Brief at page 44). Although Appellee does not concede that there was any error to be-

gin with, even if this court could find error, Appellee submits that this court cannot ignore the legislative mandate in § 924.33, Fla. Stat. (1981) which does not make an exception for capital cases.

POINT VIII

THE TRIAL COURT WAS CORRECT IN ADMITTING CROSS-EXAMINATION OF THE APPELLANT AND ARGUMENT BY THE PROSECUTOR REGARDING CIRCUMSTANCES OF APPELLANT'S PRIOR CONVICTIONS AND EVEN IF THERE WERE ANY ERROR IT WOULD BE HARMLESS.

During the cross-examination of Appellant at the penalty phase the prosecutor questioned Appellant regarding his two prior convictions which resulted in the death penalty. The prosecutor asked the Appellant if he would attack the compentency of his lawyers for those two cases. The prosecutor also tried to ellicit from the Appellant that Appellant was still denying the homicide in the present case so that if Appellant received the death penalty, in the present case, the Supreme Court would be more likely to overturn the death sentence because Appellant denied the act. At closing argument the prosecutor argued that the state needed one valid death appeal because the other two death convictions could be overturned (R 1836). Appellant now contends that such testimony and argument are irrelevent, beyond the scope of direct examination, is evidence of a non-statutory aggravating factor and assumed facts not in evidence.

Initially Appellee would point out that Appellant objected to the line of questioning attacking the previous lawyer's compentency as irrelevent. (R 1836). Defense counsel below did not object on any other grounds. In fact defense counsel below never did object, at all, to the following questions by the prosecutor to the Appellant on cross examination:

> Are you going to raise any and all errors that you can possibly see

> as a result of those two death penalties that Judge Foxman gave you? (R 1837).

In White v. State, 446 So.2d 1031,1036 (Fla. 1984) the defendant did not object to improper comment of the state attorney and admission of evidence at the penalty phase. This Honorable Court held that without a contemporaneous objection the defendant had not preserved these latter issues for review. See also, Johnson v. State, 442 So.2d 185, 188 (Fla. 1983) where comments of the state attorney at the penalty phase were not objected to and considered waived. Defense counsel's objection to the alledgedly improper argument of the state attorney was based on the premise that it was "improper". (R 1279). Such an objection, likewise, does not preserve any issues for appeal. Therefore if there is any error it must be fundamental and affect the validity of the entire proceeding.

Appellant analogizes the alleged errors to the case of Teffeteller v. State, 439 So.2d 840, 844 (Fla. 1983) where the prosecutor stated in closing argument that if the defendant was not given the death penalty he would be paroled in twenty-five years and would kill again. The prosecutor named two possible witnesses that the defendnat would supposedly kill. The argument was considered improper and the cause remanded for a new sentence hearing. Miller v. State, 373 So.2d 882,886 (Fla. 1979) maintained that the court could not consider as an aggravating factor whether the defendnat would get parole. This Honorable Court held that the policy is one for the legislature or the parole authorities and could not be considered by the courts. Appellee submits that a sentence for another capital conviction is relevent and can be considered under

§ 921.141(5)(b)[1]

In Elledge v. State, 346 So.2d 998 (Fla. 1977) the prosecutor was allowed to argue surrounding circumstances in the penalty phase of other murders. This court held that evidence and argument need not be limited to testimony of the bare prior convictions but the prosecutor could adduce surrounding circumstances for character analysis. A prosecutor could also argue these surrounding factors because "evidence may be presented as to any matter that the court deem relevent to the nature of the crime and the character of the defendant and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). § 921.141(1). A jury can consider a defendant's confession to a prior murder at the penalty phase. See, Justus v. State, 438 So.2d 358, 368 (Fla. 1983). Two police officers were allowed to testify at the penalty phase regarding past convictions of the defendant. See Perri v. State, 441 So.2d 606 (Fla. 1983). The prosecutor's comments at the penalty phase regarding the fact that the victim was a law enforcement officer and the defendant's prior life sentence had not deterred him from committing another murder was held proper at the penalty phase. Kennedy v. State, ___ So. ___ (Fla. 1984) [9 FLW 291](case No. 61,694 7/12/84). (Appellee would submit that these comments would be proper regarding past convictions as well.) The fact that the jury was made aware at the penalty phase that a defendant's second degree murder conviction resulted from a first degree murder indictment was held rele-

[1]Section 921.141(5)(b); the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

vent to apprise the jury of the defendant's background and to rebutt defendant's showing that his past criminal history was not significant. Morgan v. State, 415 So.2d 6, 12 (Fla. 1982). Appellee would submit in lieu of the latter cases that the cross-examination was proper and relevent in the case at bar.

Appellant's defense counsel below never objected that the cross-examination or comments constituted an argument on a non-statutory aggravating factor. Rather defense counsel relied on the fact that his client had two prior death penalties in his closing argument of the penalty phase by contending:

> ...there is no need for you to say, that another person should die. That has already been done for you in other cases. (R 1290).

Since Appellant has affirmatively relied on this factor has a nonstatutory mitigating circumstance, he cannot now say that its admissiblity was in error as a nonstatutory aggravating circumstance.

Appellant now (but not at the penalty phase) argues that the prosecutor assumed facts not in evidence. During cross-examination Appellant admitted that he had two prior murders which had penalties of death, that they were on appeal, that he would get an automatic appeal, and that he was planning to contest these penalties by asserting that his past trial counsel was ineffective (R 1836-1837). On closing argument of the penalty phase the prosecutor stated:

> And if these are reversed, I submit there is a good possibility of Bickerest and Muldoon, given just what you know of the case, why -- what earthly reason was there for the defendant to enter a plea.

This argument does not assume facts and evidence; it is predicated upon

what was brought forth from the Appellant's own testimony in the cross-examination. This argument does not assume facts in evidence, rather the prosecutor stated that the convictions could be reversed based upon what the jury knew. The prosecutor in no way implied that he had knowledge of the cases that the jury did not.

Appellant maintains that the line of cross-examination was beyond the scope of dirct examination. During the state's case in the penalty phase six judgment and sentences and two judgments all based upon pleas to capital murder convictions were divulged to the jury (S.R.B. 39-71). During direct examination of the Appellant in the penalty phase Appellant asserted that he confessed to these numerous murders because he needed psychiatric help. He also testified his convictions were due to his confessions (R 1821-1822). This evidence was presented to the jury by way of mitigation. To buttress his contention a report of Dr. Ann McMillen was admitted into evidence prior to the Appellant testifying (R 1265). This report mainly dealt with the Appellant's past psychiatric history and his psychiatric problems (S.R.B. 92-103). Appellee submits that the prosecutor then was entitled to impeach the Appellant and rebutt his mitigating contentions by showing that Appellant had other reasons for pleading guilty to the murders aside from trying to get psychiatric help. In Agan v. State, 445 So.2d 326, 329 (Fla. 1983) a defendant complained that his guilty plea and cooperation with a grand jury should have been mitigating factors. But the evidence showed that the defendant wanted to return to prison to kill an inmate who apparently robbed the defendant and therefore his death penalty was affirmed. Appellee submits that as in Agan the prosecutor is entitled to rebutt any mitigating factors presented by Appellant.

If there is any error in the cross-examination or the comment made during final argument, Appellee submits that such alleged error is harmless. The harmless error standard was used in the case of Sims v State, 444 So.2d 922, 926 (Fla. 1983) because there were some aggravating circumstances but no mitigating circumstances. This court held that under those circumstances death is presumed to be the appropriate punishment. In Clark v. State, 443 So.2d 973, 977 (Fla. 1983) this court found the evidence insufficient to support one aggravating circumstance. There were three valid aggravating circumstances and no mitigating factors. Under such circumstances the error was harmless and the sentence of death affirmed. In the findings of fact in support of death the trial court found no statutory or nonstatutory mitigating factors. The trial court found four aggravating factors: (1). Appellant committed other capital felonies, (2) the felony was committed during a kidnapping, (3) the crime was heinous, attrotious, or cruel, (4) the crime was cold, calculated, and done in a premeditated manner. Appellee submits that in lieu of the overwhelming evidence and the fact that there were eight prior capital felonies would render any error alleged by Appellant harmless. Even if the cross-examination and comment could have possibly affected the jury's determination with regarding the aggravating factor of other capital felonies, there is no way that such testimony could have affected the jury's recommendation regarding the other three aggravating factors.

In Elledge, supra an admission of a confession at the penalty phase for which a conviction had not been obtained was held to be error. The judge's order in Elledge stated that the mitigating circumstances were insufficient to outway the aggravating circumstances. Since the trial

court did weigh the mitigating circumstances there had to be a new sentencing hearing because this Honorable Court could not discern whether the trial court would impose death by reweighing the circumstances without the inadmissible evidence. The problem in Elledge does not exist for the case at bar. The facts in the present case are analogous to Clark, supra where the court found three valid aggravating circumstances and no mitigating circumstances. Likewise, in the case at bar, the trial court did not weigh any mitigating circumstances and as such this court need not speculate how the trial court would reweigh the evidence since he found no mitigating factors.

In Harris v. State, 438 So.2d 787, 797 (Fla. 1983) the state attorney's comment at the penalty phase that the defendant could walk out of prison at age fifty-two because of parole was held improper. Nevertheless the comment was deemed harless error. When this Honorable Court considers the evidence of the four statutory aggravating factors (including a prior capital homicide), it is clear that the alledged error claimed by Appellant is harmless in lieu of the overwhelming evidence and aggravating statutory circumstances.

POINT IX

DETAILS REGARDING PRIOR CAPITAL CONVICTIONS WERE ADMISSIBLE IN THE PENALTY PHASE

Although Appellant acknowledges that evidence of prior convictions is allowed at the penalty phase above and beyond the mere judgment and sentences, Appellant contends there was "extreme detail and (a) large amount of testimony..." which "resulted in this becoming a feature of the penalty phase." (See, Appellant's Initial Brief at page 54). Appellant acknowledges the case of Elledge v. State, 346 So.2d 998 (Fla. 1977). This Honorable Court held in Elledge that the prosecutor was entitled to argue the circumstances in the penalty phase of other murders and was not limited to the bare convictions. Surrounding circumstances could be adduced from these past violent crimes or homicides for character analysis. Since Appellant had no less than eight prior first degree murder convictions, it would be difficult to conceive of a penalty phase wherein these past convictions would not be one of the main "features". Appellant does not offer any suggestions as to what evidence should or should not be admitted based upon prior homicide convictions.

Appellant specifically mentions detailed confessions admitted into evidence concerning three past murder convictions. In Justus v. State, 438 So.2d 358, 368 (Fla. 1983) this Honorable Court held that in a penalty phase testimony of a defendant's prior confessions or a past murder conviction was admissible. Appellant also argues that an autospy and pictures of past murder victims should not have been admitted. In Perri v. State, 441 So.2d 606, 607 (Fla. 1983) this Honorable Court that testimony regarding details of a prior felony involving the use or threat of violence to another was admissible in a penalty phase of this nature.

Two police officers were allowed to testify regarding details of two past convictions of the defendant. Much of this testimony even involved hearsay. In Alvord v. State, 322 So.2d 533, 538-539 (Fla. 1975) (where a doctor was allowed to testify at the penalty phase that the defendant was sane at the time he committed a past rape in Michigan even though the Michigan jury acquitted the defendant on this past rape by reason of insanity), this Honorable Court held the latter testimony admissible and maintained:

> There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevence or to any other matter except illegally seized evidence.

Since it is not contested by Appellant that this evidence was illegally seized or in anyway unconstitutional, the trial court was certainly within his discretion in allowing the introduction of the evidence.

Appellant draws an analogy between the admissiblity of this type of evidence at a penalty phase and Williams Rule Evidence admissible in trial. Reviewing the wording of each statute, it is apparent that this analogy is not tenable. Section 921.141(1) states:

> ...in the proceeding, evidence may be presented as to any matter that the court deems relevent to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances...Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebutt any hearsay statements.

Section 90.404(2)(a), Fla. Stat. (1983) deals with similar fact evidence admissible at trial to prove motive, opportunity, intent, preparation,

plan, knowledge, identity, or absence of mistake or accident. Specifically this statute concludes:

> ...it (the Williams Rule testimony) is inadmissible when the evidence is relevent solely to prove bad character or propensity (emphasis supplies)

Under § 921.141(1), Fla. Stat. (1983) it is permissible to admit this evidence to delve into the character of the defendant. But under § 90.404(2)(a), Fla. Stat. (1983) similar fact evidence is specifically inadmissible solely to prove bad character. The analogy of Appellant fails because the capital penalty statute specifically allows this type of evidence to assess the defendant's character, while the similar fact evidence statute excludes this type of evidence when it is used to solely prove bad character.

In the findings of fact in support of the death penalty (R 2231) the trial court merely listed the victims' names, past convictions, and that the Appellant admitted to these convictions. The trial court did not rely on any other details. The trial court would have had the power to override the jury even if the jury had recommended a life sentence based upon a lack of evidence concerning Appellant's past criminal history. Since the trial court's findings do not reflect that he relied on the details or evidence of the past convictions, the Appellant cannot assert that his rights have been substantially prejudiced even if admission of all the evidence to the jury was in error. In Douglas v. Wainwright, 714 F.2d 1532 (11th Ct. of Appeals 1984) [34 Cr.L.Rep. 2044) a trial court imposed a death penalty sentence overriding the recommendation of the jury for imposing a life sentence. The defendant argued that the court was aware of defendant's prior invalid convictions. But the Eleventh

Circuit rejected defendant's contention because the court's findings in support of the death penalty did not reflect that it relied on these invalid convictions. Likewise, in the case at bar, where the court's findings of fact do not reflect that he relied on the details of the past convicitons (other than the confessions which are admissible under the Justus case), the Appellant cannot assert any prejudicial error.

Appellee would submit that the details of Appellant's past criminal convictions were certainly not the exclusive feature of the penalty phase. Dr. Frank Carrera III and Dr. George Barnard testified on behalf of the state as to the Appellant's mental condition (R 1203-1250). In any event the details of Appellant's past convictions when compared to the exhaustive evidence presented by the state during the trial phase, is minimal. In as much as the jury had already heard the exhaustive testimony regarding the present charge at the trial phase, there was no point in being redundant by featuring the facts of the present case again. Rather what was left at the penalty phase was to assess Appellant's character and since part of this relevent evidence was eight prior murder convictions, any evidence produced at the penalty phase regarding these past convictions would have to be "featured." Appellant's suggestion to limit the testimony is not only contrary to caselaw and § 921.141(1), Fla. Stat. (1983), but if adopted would be ambigious and unworkable.

POINT X

APPELLANT'S DEATH SENTENCE WAS CORRECT AND WITHIN THE DISCRETION OF THE JUDGE AND JURY AND DID NOT VIOLATE ARTICLE I, SECTIONS 9 and 17 OF THE FLORIDA CONSTITUTION NOR DID THE DEATH PENALTY VIOLATE THE EIGHT AND FOURTEENTH AMENDMENST TO THE CONSTITUTION OF THE UNITED STATES.

A. THE COURT HAD THE DISCRETION TO FIND AN ABSENCE OF ANY STATUTORY OR NONSTATUTORY MITIGATING FACTORS THUS THE PENALTY IMPOSED WAS PROPER.

Appellant contends that the trial court impermissibly did not consider mitigating evidence that he was under the influence of extreme mental or emotional distress during the commission of the crime and that Appellant was not able to conform his conduct to the requirements of the law because he was substantially impaired. Essentially Appellant would have the trial court give greater weight to the report of Dr. Ann McMillen admitted at the penalty phase on behalf of a Appellant (R 1265) as opposed to the conclusions of Dr. Carrera and Dr. Barnard who testified on behalf of the state at the penalty phase.

Dr. Frank Carrera testified he examined the Appellant three times both for the trial and penalty phases (R 1206). The time spent with Appellant totaled almost six hours. Additionally Dr. Carrera reviewed Appellant's history, schooling, jobs, family, marital relations, medical history, psychological background, sexual history, and perfomred numerous tests on Appellant (R 1207). For the second interview Dr. Carrera performed even more tests (R 1208). He had the Appellant take a mental examination right before the penalty phase (R 1209). Again more tests were repeated. Likewise, Dr. Barnard also interviewed the Appellant personally three times (R 1239). He did a mental status exam based upon Appellant's

history (R 1240). Both doctors maintained that the Appellant was not suffering from paronoid schizophrenia nor any neurological disorder. They did maintain that the Appellant had an anti-social personality but maintained that the Appellant could conform his conduct to the requirements of the law, that he was not substantially impaired, nor was he under any extreme mental or emotional disturbance. (R 1216,128,1240,1243). These conclusions differed significantly from the report of Dr. Ann McMillen (S.R.B. 92-103).

In Daughtery v. State, 419 So.2d 1067, 1070-1071 (Fla. 1982) this Honorable Court maintained it is within the province of a trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight be given that circumstance. In Smith v. State, 407 So.2d 894, 901 (Fla. 1982) (cert. denied 102 S.Ct. 2260), the defendant claimed the trial court erred regarding not finding a mitigating circumstance of extreme emotional or mental distress and that the defendant could not appreciate the criminality of his act nor conform his conduct to the requirements of law. In rejecting the defendant's contention this Honorable Court held that whether a mitigating circumstance is proven and a weight to be given that circumstance lies within the discretion of the judge and the jury. This Honorable Court then distinguished the case of Huckaby v. State, 343 So.2d 29 (Fla. 1976). In Huckaby the trial court ignored every aspect of uncontested medical testimony regarding defendant's mental illness. But in Smith this Honorable Court maintained that the Appellant was simply disagreeing with the force and effect given to the testimony of a psychologist and psychiatrist at the sentencing hearing. In affirming the conviction in Smith this Honorable Court held that a reversal would not be justified simply because Appellant draws a different

conclusion from the testimony presented than did the jury. In the case at bar Appellant simply wants this Honorable Court to reweigh the differing conclusions of the mental health experts. In Sireci v. State, 399 So.2d 964, 971-972 (Fla. 1981) the defedant contended that the trial court failed to consider certain mitigating factors. This Supreme Court held that the findings of the trial court were factual matters which should not be disturbed unless there is an absence or lack of a substantial competent evidence to support the findings. In the case at bar this principle should be applied since the testimony of Dr. Carrera and Dr. Barnard would be more than ample to support the findings of fact by the trial court.

Appellant claims error because the two psychiatrist on behalf of the state did not examine the Appellant regarding the instant offense. The facts refute this contention. Prior to the penalty stage Dr. Carrera testified that both he and Dr. Barnard reviewed Appellant's account for his recall of the events on the day of the offense for which he was being seen in court (R 1209). Additionally the hypothetical question presented to Dr. Carrera (R 1210) and Dr. Barnard (R 1240-1241) included all the details of the instant offense.

Appellant also claims error because the trial court alledgedly rejected the numerous confessions by Appellant to other murders as a non-statutory mitigating factor. Appellant contends that the trial court rejected this mitigating evidence because Appellant had not admitted that he had, in fact, killed Cathy Lee Scharf. Therefore, Appellant contends, the trial court punished him for maintaining his innocence in the case at bar. Looking at the court's findings specifically (R 2234) the order states:

> ...while the defendant admitted in this

> under oath that he committed the crime confessed to Sargeant Paul Crow and Detective Johnny Mannis in this cause, he denies that the person killed was Cathy Lee Scharf although the circumstances of the killing and the location of the body are identical to the circumstances of this crime.

So it is incorrect to imply that the trial court was denying this mitigating factor based upon the claim that Appellant was protesting his "innocence". In fact the Appellant has not denied that he did commit a homicide; he is denying that Cathy Lee Scharf was the particular victim of this homicide. In any event Appellant's testimony was voluntary and not coerced. The fact that Appellant would like to deny that Cathy Lee Scharf was the particular victim in the case at bar would certainly be a consideration to rebutt any non-statutory mitigating factor of remorse or wanting to seek psychiatric help. The trial court could certainly find that the Appellant could not be remorseful nor one to seek psychiatric help when he has in fact denied that the victim was indeed Cathy Lee Scharf. Additionally this evidence could have been used to establish a lack of remorse which could be considered in the courts finding that this murder was heinous, atrocious or cruel (R 2231-2232). In Sireci, supra this Honorable Court held that indeed evidence of a lack of remorse could be considered to uphold the findings that the crime was heinous, atrocious or cruel.

Appellant next contests that the trial court alledgedly rejected Stano's musical abilities as a mitigating circumstance, stating no evidence was presented. Dr. Ann McMillen's report commented on this subject as follows:

> The only school subject Gerald did well in

music (S.R.B.93).

Appellee would submit that this evidence is tantamount to no evidence. It is only a conclusion and doesn't present any facts on which to make a finding of a mitigating nature. No other evidence regarding this subject was presented. In any event even if this is considered technical error, the error certainly would be harmless and not substantially prejudice the rights of Appellant.

Finally Appellant contends that the trial court did not consider or weigh the testimony of Stano himself, i.e. the trial proceedings had changed him so that he had developed feelings for his victims and their families.[1] To buttress his contention, Appellant alludes to his testimony that all of his convictions were the result of his confessions. The professional mental health testimony was contrary to this conclusion. Both Dr. Ann McMillen, whose report was admitted on behalf of the Appellant and Dr. Carrera testified that Appellant had an anti-social personality (S.R.B.96) (R 1216). In addition Dr. Carrera testified that Appellant had a lack of emphathy for others. It must be remembered that Dr. Carrera examined Appellant right before the sentencing hearing so it would be unlikely that Appellant had a complete change of personality in such a short time span. In addition, during cross-examination of Stano at the penalty phase, the Appellant admitted that he was seeing a psychiatrist and yet still was murdering young women at the time (R 1824). He also admitted that at the time of the murder he was more concerned with the

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1 It must be remembered that Appellant has not admitted that Cathy Lee Scharf was the victim in this particular homicide.

cleanliness of his car and his shoes rather than the victim in the case at bar (R 1824). In Washington v. State, 362 So.2d 658 (Fla. 1978) cert. denied 99 S.Ct. 2063 the defendant contended that the trial court should have considered as mitigating circumstances the defendant's surrender to police officers and the fact that he had plead guilty. This Honorable Court pointed out that the defendant did not surrender until he knew he was an accomplice and that the confessions were a matter of speculation. Likewise, in the case at bar, the testimony of the mental health experts (including Appellant's expert testimony) establish and negate any self serving assertion by the Appellant himself that he had feelings for his victims and their families.

B. THE TRIAL COURT WAS CORRECT IN FINDING A STATUTORY AGGRAVATING CIRCUMSTANCE DUE TO THE FACT THAT THE MURDER WAS COMMITTED IN THE COMMISSION OF A KIDNAPPING

Appellant contends that the trial court could not find an aggravating circumstance based upon the fact that the murder was predicated upon a kidnapping because this finding would be based only on a confession with no corresponding corpus delicti. Appellant cites the case of Smith v. State, 407 So.2d 894 (Fla. 1981). But any analogy to the Smith case is inapposite. It would not be necessary to establish a corpus delicti to rebutt the mitigating factor that the Appellant had no prior criminal activity pursuant to § 921.141(6)(a), Fla. Stat. (1983). In any event a distinction must be made between § 921.141(5)(a) and subsection (d). In subsection (a) the statute explicitely concerns previous capital or violent felony convictions. Subsection (d) concerns capital felonies while a defendant is committing or attempting to commit other enumerated felonies (including a kidnapping) but this subsection is not concerned

with convictions explicitely. Appellee submits therefore that a corpus delicti need not be established

In any event a corpus delicti has been established pursuant to the facts. The body was discovered in remote woods off a dirt road (R 653-657). The area was heavily dense with vegetation, trees, and bush. The closest house was two miles away (R 751-752). It was difficult to find the dirt road where the body was discovered (R 773). The last witness to see the victim, saw her on Route One near her home and Marko's Restaurant (R 806-809, 737, 750-754). The victim was employed at a restaurant (R 727). And was to report to work the next day (R 774). The victim never stayed away from home for an extended period of time (R 730-731). The victim was not depressed nor did she have any mental or physical health problems. (R 729-731). Since the victim was found in a very remote area, far from her home and place of work, the evidence would establish a prima facie the corpus delicti that she had been taken to this area against her will and for the purpose of being tortured or having a felony committed upon her person. In State v. Allen, supra, a corpus delicti need not be uncontradicted or overwhelming. Rather the state just need show a prima facie case of the elements. Additionally the state need not rebutt every other possible contention. So based on the location of the body and the cause of the death, the evidence was more than sufficient to demonstrate that the victim reached her final destination through the criminal agency of another. Stone v. State, 378 So.2d 765 (Fla. 1979).

In Adams v. State, 412 So.2d 850 (Fla. 1982) a homicide victim of eight years old was last seen leaving her school about two thirty p.m. Her body was found in a wooded area about three months later. The defendant confessed that he picked the victim up walking home from school,

drove away with her, and then stopped somewhere and suffocated her. The Adams finding that the murder was committed in the course of a kidnapping was upheld. The facts in the case at bar are similar and the finding of this aggravated circumstance should be upheld. Next, Appellant contends that the state did not prove a kidnapping beyond a reasonable doubt. Appellant cites one of Appellant's confessions where he maintained that he picked up the victim then killed her and then took the body to a deserted,wooded area. Appellant maintains that the kidnapping was an "incidental" movement. Appellee submits that had no confinement occurred, no murder would have occurred. Furthermore, Appellant's actions in transporting his victim to a secluded spot clearly made the commission of the murder easier and substantially lessened the risk of detection. The movement and confinement was neither slight nor inherent in the nature of the crime or murder. See, Faison v. State, 426 So.2d 963 (Fla. 1983) and Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980).

Next Appellant would have the trial court disregard certain confessions (notably admissions to Albert Zacke and a confession to Johnny Mannis) and rely on the confession to Sargeant Crow (R 869). Appellee submits that it would be within the discretion of the trial court to consider the weight of the confessions/admission of Appellant. Not withstanding Appellant's contention, Appellee would specifically point out that a taped confession of Appellant was played to the jury. Certainly Appellant's own words would far outweigh any third party confession/admissions. The jury was priviledged to hear Appellant's own words to the effect that he picked up the victim hitchiking and that she wanted to go to a skating rink (R 985). Appellant stated on the tape that they continued driving and the following colloquy took place:

> (By Johnny Mannis)...was she wanting out or just didn't like the way you were driving or what?
>
> (By Appellant) It was a combination of both, ...she wanted out, and I said, no, you're not going to get out....she (said) ...I'm going to get out anyway. And I said try if you want. But she couldn't do it, because I have the kind of door locks that once your hands get slippery or wet...(R 989)

Appellant then said he struck her which shut her up for awhile and then he made a left turn off of Route 1 onto State road A1A (R990). He then stated that he drove to a canal in a "little everglades area." He stopped the car, undid the lock and said to the victim that this is the end of the line (R 991). Without any doubt this taped confession in Appellant's own words establishes a kidnapping.

Appellant contends there was no evidence that the Appellant had installed the antitheft door locks in order to hinder the escape of his victim but rather these locks were solely to protect his automobile from theft. This argument ignores what Appellant said on his taped confession to Johnny Mannis, i.e. "But she couldn't do it, because I have the kind of door locks that once your hands get slippery or wet --they were the kind that you couldn't put a coat hanger through them and pull up and there just the straight." (R 989). Additionally, in a confession regarding two prior murders the Appellant explained that his victims were unable to escape from his car before he murdered them because of the special locks that he had in his car (S.R.A. 35). Appellant has presented this Honorable Court with an either or proposition. Appellee submits that these locks could be used both for antitheft purposes and to facilitate his kidnapping/murders. Just an ordinary carpenter's tool can become a

deadly weapon in certain situations, these door locks can likewise used for deadly purposes.

C. THE TRIAL COURT WAS CORRECT IN FINDING AN AGGRAVATING CIRCUMSTANCE, TO WIT: THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Appellant contends that the trial court did not weigh the evidence properly in finding an aggravating circumstance (that the capital felony was especially heinous, atrocious, or cruel) because the court relied on Appellant's admission to inmate Alber Zacke as opposed to relying on the confessions to either Sargeant Crow or Johnny Mannis (R 2233). In Sireci, supra this Honorable Court held in a sentencing phase that the findings of a trial court are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support the findings. Likewise, it is within the province of the trial court to determine whether a mitigating or aggravating circumstance has been established and the weight be given to that factor. See, Daughtery, supra at 1070-1071.

The trial court is not required to view the testimony of Albert Zacke as contradictory or mutually exclusive from the testimony of Sargeant Crow or Johnny Mannis. Rather Zacke's testimony can be viewed as "filling in the gaps" of the confessions given to police officers. During the taped interview of Appellant by Johnny Mannis played for the jury at trial, Appellant stated that the victim wanted to get out of his car but he would not let her out. Appellant commented that his door locks were designed in such a way as to make it difficult for the victim to get out of his vehicle (R 989). Appellant also stated that he struck the victim

during the drive and left the main road to go on a desol te dirt road (R 990). He described the place where he took the victim as a "litte everglades area." At this juncture he told the victim that, "This is the end of the line." (R 991). This taped testimony of Appellant certainly would support and not be inconsistent with the admissions that Appellant made to inmate, Albert Zacke.

It is up to the trial court to assess the weight of the testimony of Albert Zacke. Notwithstanding that the trial court had the discretion to rely on the testimony of Albert Zacke, Appellee out of an abundance of caution, can refute the impeachment of Albert Zacke that Appellant has cited in his initial brief. Zacke told the jury that he did not testify at the first trial because he believed the state had overwhelming evidence anyway and he believed the defendant had already plead guilty to the crime (R 910-911). Zacke also testified that his chances of survival at the Florida State Prison were not very good because he testified against Mr. Stano. He essentially told the jury that testifying against Stano was like "picking on home folks to them up there." Zacke disclosed that for two cartons of cigarettes an inmate could hire another to retaliate against him. Zacke estimated that there could be about several hundred inmates that would kill him for his testimony (R 920-921). Since Albert Zacke's sentence would be for long term whether or not he made any "deals" with the state, the fact that he would be jeopardizing his life for this testimony certainly would override any impeachment regarding "deals".

Appellant maintains that the judge did not consider and weight that this aggravating circumstance was caused by Stano's severe mental problems. Looking at the trial court's findings of fact (R 2233) it is clear that the judge did consider this factor and could properly reject Stano's

alledged mental problems as a mitigating circumstance and thus not negate the findings of the aggravated circumstance. Again there was substantial competent evidence from Dr. Carrera and Dr. Barnard (R 1206-1218,1239-1243) to reject Appellant's contention. Miller v. State, 373 So.2d 882 (Fla. 1979) can be distinguished since the judge made a finding that the defendant was suffering from a mental illness at the time he committed the murder. In the case at bar, the trial court made no such finding and indeed was entitled to do so. In Miller the trial court found a non statutory aggravating circumstance that the defendant would probably kill again if he were released on parole. In the case at bar the trial court did not do so. The case Smith v. State, 407 So.2d 894, 901 (Fla. 1982), supra distinguished the case of Huckaby v. State, 343 So.2d 29 (Fla. 1976). In Huckaby the trial court ignored every aspect of uncontested medical testimony regarding the defendant's being under a mental illness. Smith distinguished Huckaby in that the Appellant in Smith was simply disagreeing with the force and affect given to the testimony of a psychologist and a psychiatrist at the sentencing hearing. Likewise, in the case at bar, Appellant is simply disagreeing with the force and affect given to the testimony of Dr. Carrera and Dr. Barnard.

D. THE TRIAL COURT WAS CORRECT IN FINDING THE EXISTENCE OF AN AGGRAVATING CIRCUMSTANCE, THAT IS THAT THE COMMISSION OF THIS CRIME WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL ADJUSTIFICATION.

Appellent first contends that use of this aggravating factor is a violation of an ex poste facto law because this particular aggravating circumstance was amended in July of 79 and the crime occurred in

1973. Appellant urges the court to reverse the holding in Combs v.State, 403 So.2d 418 (Fla. 1981) which specifically rejected this contention. Yet the holding in Combs was reaffirmed by the Honorable Court in Preston v. State, 444 So.2d 939, 946 (Fla. 1984). Appellee submits that the holdings of Combs and Preston should not be overruled.

The next argument maintains that the Appellant's concern with his vehicle and clothes as opposed to any concerns to the life of the victim should not have been a consideration in this aggravating factor since these acts occurred after the murder. Appellee submits that acts which are designed to cover up the crime and make detection less likely are factors to be considered for purposed of this subsection. Certainly the lack of care for the victim could be considered to determine that the crime was committed "without any pretense of moral or legal justification." Section 921.141(5)(i), Fla. Stat. (1983) Appellee would submit that even if this could be construed as an error it certainly would be harmless error in as much as this was just one of several factors used to determine this aggravating circumstance.

Appellant again attacks the finding of the trial court for this aggravating circumstance because the trial court relied on the testimony of Albert Zacke. And again, Appellee reiterates that the weight of the testimony is to be assessed by the trial court and since there is substantial competent evidence from the witness Zacke on which to make this finding, the trial court's finding should not be disturbed. Appellee would incorporate the same arguments regarding Albert Zacke's testimony from section ix c. of his answer brief.

The trial court, in his findings for this aggravating circumstance again referred to the special locks in his automobile which made

it difficult, if not impossible, for the victim to escape (R 2232). Again Appellant takes umbrage with this finding. Appellee would, once again, maintain that these locks were utilized by Appellant specifically for an unlawful purpose and to effectuate his murder. Again this conclusion is supported by the evidencein Appellant's confession to Johnny Mannis (played to the jury at the trial on a tape recorder) (R 989). Additionally the jury at the penalty phase heard Appellant's confession regarding his murder convictions of Jenny Ligotino and Ann Arceneaux (S.R.A. 13). These murders occurred on March 21, 1973 (S.R.A. 13). Again, these burglar proof locks were utilized by Appellant to prohibit the victims from escaping and thus facilitate his murder (S.R.A. 26,35). Since Appellant had already utilized these types of locks to facilitate a double murder in March of 1973, it certainly would be within the trial court's discretion to find that these types of locks were utilized in the subsequent murder of the victim in the case at bar.

Appellant maintains as his final argument for this subsection that there was not a high level of premeditation since it could be concluded that Appellant drove thirty miles to a desolate, wooded area and then decided to kill the victim. In Preston v. State, 444 So.2d 939 (Fla. 1984) this Honorable Court maintained that this particular aggravating factor could be found when the facts show a particularly lengthy, methodic, or involve series of atrocious events or substantialy periods of reflection or thought by the perpetrator. When viewing the evidence in the case at bar, it is clear that these later parameters have been met. Evidence at the penalty phase revealed that Appellant confessed to the murder of Mary Carol Maher (S.R.A. 2). Appellant confessed that he picked this victim up in car and drove around for a period of time. He

then asked her for sex and she refused. At that time he yelled at her and obtained a knife under his seat. He first stabbed her in the chest and then he stabbed her in the back. He prevented her from getting out of the car (S.R.A. 3-6). The fact that the Appellant had the murder weapon so handy would indicate both in the Mary Carol Maher case and in the present case that there was a high degree of premeditation and preparation. Again, regarding the murders of Jenny Ligotino and Ann Arcneaux, Appellant confessed that he pulled a knife from under his seat as well as pulled the car off into a desolate spot and then murdered his victims (S.R.A 23). During the penalty phase, in the case at bar, the prosecutor questioned Appellant regarding the murder of these two girls in Alachua County as follows:

> Q: Did these two girls up in Alachua County have any idea when you stopped you were going to kill them both?
>
> A: No, Sir.
>
> Q: You intended to kill both of them at that time thought, didn't you?
>
> A: Yes, Sir. (R 1825-1826).

Appellant also revealed that he helped another victim of murder, Barbar Bower with her car initially. He then drove with his victim up to Bradford County, tied and binded her, and then went on to kill her (R 1831-1832). All these other similar type murders would certainly indicate a planned, premeditated, and calculated course of behavior and would be ample evidence to sustain the trial court's finding that this murder was done in a cold, calculated and premeditated manner without any pretense of legal or moral justification. Given the evidence in this case and of the other murder convictions, it would be hard to come to any other conclusions.

E. CONCLUSION

There is ample evidence to support each and every one of the aggravating factors. Likewise, the trial court had the discretion to weigh the evidence and to make findings that there were no material mitigating factors. Even if this Honorable Court found just one aggravating factor because there are no mitigating circumstances in this cause, death is presumed to be the appropriate punishment. See Sims v. State, 444 So. 2d 922, 926 (Fla. 1983).

POINT XI

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTUTIONAL ON ITS FACE AND AS APPLIED.

Appellant contends that the failure to provide notice of the aggravating circumstances upon which the state intends to rely is a denial of due process. Defense counsel below acknowledged, "I know the state has disclosed various witnesses and various reports that they will rely upon. They may have already complied with this." (R 1728). At this point the state did announce certain psychiatrist to be called as well as witnesses to establish Appellant's prior convictions. In addition ample discovery was provided to the Appellant for the penalty phase (R 2464-2471, 2474). Appellant was put on actual notice of the evidence that the state had and therefore would have notice of what aggravating circumstances the state could rely upon. In any event, this contention has been raised and rejected already in the cases if Sireci v. State, 399 So.2d 964, 965-966; (Fla. 1981) and Menendez v. State, 368 So.2d 1278 (Fla. 1979).

Next, Appellant argues § 921.141, Fla. Stat. (1983) fails to provide any standard of proof for determining the aggravating circumstances "out weigh" mitigating factors. This Honorable Court has continuously held that the aggravating and mitigating circumstance emumerated in the statute are not vague and provide meaningful restraints and guidelines to the discretion of the judge and the jury. See, Lightbourne v. State, 438 So.2d 380 (Fla. 1983) and State v. Dixon, supra. In any event this issue was not presented to the trial court and therefore had not been preserved for appellate review. See, Fla. R. Crim. P. 3.190(b)(c); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Williams v. State, 414 So.2d 509 (Fla. 1982); and Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Appellant asserts the aggravating factors have been applied in a vague and inconsistent manner. Again, Appellee would submit that this issue has not been preserved below. Defense counsel below did not assert what aggravating factors had been applied in a vague manner nor how they had been misapplied. Again, the decisions in Lightborne, supra and Dixon, supra would dispell this contention even if defense counsel below or Appellant had demonstrated specific error.

Appellant suggests that the capital sentencing statute should require a unanimous or substantial majority of the jury to recommend the death penalty before it is imposed. Again, the specific objection was not raised below. Indeed it could not be raised below because it would be totally illogical in the context of the case, because the jury recommended the death penalty by a ten to two majority (R 2248).

Appellant argues that the exclusion of veniremen from the jury based upon their capital punishment views denies the right to a fair cross-section of the community. In Riley v. State, 366 So.2d 19 (Fla. 1979) the defendant argued that people could remain on the jury who are unalterably opposed to the death penalty so that there would be a fair cross section of the community. The defendant also suggested that an alternate serve on the penalty phase if necessary. This Honorable Court, in Riley, rejected both contentions. (reversed on other grounds. death penalty affirmed on remand 413 So.2d 1173 (Fla. 1982.) Likewise, the decision in Witherspoon v. Illinois, 391 U.S. 510, 517-518, 88 S.Ct. 1770, 1774-1775 (1968) would reject this argument. The United States Supreme Court stated in Witherspoon:

> We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclu-

> sion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction... We are not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a juror selected as this one was.

Appellant next focuses the Witherspoon issue upon veniremen Nattile. Appellant contended that Nattile's statements fell short of the certainty requirement of Witherspoon. Mr. Nattile unequivocally and unambiguously maintained that under any set of circumstances he would not invoke the death penalty. This he did at least three times (R 116, 123, 160). Looking at the record there is absolutely no doubt that Nattile's statements were certain for purposes of Witherspoon. Appellant also suggested that this venireman should have been allowed to be a juror at the guilt/innocence phase. This court in Riley has rejected this argument. See, supra.

Next, Appellant takes umbrage with the rule of Elledge v. State, supra which holds that where an improper aggravating factor is found it would be harmless error in the absence of a finding of any mitigating factors. Again this issue has not been preserved below. This issue is more of an anticipatory objection and should not be advanced at this time since it is based upon speculation.

Appellant contends that § 921.141(5)(i), Fla. Stat. (1983) renders the statute in violation of the Eighth and Fourteenth Amendment to the United States Constitution because the death penalty is automatic unless the trial court finds some mitigating circumstance out of infinite array of possibilities as to what may be mitigating. Giving a jury or trial court an "infinite array of possibilities" to choose from would seem

to be in the Appellant's favor. In any event this Honorable Court has clearly and consistently held that the pronouncement of this aggravating factor does not apply in all premeditated murder cases but only under certain factual circumstances. See Harris v. State, 438 So.2d 787 (Fla. 1983) and Jent v. State, 408 So.2d 1024 (Fla. 1981).

Finally Appellant argues, "The Florida Supreme Court does not independantly weigh and reexamine aggravating and mitigating circumstances." (See Appellant's Initial Brief at page 69). Although this Honorable Court is under no constitutional duty to reexamine the sentence and compare it to past capital cases (See Pulley v. Harris 104 S.Ct. 871 (1984) this court has assumed the duty of this type of review. See State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). In any event this is an anticipatory objection and, at this point, is only speculation.

Defense counsel below filed a motion declaring the statute to be unconstitutional and specifically alleged that the death penalty had been administered and applied in a manner which was inconsistent with the premises of the courts' decisions. The allegations also maintained that the equal protection clause of the Fourteenth Amendment to the United States Constitution required that harsh punishments be fairly and evenly imposed (R 2458). Yet the state attorney disagreed and asked the defense counsel below to present evidence and facts. The court also asked the defense counsel to present case authority (R 1727). Defense counsel below could provide nothing (R 1728). Appellee submits that this objection has not been preserved, and even waived in addition to the ground that it is speculative.

Appellant has candidly admitted that this Honorable Court has specifically or impliedly rejected each of these challenges enumerated in

point eleven. (See Appellant's Initial Brief at page 67). Appellee would urge this Honorable Court to reaffirm the rejection of all these points.

CONCLUSION

Based on the arguments and authorities presented herein, Appellee respectfully prays this Honorable Court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished, by delivery, to Christopher S. Quarles, Assistant Public Defender for Appellant, this 29th day of August, 1984.

W. Brian Bayly

W. BRIAN BAYLY
Of Counsel for Appellee