IN THE FLORIDA SUPREME COURT

JEFFREY A. MUEHLEMAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 65,546

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief refers to the State of Florida as "Appellee"; and to Jeffrey A. Muehleman as "Appellant"; and to the Record on Appeal as "R" followed by the appropriate page number. The record consists of sixteen volumes and a supplement.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's Statement of the Case and Facts as a substantially accurate account of the proceedings below with such exceptions or additions as set forth in the Argument portion of this Brief.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Appellant's Motion to Suppress. His statements to the investigating officers were voluntary. They were not the product of an illegal arrest. Neither was his arrest illegal.

Informant Ronald Rewis was not a state agent. If he was, he only became one after Appellant volunteered the incriminating details of the murder of Earl Baughman.

Appellant had no reasonable expectation of privacy in the open and accessible garage where he was temporarily sleeping. He consented to an initial search. The garage owners, the Woodwards, subsequently consented to another search. Physical evidence taken from the garage was thus admissible. (Issue I)

Appellant has not submitted to the trial court a motion to withdraw his guilty plea. He thus fails to properly preserve any challenge on direct appeal to the voluntary and intelligent character of his plea.

Substantial, competent evidence, aside from Appellant's own admissions, support his plea, conviction and sentence. (Issue II)

Appellant's voluntary absence and waiver of presence by his attorney at a Motion to Suppress hearing and jury charge conference presents no error. (Issue III)

Appellant fails to properly preserve for appeal his challenge to the admission of the Juvenile Social History ("JSH") Report.

It was, in any event, admissible. Appellant's psychiatric testimony expert witness used it in formulating his opinion of Appellant. The State used it to impeach him. (Issue IV)

The trial court properly admitted rebuttal testimony from three Illinois policemen concerning a number of offenses Muehleman allegedly committed in Illinois, as well as the taped statement of Richard Wesley. Appellant by-passed his opportunity to cross-examine Wesley. There was no Bruton violation. (Issues V- VI)

The trial court properly refused to admit a copy of a newspaper article detailing Appellant's confession. Appellant declined to call the reporter who wrote it despite his availability.

The trial court properly struck the testimony of Appellant's grandmother for lack of relevancy.

On cross-examination Appellant in fact impeached Ronald Rewis on the precise point he claims denial of admission of a particular transcript denied him the opportunity to do.

There were no Lockett or Eddings violations (Issue VII).

Appellee contests Appellant's characterization of several of the prosecutor's remarks on closing argument. He demonstrates no reversible error. (Issue VIII)

The trial court court need not instruct jurors on aggravating and mitigating circumstances for which there is no supporting evidence. It properly instructed the jury accordingly.

The trial court properly defined "premeditation" in connection with its instruction the "cold, calculated and premeditated" circumstance. (Issue IX)

It did not improperly consider his lack of remorse in aggravation. Its findings supported the conclusion it reached.

Appellant erroneously equates a failure to find certain statutory and non-statutory mitigating circumstances with a failure to consider the evidence Appellant submitted in support of them. The trial court properly considered all relevant evidence and exercised its function as fact finder. Appellant would usurp that function. (Issue X)

ARGUMENT

ISSUE I

A.

THE COURT BELOW ERRED IN REFUSING TO SUPPRESS STATEMENTS JEFF MUEHLEMAN MADE TO LAW ENFORCEMENT AUTHORITIES, TO STATE AGENT RONALD REWIS, AND TO REPORTER CHRISTOPHER SMART, AS THE STATEMENTS WERE THE FRUIT OF AN ILLEGAL WARRANTLESS ARREST, AND SOME WERE OBTAINED IN VIOLATION OF MUEHLEMAN'S RIGHT TO COUNSEL AND RIGHT TO REMAIN SILENT.

B.

THE COURT BELOW ERRED IN REFUSING TO SUPPRESS PHYSICAL EVIDENCE OBTAINED FROM MUEHLEMAN AND HIS GARAGE APARTMENT, AS SUCH EVIDENCE WAS THE FRUIT OF AN ILLEGAL ARREST, AND WAS OBTAINED WITHOUT A WARRANT IN VIOLATION OF MUEHLEMAN'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

A. Statements

Appellant was not under arrest from the moment Deputy Lions grabbed his arm. He fails to establish elements one and three of an arrest set out in his own supporting authority for the proposition: Melton v. State, 75 So.2d 291, 294 (Fla. 1954).[1]

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) adopts a dual inquiry for evaluating an investigative stop:

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[1] An arrest involves the following elements: (1) A purpose or intention to effect an arrest under a real or pretended authority; (2) An actual or constructive seizure or detention of the person to be arrested by a person having present power to control the person arrested: (3) A communication by the arresting officer to the person whose arrest is sought, of an intention or purpose then and there to effect an arrest; and (4) An understanding by the person whose arrest is sought that it is the intention of the arresting officer then and there to arrest and detain him. Melton, supra, at 294

(a) whether the officer's action was justified at its inception, and

(b) whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

Terry, 392 U.S. at 20 (emphasis added)

Appellant does not contest the justification for a Terry stop. His argument is that the stop exceeded Terry's scope. (Appellant's Initial Brief, P. 20)

Appellant cites a line of cases[2] for the proposition that his subsequent arrest for obstruction by false information does not cure the illegality of the initial detention.

However, he fails to establish the illegality of the initial detention:

The flaw in his position is that he argues under a line of cases concerned with the events during the detention: Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979)[3]; and Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)[4].

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[2] Appellant's Initial Brief, P. 22; Ward v. State, 453 So.2d 517 (Fla. 2d DCA 1984); Knoble v. State, 399 So.2d 85 (Fla. 1st DCA 1981); Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed.436 (1948); Melton, supra.

[3] The pertinent facts relied on by the Court in Dunaway were that (1) the defendant was taken from a private dwelling; (2) he was transported unwillingly to the police station; and (3) he there was subjected to custodial interrogation resulting in a confession. Dunaway, 442 U.S. at 212.

[4] Royer, supra, focused on the defendant's confinement in a small airport room for questioning.

However, any statements he gave came only after the investigating officer(s) did in fact arrest him for obstruction of justice by false information; and after they had both informed him they wanted to talk to him about victim Baughman's disappearance and read him Miranda warnings (R 97).

The investigator(s):

Learn Appellant's name (R 581); spot him (R 582); see him attempt to cover his face (R 582); jump off his bicycle and turn around; grab him; ask him his name; receive an alias for an answer (R 582-583); pat him down; put him in the back of the police cruiser (R 583); and place him under arrest for obstruction by false information (R 583, 606).

Thus: Royer and Dunaway are simply inapposite to this case. In light of Appellant's concession of justification for the stop, the investigating officers acted well within the constitutional scope of Terry.

Neither did the trial court err in refusing to suppress Appellant's statements of May 17, 1983, May 18, 1983, June 8, 1983 and June 10, 1983 because Appellant invoked his right to remain silent on May 9 (R 568).

Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321. 46 L.Ed.2d 313 (1975) does indeed demand that once a defendant invokes his right to remain silent, law enforcement officials must scrupulously honor that right.

However, Appellant cites Mosely out of context. Mosely also makes clear that:

> [Miranda cannot] be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.
>
> Mosely, 46 L.Ed.2d at 321.

See also: Mosely, 46 L.Ed.2d at 321, footnote nine (9); and Edwards v. Arizona, 451 U.S. 477, at 484-485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

Appellant's May 17, 1983 statement is pursuant to a written waiver (R 569).

Appellant's May 18, 1983, June 8, 1983 and June 10, 1983, statements are pursuant to written waivers. Appellant initiated the interviews leading to these last three statements (R 569-570).

The statements by inmate Ronald Rewis bear no taint of an illegal arrest. Neither did their use violate Appellant's privlege against self incrimination and his right to counsel.

Johnson v. State, 438 So.2d 774 (Fla. 1983) is on point and disposes Appellant's argument. Johnson claimed that the trial court should have suppressed a fellow inmate's testimony as to Johnson's admissions of guilt, under United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), and Malone v. State, 390 So.2d 338 (Fla. 1980), cert. denied, 450 U.S. 1034, 101 S.Ct. 1249, 68 L.Ed.2d 231 (1981), because the other inmate had become a state agent.

The inmate, Smith, had worked as an informant for the sheriff's department several months prior to the incidents at issue here. After meeting Johnson by chance and having a casual conversation with him, Smith contacted the detective he had previously worked for and told him what Johnson had said. This detective contacted the two detectives working on Johnson's case, who also spoke with Smith. Smith was moved to several different cells and eventually wound up in one next to Johnson's cell. He took notes on his conversations with Johnson and turned them over to the detectives handling Johnson's case.

At the hearing on the suppression motion Smith and the three detectives testified that Smith talked to Johnson on his own initiative, without any prompting from the detectives. The detective that Smith originally contacted said that he had told Smith that it might be in Smith's best interest to write down what Johnson said. Smith, on the other hand, testified that he decided to take notes, solely on his own, because he had trouble remembering things. The other detectives stated that they had not told Smith to talk to Johnson or to take notes. Smith testified that he thought he had been moved to the isolation cell next to Johnson's because he had been injured and because he had had a bad argument with a counselor.

After hearing both sides' testimony, the court found Malone distinguishable from the instant case and denied the motion to suppress. A ruling on a motion to suppress is presumptively correct, and a reviewing court should interpret the evidence and deductions drawn from the evidence in a manner most favorable to sustaining the trial court ruling. McNamara v. State, 357 So.2d 410 (Fla. 1978). Here, the trial court held that the detectives did not direct Smith, either directly or surreptitiously, to talk with Johnson or to take notes on their conversations. Henry and Malone did not impose on the police an affirmative duty to tell an informer to stop talking and not approach them again nor do they require that informers be segregated from the rest of a jail's population. We agree with the trial

> court that this case presents a close question whether Smith had become an agent of the state, but we find the ruling that he had not to be supported by the evidence.

Johnson, supra at 776, (emphasis added).

See also: Miller v. State, 415 So.2d 1262 at 1263 (Fla. 1982)

The record indicates:

Initially, Appellant approached Rewis and volunteered the incriminating information (R 749).

Appellant first asked Rewis for a newspaper article about the disappearance of Mr. Baughman, the victim (R 736-737, 754). Rewis attempted to discourage Appellant from discussing what happened (R 738, 745-746, 755). Nonetheless, Appellant expresses his trust in Rewis and continues to detail Baughman's murder (R 738-744, 755)

Rewis then goes to Detention Officer Jacobs (R 745, 755).

The officers advise Rewis not to initiate any conversations (R 564, 566).

Appellee acknowledges that Rewis wore the tape recorder after investigators asked him to do so (R 746-747).

Appellee respectfully submits that Rewis's use of a tape recorder no more makes him a state agent than did informant Smith's use of pen and paper in the Johnson case.

If however, this court finds that the point at which Rewis put on the "bug" demarks his move from independent agent to police agent, then Appellee argues that his own testimony and

recorded statement is still admissible because it reflects informatin gathered prior to that point (R 371) and makes clear that Rewis had by then gleaned much incriminating information (R 366-372).

Appellant continued to talk to Rewis after Rewis went to the authorities just the same way he had talked to Rewis before Rewis went to the authorities. Thus, unlike in Malone, Appellant's statements were not directly elicited by the State's stratagem deliberately designed to elicit an incriminating statement. Miller, supra at 1263.

Finally: Appellant advances as argument the virtually unsupported and highly speculative conclusion that his confession to the authorities motivated his confession to the newspaper reporter. Appellee categorically rejects this proposition.

In summary: Appellant's arrest was legal. Ronald Rewis was not a state agent. Any statements Appellant gave investigating officers after he invoked his right to remain silent he gave at his own behest and/or with a written waiver. Cannaday v. State, 427 So.2d 723, 729 (Fla. 1983). All his statements were admissible.

B. Physical Evidence

Appellant correctly anticipates the State's position that his consent justified the initial search of the garage where he was staying (R 549, 608-609, 615, 682-683, 703); and that the consent of garage owner Woodward justified the second and third searches (R 554, 628-629, 798-798).

However, no illegal arrest taints Appellant's consent. (See Issue I-A).

The Woodwards consent to search the garage was valid because at no time did Appellant ever have exclusive control of any portion of the garage; at all times the Woodwards had maintained access to and common control over the garage (R 628); and Appellant's belongings were in open plain view. (R 627).

This honorable court should therefore affirm Appellant's judgment and sentence. His Issue I is without merit.

ISSUE II

JEFF MUEHLMAN'S CONVICTION AND SENTENCE SHOULD BE VACATED, AS THEY WERE PREDICATED UPON INADMISSIBLE EVIDENCE.

Elledge v. Graham, 432 So.2d 35 (Fla. 1983) requires Appellant to submit a motion to withdraw the plea to the trial court in order to properly preserve any challenge on direct appeal to the voluntary and intelligent character of his plea, notwithstanding Anderson v. State, 420 So.2d 574 (Fla. 1982), cited by Appellant. The Record is devoid of any such motion.

In any event, substantial competent evidence aside from Appellant's own admissions, provide a basis for his plea, conviction and sentence (R 634).

This evidence includes:

Approximately three to four weeks prior to his arrest, Appellant began living in a detached garage at Jeff and Marie Woodward's house. (R 690--691) Richard Wesley, Marie Woodward's cousin, introduced Appellant to the Woodwards. (R 690) Wesley and Appellant contemplated using the garage to do auto repair work and had made a partial rent payment to the Woodwards for that purpose. (R 626, 630)

On Sunday May 1, 1983, Baughman ran an ad in the newspaper requesting a live-in helper. (R 651)

On May 2, 1983 Appellant looked in the newspaper for a job, then went out job hunting. (R 692)

That same day, Baughman hired Appellant as a "helper". (R

649-650, 659, 665, 672-673). Appellant identified himself as "Jeff Williams" and wrote this name down on a sheet in a date book (R 666-667); and said he was from Chicago. (R 665)

The following day, Appellant took Baughman and Baughman's friend, Virginia Peterson, to the grocery store. (R 651)

That same day he returned to the Woodward residence to pick up his belongings. (R 692) He was driving Baughman's 1961 Cadillac. (R 693)

Appellant told Marie Woodward about the job he had gotten working for an old man for sixty dollars a week plus room and board. (R 693) She testified he said something about drugging the old man from month to month and bringing him around the first of the month to cash his check. (R 695) She did not take this statement seriously. (R 696)

On Tuesday, May 3, Appellant asked Richard Wesley to help him commit the murder. He told Wesley he planned to drug the old man, beat him up, and dispose of the body. Wesley initially told the defendant he would help but later became afraid. He never showed up to help the defendant. Instead, he left town the next morning. (R 449-459)

On Wednesday, May 4, Appellant took Baughman and Baughman's long time friend, Virginia Peterson, to the bank where they cashed their monthly social security checks. (R 651-652) Baughman cashed two checks: one for five hundred twenty six dollars and the second for one hundred dollars. (R 652). Later, Baughman called her and had Appellant drive him to her house.

While the defendant waited in the car, Baughman went inside and gave her most of the money. (R 655) He felt a little bit safer that she had the money because he had a new housekeeper. (R 655)

On Thursday morning, May 5, Mr. Baughman was missing. (R 656, 668) The page in his book on which his helper had written his name was torn out. (R 668-669) Baughman's bed was ruffled, and was not like it normally was when he slept in it. (R 669) In the kitchen there was a plate on the table with a little piece of bread or something on it. (RT 670) Baughman's 1961 Cadillac was gone. (R 656, 658)

Appellant returned to the Woodward garage on Thursday morning. (R 697) He indicated he was taking a vacation and going north to visit his parents. (R 697-698) He gave Marie Woodward an 1886 silver dollar for a pack of cigarettes which he said Baughman gave him along with a handful of change to go to the store. (R 698) This silver dollar was identified as belonging to Baughman. (R 672)

That night, she saw a television news story about Baughman's disappearance and that his hired helper was a suspect. (R 701) She called the Sheriff's office the next morning and learned that Baughman lived where Appellant's employer lived. (R 701-702, 693). Her husband also notified the sheriff's office. (R 703)

When arrested, Appellant possessed a cigarette lighter, inscribed with the initials "E.B." (R 681) He initially gave them a false name. (R 681)

A search of defendant's belongings uncovered several items

taken from the victim. (R 782-783, 823-824)

On May 14, 1983, Earl Baughman's body was found in the trunk of his Cadillac on a St. Petersburg Street. (R 716, 785)

An autopsy followed. (R 724) Medical Examiner Joan Wood found injury consistent with manual strangulation. (R 722-725) There were two plastic bags of the type used around newspapers in Baughman's mouth. (R 723-724)

Therefore, assuming only for argument the inclusion of inadmissable statements as a predicate for the judgment of conviction, they do not "substantially impair" that predicate. Anderson, supra at 576.

This honorable court should therefore affirm Appellant's judgment and sentence. His Issue II is without merit.

ISSUE III

JEFF MUEHLEMAN'S ABSENCE FROM PORTIONS OF THE PROCEEDINGS BELOW VIOLATED HIS CONSTITUTIONAL RIGHT TO BE PRESENT.

Appellant claims that his absence from the courtroom during a pre-trial suppression hearing on May 1, 1984 (R 578) and during a jury charge conference (R 2428) violated his Sixth and Fourteenth Amendment constitutional right to be present. Francis v. State, 413 So.2d 1175 (Fla. 1982).

United States v. Gagnon, 470 U.S. ___, 84 L.Ed.2d 486, 106 S.Ct. ___ (1985) addressed the absence of four defendants from an in camera discussion between the trial judge, a juror, and a fifth (co)defendant. The purpose of the discussion was to determine whether the juror became prejudiced against the fifth co-defendant after the juror noticed him sketching portraits of the jury.

The Respondents claims violations of their Sixth Amendment right to an impartial jury and their Fed. R. Crim. P. 43 right to be present at all stages of the trial.

It rejected their argument.

> The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, e.g., Illinois v. Allen, 397 U.S. 337, 25 L.Ed.2d 353, 90 S.Ct. 1057, 51 Ohio Ops 2d 163 (1970), but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. In Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330, 90 ALR 575 (1934) the Court explained that a defendant has a due process right to be present at a

> proceeding "whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge... [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Id., at 105-106, 108, 78 L.E. 674, 54 S.Ct. 330, 90 ALR 575; see also Faretta v. California, 422 U.S. 806, 819, n. 15, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975). The Court also cautioned in Snyder that the exclusion of a defendant from a trial proceeding should be considered in light of the whole record. 291 U.S., at 115, 78 L.Ed. 674, 54 S.ct. 330, 90 ALR 575.
>
> Gagnon, L.Ed.2d at 490
> (emphasis added)

Appellant's presence either at the charge conference or the suppression hearing was not required to ensure fundamental fairness or a reasonably substantial opportunity to defend against the charge.[5]

The Gagnon decision also notes:

> The district court need not get an express "on the record" waiver from the defendant for every trial conference which a defendant may have a right to attend.
>
> L.Ed.2d at 491.

and that (citing Taylor v. United States, 414 U.S. 17, 38 L.Ed.2d 174, 94 S.Ct. 194 (1973) it does not require any type of waiver

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[5] Appellant operated on the assumption there were no large factual disputes. (R 553) The trial court accepted the Appellant's and State's stipulation as to what the facts were as to every aspect of Appellant's Motion to Suppress (R 225-231) save the circumstances of his arrest, on which it heard testimony. (R 567, 571, 575-576)

to exist on the record; defendant's failure to assert his right was an adequate waiver.

Appellee argues further:

This honorable court may distinguish this case from Francis on the same basis this court distinguished Hall v. State, 420 So.2d 872 (Fla. 1982) from Francis:

At no time was Appellant absent from the courtroom during a "critical stage"[6] of his trial.

Conversely, he was present at all critical stages of the proceedings and available to consult with his counsel.

There is a second distinction. Francis was a case where the defendant's absence was involuntary.

Here, Appellant's voluntary absence during a non crucial portion of the trial is not error, irrespective of waiver by defense counsel: Herzog v. State, 439 So.2d 1372 (Fla. 1983).

In any event, the record below amply demonstrates that Appellant waived his presence through counsel.

> A waiver is ordinarily an intentional relinquishment of a known right or privilege. The determination of whether there has been an intelligent waiver... [of the right to counsel].. must depend in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.
> Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938)

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[6] Critical stages are "all stages of a trial when the defendant's absence might frustrate the fairness of the proceedings." United States v. Stratton, 649 F.2d 1066, 1080 (5th Cir. 1981) (footnote omitted)

If the defendant has no objection to his counsel, counsel may waive objection to his absence and case law imputes actual or constructive knowledge of the proceedings to the defendant. Upon his re-appearance, defendant must acquiesce or ratify the actions his counsel took in his absence. State v. Melendez, 244 So.2d 137 (Fla. 1971). Henzel v. State, 212 So.2d 92, (Fla. 3d DCA 1968). Smith v. State, 453 So.2d 505 (Fla. 4th DCA 1984).

No appellate court has extended a defendant's right to be present at trial to an evidentiary hearing. United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970); Hall v. Wainwright, 733 F.2d 766 at 786 (1984), Judge Hill, concurring).

Appellant's counsel, in any event, waived his presence in his absence:

> MR. CROW: I thought of something that we had discussed. We -- obviously, counsel had discussed with the Court on the record various factual matters in the motion to suppress. Mr. Muehleman was not present at the time and I ask the Court to reflect that he has waived any right that he might have to be present or make inquires [sic] as to that. We need to go over that again and what has been fully discussed.
>
> MR. McMILLAN: If the Court would allow us the time period through lunch, I feel we could have that statement for the Court regarding that waiver of the statements. I do not feel it should be a problem but due to the time frame of what we are dealing with, we can furnish that to the Court.
>
> THE COURT: All right.
>
> (R 573)

The absence of any subsequent objection indicates Appellant's acquiescence to counsel's representation in his absence.

Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963), cited by Appellant, is inapposite. There, Cross announced that he was "not going on any further with the trial;" refused to talk to his lawyer; and "declined" to come into the courtroom. The trial continued nonetheless.

Failure to have the defendant present during a charge conference is not fundamental error. Defendant need not be present. Randall v. State, 346 So.2d 1233 (Fla. 3d DCA 1977)

Again, there was in any event a waiver by counsel:

> (By Mr. Crow):
>
> Judge, one thing that we would have on the record at this time, I think you should make some statements on the record about waiving the defendant's presence for this conference or that we can get him, whichever you prefer.
>
> THE COURT: On the record.
>
> MR. McMILLAN: Your Honor, I have consulted with Jeff and it has been a long case, a long week for him. He's waiving his presence to be present during the jury instruction conference that we are holding at this time. He requests to be sent back to the facility at this time.
>
> THE COURT: Thank you, sir.
>
> (R 2428)

Appellant cites Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984); and Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified on pet. for reh. 706 F.2d 311 (11th Cir. 1983)

706 F.2d 311, pet. for cert. denied, ___U.S.___, ___S.Ct.___, 78 L.Ed.2d 697 (1983).

They are inapplicable. They deal with defendant's absence at a critical stage of the trial.

Appellee iterates its position that Apellant was at no time absent during any critical stage.

Appellee nonetheless argues further: Hall, supra, reads Proffitt to hold that a defendant may not waive his presence at any critical stage of the trial. Hall, supra at 775.

However, notwithstanding its analysis, Proffitt, supra, specifically declines to decide the issue of whether presence at a capital trial is ever waivable. Proffitt, supra, at 312.

Judge Hill, in his concurring opinion in Hall analyzes the same line of cases the Proffitt court analyzes[7] and concludes "that the defendant may waive his presence in a capital trial and that he may do so in any variety of ways." Hall, supra at 785.

Appellee respectfully submits that Judge Hill's is the better analysis.

As a general rule, appellate courts will not review a matter raised for the first time on appeal. Only in the rare case of fundamental error is the defendant's right to appeal preserved

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[7] Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912); Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884); Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892); Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

without a contemporaneous objection. State v. Jones, 377 So.2d 1163 (Fla. 1979). This is not a case of fundamental error. See Lowman v. State, 85 So. 166 (Fla. 1920), and Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674 (1934).

Finally, appellee objects to appellant's attempt to sandbag the State by waiving his presence and then asking that this court overturn his conviction because the trial court honored his waiver. Consistently, the Florida appellate courts have estopped defendants from advocating a position in the lower court, or to invite error, and then to urge reversal in the appellate court. McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971); Davis v. State, 413 So.2d 70 (Fla. 3d DCA 1982); State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980); Odom v. State, 375 So.2d 1079 (Fla. 1st DCA 1979); McClure v. State, 371 So.2d 196 (Fla. 2d DCA 1979); Jones v. State, 358 So.2d 37 (Fla. 4th DCA 1978); Richardson v. State, 345 So.2d 380 (Fla. 3d DCA 1977); Andrews v. State, 343 So.2d 844 (Fla. 1st DCA 1976); Jackson v. State, 359 So. 2d 1190 (Fla. 1978).

As stated by Judge Schwartz in State v. Belien, supra, "...gotcha! maneuvers will not be permitted to succeed in criminal, any more than in civil litigation."

This Honorable Court need not allow Appellant to both waive his presence and then claim constitutional infirmity.

This honorable court should therefore affirm Appellant's judgment and sentence. His Issue III is without merit.

ISSUE IV

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE DURING THE DEFENSE CASE A DOCUMENT ENTITLED "JUVENILE SOCIAL HISTORY REPORT," WHICH WAS HEARSAY AND CONTAINED EXTREMELY PREJUDICIAL IRRELEVANT MATERIAL, INVADED THE PROVINCE OF THE JURY, AND VIOLATED THE COURT'S PRETRIAL RULING ON DISCOVERY.

Appellant fails to properly preserve his issue for appeal:

> Mr. McMillan: Judge, our objection to it would be that it outlines a specific criminal history of the defendant, which we think is improper for the state to introduce during the penalty phase portion.
>
> (R 1059)

Appellant thus fails to specify any reason why it is improper. His "objection" does no more than merely identify the report's contents.

> Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. State v. Jones, 377 So.2d 1163 (Fla. 1979); State v. Barber, 301 So.2d 7 (Fla. 1974); Silver v. State, 188 So.2d 300 (Fla. 1966); Dukes v. State, 3 So.2d 754, 148 Fla. 109, (1941). Furthermore, in order for an argument to be cognizable on appeal it must be the specific contention asserted as legal ground for the objection, exception, or motion below. Haager v. State, 83 Fla. 41, 90 So. 812, 813 (1922); Kelly v. State, 55 Fla. 51, 45 So. 990 (1908); Camp v. Hall, 39 Fla. 535, 22 So. 792 (1897); Black v. State, 367 So.2d 656 (Fla. 3d DCA 1979).
>
> Steinhorst v. State, 412 So.2d 332 (Fla. 1982)

Appellant now attempts to argue:

> 1) Dr. Galloway did not rely upon the "JSH" Report in formulating his opinion.
>
> The Record belies this contention. Galloway acknowledged: "... I believe that it is in my briefcase at this moment." (R 1059).
>
> 2) It was hearsay. However F.S. §921.141 provides:
>
> ... 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 rebut any hearsay statements...
>
> (emphasis added)
>
> 3) It was irrelevant and contained highly prejudicial material.

Dr. Galloway used the "JSH" report in formulating his opinion that:

> 1) Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
>
> 2) Appellant was under the influence of emotional distress at the time of the homicide.
>
> (R 1036-1037)

Thus, the material he used was relevant for impeachment purposes. (R 1060-1062, 2493). Appellant misplaces his reliance upon Holliday v. State, 389 So.2d 679 (Fla. 3d DCA 1980) and Lamazares v. Valdez, 353 So.2d 1257 (Fla. 3d DCA 1978)

If appellant wanted the trial court to instruct the jury that it might consider this material only for impeachment

purposes, he was free to do so. He did not.

High prejudice, in and of itself, is no ground for complaint. "The primary test for admissibility is relevance. Ruffin v. State, 397 So.2d 277 (Fla. 1981)." Tafero v. State, 403 So.2d 355 (Fla. 1981) (footnote omitted).

F.S. §90.403 provides:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury or needless presentation of cumulative evidence.....

Appellant's own use of this material belies any claim that the State's use is unfair. (Appellant makes no claim that it confuses issues, misleads the jury or was a needless presentation of cumulative evidence.)

> The trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed. Mikenas v. State, 367 So.2d 606 (Fla. 1978); Rodriguez v. State, 327 So.2d 903 (Fla. 3d DCA), cert. denied, 336 So.2d 1184 (Fla. 1976).
>
> Welty v. State, 402 So.2d 1159 (Fla. 1981)

3) The report did not go to any statutory mitigating circumstances.

Appellee respectfully submits that the "JSH" report comments which Appellant cites in his brief do indeed go to whether his capacity to appreciate the criminality of the law was

substantially impaired. (R 432, 441)[8]

Further: Appellant argued that his age was a mitigating factor. (R 2429-2430, 2450) The trial court instructed the jury on this mitigating circumstance (R 2545).

Thus, it was proper for the State to use the "JSH" to rebut Appellant's argument. It was only in this context that the State urged the jury to read the "JSH" report "of all the juvenile offenses." (R 2497-2498). (See Appellant's Initial Brief, Page 38).

Appellant challenges the trial court's decision to allow the State access to the "JSH" report.

The trial court did not, as Appellant contends, reverse itself on whether or not to allow "discovery" in the middle of the trial.

The State acknowledges the trial court's "no discovery" rule. (R 928-929)

However, Appellant subsequently supplied the State with records it sought to introduce without any authenticating witnesses (R 929), or without any predicate as to when, where and

---

8 "Jeff is a habitual offender who has never shown any sign of rehabilitation, remorse or other signs that his behavior will ever be anything other than a propensity toward crime." (R 432)

[Re Appellant's] ... apparent lack of remorse [for his juvenile offenses] and the lack of sound conscience for social welfare on Jeffrey's part." (R 441)

how they came into their possession. (R 930-931) Appellant acknowledged that his psychiatric experts would base their opinions on these records. (R 931)

The State sought assurance in return that Appellant was not selectively editing from the records he had received those which might be adverse to his case. (R 932-936)

The trial court acknowledged the State's problem in conditionally accepting the "Black Book" into evidence. (R 934-935)

Appellant subsequently acknowledges that he has not included the "JSH" report (referred to as a "PDR" at the trial level,(R 936) because it was waiving the mitigating factor of "no significant history of prior criminal activity."

The State argued it was entitled to whatever Dr. Galloway based his opinion upon. (R 937-938) The Court agreed. (R 938)

In summary: Appellant has not preserved this issue for appeal.

Assuming only for argument that he has preserved his argument(s): the State sought the introduction of a report that the defendant's expert psychiatric witness used in formulating his opinion. The State used it to impeach that expert's opinion and to rebut Appellant's argument that his age mitigated against imposition of the death penalty.

Appellant never requested a mitigating instruction on the jury's use of this evidence.

This honorable court should affirm Appellant's sentence. His Issue IV is without merit.

ISSUE V

THE COURT BELOW ERRED IN ALLOWING THE STATE TO PRESENT DURING ITS CASE IN REBUTTAL EVIDENCE OF OTHER CRIMES ALLEGEDLY COMMITTED BY JEFF MUEHLEMAN.

Appellant attacks the rebuttal testimony of three Illinois policemen about crimes he committed there.

He argues that their testimony neither rebutted the absence of any significant history of prior criminal activity nor related to any statutory aggravating circumstances. Appellant concludes that the only purpose of this evidence was to show his bad, violent character and propensity to commit crimes. (Appellant's Initial Brief, p. 41-42).

The State does not argue that this testimony goes to a statutory aggravating factor (R 1244).

Appellee respectfully submits: It is incontrovertible that Appellant threw open his entire life to the jury on his case in chief. (R 1148) He called fifteen witnesses to the stand. Their collective narrative began with his difficult birth (R 1188-1190). The picture of Jeffrey Muehleman's life they painted included no less detail than reference to this "compassionate" (R 1081) "sweet boy('s)" kindness to his grandfather (R 1146) and love for animals (R 1122) allows.

Appellant argued that all of this related to the killing of Mr. Baughman because, it was all part and parcel of the experience which led to Appellant's substantially impaired capacity to appreciate the criminaltiy of his act, according

to his expert witness, Dr. Galloway (R 1146-1147).

While the State specifically does not concede that the testimony Appellant now attacks merely goes to his bad character or propensity to commit crime, it points out that it is in any event admissible if (and when, as here) the defendant puts his character in evidence. Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977). Dixon v. State, 426 So.2d 1258 (Fla. 2d DCA 1983).

The trial court granted Appellant room to roam far and wide in introducing this character evidence (R 1147-1148).

However, Appellant cries foul at the idea that the State should have its own opportunity to explore some of the darker recesses of the picture Appellant put before jurors. (R 1244-1245)

The purpose of the officer's testimony was two-fold:

1) To rebut Appellant's evidence that his mother, Pat Muehleman, abused him and was somehow responsible for the victim's death (R 1232, 1011-1013, 1017-1020, 1023, 1025, 1027-1028, 1037, 1108-1101, 1111-1112, 1149, 1159-1160, 1168-1171, 1172-1173, 1182, 1193, 1197, 1203-1205, 1209, 1211-1212, 1214-1215).

2) To rebut the testimony of Appellant's psychiatric expert vis a vis Appellant's "substantially impaired capacity" (R 1232-1233, 1054-1055).

This honorable court should affirm Appellant's sentence. Apellant's Issue V is without merit.

ISSUE VI

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE AS REBUTTAL EVIDENCE THE TRANSCRIPT OF A TAPED INTERVIEW WITH RICHARD WESLEY.

Appellant objected to introduction of Richard Wesley's taped statement at trial on the following basis:

1) It did not rebut any evidence the Defense presented

2) It denied him the right of confrontation guaranteed him by the Florida and the United States constitution.

3) It was improper and irrelevant because it went to non-specified, non-statutory aggravating factors.

(R 1224-1225)

Appellant now argues:

1) It did not rebut any evidence the defense presented

2) It denied him the right of confrontation guaranteed him by the Florida and the United States Constitution.

3) Richard Wesley did not acknowledge the correctness of the transcription of his statement.

4) It was not the best evidence of the statement.

Appellant's Initial Brief
p. 43-44

He thus fails to properly preserve his third and fourth argument for appeal. Steinhorst, supra at 338

Appellant's third and fourth arguments are in any event unavailing because the tape was otherwise admissible pursuant to

F.S. §921.141(1).

Appellant correctly points out that:

> The crux of a Bruton violation is the introduction of statements which incriminate an accused without affording him an opportunity to cross examine the declarant.
>
> Hall v. State, 381 So.2d 683, 687 (Fla. 1979) (emphasis added)

His Bruton claim fails, however, because the State afforded him an opportunity to cross examine Richard Wesley:

> Mr. Crow: I'll represent, if the Defense wishes to call Mr. Wesley to the stand for purpose of cross examination, he can be made available should they desire to do that.
>
> (R 1227) (emphasis added)

Wesley previously acknowledged his willingness to testify (R 455-456).

Appellant ignores this offer. However, it belies his argument that Wesley was unavailable because he was not at the trial or otherwise might have invoked his right to remain silent rather than risk prosecution for murder conspiracy. (Appellant's Initial Brief, pg. 45).

On cross-examination, the State asked Dr. Galloway, Appellant's psychiatric expert:

> Q. Would it be inconsistent with the diagnosis if he planned on killing the gentleman two or three days or one day before?
>
> A. That would not be inconsistent with the diagnosis. It would indicate a level of planning and a level of sort of projecting possibilities into the future. That is

relatively unlike him.
His father said at the interview relative to this, quote, "Jeff never planned anything in his life," end quote. I was concerned about the same issue.

Q. So in terms of the mitigating circumstances, you testified to -- you've indicated that you felt his ability to appreciate the criminalities [sic] of his conduct was substantially impaired?

A. Yes.

Q. And you also indicated, I believe, he was acting under not extreme emotional distress but a chronic distress?

A. Yes.

Q. As to the behaviors [sic] for him being substantially impaired, if I understand your testimony, you're indicating that due to the difficulty he's had all of his life, he still acts impulsively, without thinking things through and without analyzing the consequences of what he is doing?

A. That is more likely to what [sic] happened when he is emotionally upset. By that, I mean more than usually so.

Q. How does his problem apply to the crime, the commission of the crime? Would you explain that for me?

A. This was a perfectly senseless crime. He has an option to rob Mr. Baughman, also had an option to take a diamond ring. He certainly, with all of his trouble with the law, should be street-wise enough to know if you are working for the man and the man ends up dead, you are going to be a suspect.
Now, not to realize that is either dumb, which he isn't, or not thinking very straight, which he wasn't and is handicapped in doing.
That is really part of the point, that his capacity to reality test [sic], his capacity to comprehend the significance of his acts, his capacity to comprehend the way society works

> and what likely consequences his act would have, all of those capacities are damaged, evidence they [sic] should have shown up and didn't.
>
> (R 1054-1055)

The State argues that since Richard Wesley's taped statement was part and parcel of the basis of Dr. Galloway's opinion (R 1057) that it is proper to use it to rebut his diagnosis.

This statement indicated that, notwithstanding the doctor's opinion that Appellant was not likely to make plans in advance and contemplate their consequences, that here, he asks Richard Wesley to help him assist in the victim's murder, several days in advance. (R 1229)

Wesley's statement also corroborates State witness Ronald Rewis's testimony that a second person was to help Appellant but never showed up. Appellant attempted to impeach Rewis on this point. (R 764-765)

Finally: Error, if any, is harmless where, as here, there is overwhelming evidence of statutory aggravating factors. Jones v. State, 332 So.2d 615, 619 (Fla. 1976).

The trial court thus properly permitted the State to introduce Richard Wesley's taped interview as rebuttal evidence. Appellant's Bruton claim falls with his failure to avail himself of the opportunity to cross examine Wesley; an opportunity he deliberately by-passed despite the State's offer to make Wesley available.

Appellant's Issue VI is without merit. This honorable court should affirm Appellant's death sentence.

ISSUE VII

THE COURT BELOW ERRED IN RESTRICTING JEFF MUEHLEMAN'S PRESENTATION OF EVIDENCE IN MITIGATION AND EVIDENCE RELEVANT TO THE CREDIBILITY OF A KEY STATE WITNESS.

Appellee notes at the outset that Appellant presents this issue as a Lockett v. Ohio, 438 U.S. 586, (98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) question of the categorical preclusion of a mitigating factor or evidence thereof.

It is, in fact, an evidence question of relevance: "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Lockett, L.E.2d at 990, footnote 12. Eddings, supra prohibits the sentencer from refusing to consider, as a matter of law, any relevant mitigating evidence.

The trial court properly refused to admit a copy of the St. Petersburg Times article.

The State's objection to its admission was that it did not reflect all the conversations between the reporter Christopher Smart, who interviewed Appellant and wrote the story; and that conversely, it contained other matters that did not come in the conversation (R 923).

Furthermore, the State made clear that both prosecution and defense had subpoenaed Christopher Smart; that it had no objection to the admission of the material contained in the

article by way of Smart's testimony; but that Appellant had declined to call him.

Thus the trial court imposed no obstacle to introduction of the substance of the material; but only to its form.

This evidence would in any event have been cumulative. Appellant's statements that he intended only to render Baughman unconscious when he entered the bedroom and killed him only after he realized the man had probably suffered brain damage also appeared in the June 8, 1983 taped confession he gave the investigating detectives (R 352-353) and which the prosecution had previously placed in evidence and played for the jury. (R 821)

The trial court struck Edith Argustein's testimony based upon the State's objection to it's relevance (R 1133).

Appellee iterates its earlier argument that this is not, as Appellant bills it, a Lockett or Eddings violation.

The trial court did not, as a matter of law, either preclude Appellant from offering an aspect of his character and record nor did it refuse to consider relevant mitigating evidence.

Indeed, as Appellee has noted earlier in this brief, Appellant's fifteen witnesses testified at length: to the fact that they loved him (R 1080); that he was a helpful, considerate person, in contrast to most people (R 1080, 1180); that he needed love (R 1090); that he desperately wanted his father to participate in his life and take care of him (R 1092); that he cried when his step-mother threw him out of his father's home (R

1093); that his aunt and uncle loved and cared for him (R 1096); that he kept reaching out for love and approval (R 1101-1103); that there were family members willing to help him (R 1110); and that Appellant put a band around the broken wing of a sparrow when he was a child (R 1113).

This is a sampling of the record references to the testimony that there were people who cared for him, who might aid in his rehabilitation, and that otherwise appeal to the jury's sympathy for Appellant.

Appellee distinguishes Perry v. State, 395 So.2d 170 (Fla. 1980). There, the trial court excluded the proffered testimony of Perry's mother on the grounds that it did not fall within the statutory mitigating factors, citing this court's decision in Cooper v. State, 336 So.2d 1133 (Fla. 1976), rather than, as here, for lack of relevance.

Appellee also notes that Georgia Supreme Court decided neither Romine v. State, 305 S.E. 2d 93 (GA 1983) nor Cofield v. State, 274 S.E. 2d 530 (GA 1981), cited by Appellant, pursuant to Lockett, but rather, as a matter of Georgia law.

Thus, if Appellant is to successfully attack the trial court's ruling, he must demonstrate a palpable abuse of its discretion. Welty, supra, at 1163. He fails to do so.

The record clearly demonstrates that the trial court granted Appellant wide latitude in eliciting testimony to the mitigating factors he now claims the ruling on Edith Argustein's testimony denied him. Her testimony could only have been cumulative at

best. Error, if any, is thus harmless.

Appellant attacks the court's exclusion of portions of the transcript of a pre-trial conference and change of plea hearing held on April 21, 1983 when prosecution witness Ronald Rewis pled guilty to being a felon in possession of a firearm and obstruction by false information.

The Record reflects thirty nine pages of unrestricted cross examination by Appellant (R 201-240) save two objections by the State. The first resulted in Appellant acknowledging factual error (R 763-764); and the second, resolved favorably to the Appellant, bears directly on the purported "limitation" he now raises:

> Q... On April 28th, you entered a plea, get a cap of five years. The State wants five years. You jump bond, you don't show up in court. They issue a warrant --
>
> MR. CROW: I object to this, his recitation in the form of cross-examination. You can ask this witness what his knowledge is but to try to just make a long list and say what he wants to say. He's not a witness, he's not under oath and I object to it.
>
> MR. McMILLAN: It's cross-examination.
>
> THE COURT: Go ahead.
>
> Q. Again, entered a plea on 4-21, a cap of five years. State of Florida indicates their desire to incarcerate you for five years. You bond out, jump bond. You don't show up. They extradite from Lee County back up here to show up in court, get a year in the Court [sic] Jail with probation on top of it and you don't think that has anything to do with your testimony in this case?
>
> A. I don't know. I talked to the parole

lady that is in charge here in Pinellas County and I explained my situation to her and she seemed to think I needed drug treatment, too. She recommended I go to PAR.

MR. McMILLAN: That's all I have, Judge.

(R 770-771)
(emphasis added)

This exchange clearly obviates Appellant's argument that the trial court deprived the jury of all the information they needed to evaluate Ronald Rewis's credibility. (Appellant's Brief, Page 50)

The trial court correctly noted that the prosecutor's comments in the stricken paragraph[9] may well have addressed the nature and character of prior offenses not within his personal knowledge. (R 927)

Appellant argues a line of cases which insure him wide latitude in Sixth Amendment right to cross-examine witnesses against him: Harmon v. State, 394 So.2d 121 (Fla. 1st DCA 1980); Blair v. State, 371 So.2d 224 (Fla. 2d DCA 1979); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). That's exactly what he had here: wide latitude to cross-examine Rewis.

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9 It seems to me that we've got to start thinking of what's best for the public, and, personally, I think that he has had many opportunities--maybe he has not been through these programs they have suggested, but certainly he had many opportunities to straighten out his life. He's been before many different courts on many different occasions. (Apellant's Initial Brief, page 49)

His complaint is that he wants another chance to get in an editorial comment by the prosecutor. Appellee respectfully submits that Appellant is trying to rewrite rules of relevancy.

This honorable court should affirm Appellant's judgment and sentence. His Issue VII is without merit.

ISSUE VIII

THE COURT BELOW ERRED IN PERMITTING THE PROSECUTOR TO MAKE A NUMBER OF IMPROPER AND PREJUDICIAL COMMENTS TO THE JURY DURING HIS CLOSING ARGUMENT.

At the outset, Appellee distinguishes that line of cases cited by Appellant (Goddard v. State, 143 Fla. 28, 196 So. 596 (Fla. 1940); Harper v. State, 411 So.2d 235 (Fla. 3d DCA 1982); Meade v. State, 431 So.2d 1031 (Fla. 4th DCA 1983); Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982)) wherein the prosecutor's remarks occurred during the guilt phase of a trial. Appellee respectfully submits that a description of the victim and the circumstances surrounding the killing is far more relevant at the penalty portion of the bifurcated capital trial where, as here, those specific circumstances go to statutory aggravating factors (F.S. §921.141(5)) which the jury is to consider.

Appellee submits that the prosecutor's statement that:

> On that day, this man sentenced Earl Baughman to death without a proceeding, without the opportunity to present evidence to talk about his life, his family, his expectations, his joys and sorrows (R 2454).

is not unlike the statement Hall v. Wainwright, 733 F.2d 766 (1984) analyzed:

> I don't know; there she is, we can't bring her back, you know; I don't know much worse that you could have. I really don't know... now this is a tragic case. We have a deceased woman; she can't testify. I don't know how quick death comes to people; I know some die hard, some die easy. It comes to all of us sooner or later.
>
> Hall, supra at 773

and found did not reach a level which rendered the trial fundamentally unfair.

Like the Hall comment, ..."These comments are barely questionable; certainly, they are not of constitutional magnitude." Hall, supra at 773.

In closing argument, the prosecutor focused on the premeditated nature of the crimes:

> A victim is selected as a wolf trails a herd of deer; the young, the feeble who trail behind are selected out as victims and Mr. Baughman is dead because he was an easy victim. This man saw an opportunity, an aged and infirmed [sic] man, who couldn't resist, who couldn't defend himself. The callousness with which the events occurred are incredible. Incredible. (R 2485)

* * *

The prosecutor's comments constituted a fair comment on the deliberate, premeditated nature of the Appellant's conduct. This court affirmed the judgment and sentence in a capital case when the prosecutor referred to the perpetrator of the crime as a vicious animal. Darden v. State, 329 So.2d 287 (Fla. 1976); see also Breedlove v. State, 413 So.2d 1 (Fla. 1982). The comment certainly is not as harsh as that sustained in Cronnon v. Alabama, 587 F.2d 246, 251 (5th Cir. 1979) wherein the prosecutor referred to the "fiendish ghoul'" who could have committed this crime and the assailant's desire to hear "the squish of her blood." See also Collins v. State, 180 So.2d 340 (Fla. 1965) upholding the prosecutor's reference to the accused as a vulture,

a vile creature and a beast.

Since the comment was a fair one upon the evidence and did not improperly influence the jury to reach a more severe verdict than warranted, this court must affirm.

Appellee contests Appellants unsupported summary conclusion that the prosecutor's statements amounted to a warning Appellant would kill again if not sentenced to death.

The State comments cited by Appellant (Appellant's Initial Brief, pg. 54-55) could only rise by a stretch of the imagination to the explicit "Don't let it happen. Don't let it happen. Don't let Robert Teffeteller kill again" for which this court reversed the defendant's conviction in Teffeteller v. State, 439 So.2d 840 (Fla. 1983).

Appellee emphasizes that the victim's age, and the fact that Appellant killed Baughman so that he could get the victim's money go to statutory aggravating circumstances §921.141(5)(f) (pecuniary gain), (h), (heinous, atrocious or cruel) and (i) (cold, calculated and premeditated).

The State's comments vis a vis his non-rehability are also fair comments on the evidence. Certainly Appellee is free to argue his rehability and would justifiably attack any preclusion of his effort to do so. Why then may the State not argue his non-rehability?

Appellant argues that certain of the State's comments did not go to statutory aggravating circumstances. He ignores their use in attacking the mitigating circumstances Appellant advanced,

specifically, his age.

Indeed, that is exactly what the State did:

> His age does not jusitfy or mitigate what he has done in light of his history and his record indicates he is....
>
> (R 2498)

Appellant's attack on the prosecutor's comments to the effect that "...this is not an ordinary homocide [sic]"... are ill taken.

This is precisely what the prosecutor must do in order to demonstrate why the case warrants imposition of the death penalty.

Appellee notes that Appellant incorrectly asserts that the trial court refused his request to instruct on all mitigating circumstances when in fact he specifically waived argument under F.S. §921.141(6)(a) (no significant history of prior criminal activity) (R 2429).

Appellant's attack on the prosecutor's (purported) attempt to restrict the jury's consideration of mitigating evidence in violation of Lockett and Eddings is also ill taken. His real complaint here is that the prosecutor argued the weight of the evidence. Lockett and Eddings demand only that the jurors have an opportunity to hear such evidence and consider all mitigating factors. They did.

However, if, as in Washington, supra, the trial court was not bound to find the defendant's surrender a mitigating circumstance, why then may the prosecutor not argue to jurors against its mitigating effect?

Appellant argues pursuant to Washington v. State, 362 So.2d 658 (Fla. 1978), Agan v. State, 445 So.2d 326 (Fla. 1983) and Caruthers v. State, 465 So.2d 496 (Fla. 1985) that the prosecutor erred in arguing that the fact he pled guilty was not "a mitigating circumstance in any way" (R 2501) because a guilty plea may be a mitigating circumstance in an appropriate case.

Appellee responds: This is not an appropriate case. Appellant has acknowledged that after making several "primarily exculpatory" statements, he confessed only after the investigating officers confronted him with incriminating evidence. Appellant's Initial Brief, page 24, (R 818, 844).

Appellant argues that the prosecutor committed impropriety in expressing personal beliefs concerning the evidence and what it showed. Appellant's Initial Brief, page 58.

Appellant would require the prosecutor to drop the pronouns "I" and "me" from his argument to jurors. However, a review of the challenged statement(s) reveals they are argument on the evidence.

They reveal no attempt to express (his) belief in the credibility of a witness based upon the prosecutor's knowledge of additional information not disclosed to jurors. Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982).

See also: Hall, supra, wherein the defendant also challenged the prosecutor's statement:

> Ladies and gentlemen of the jury, with all due sincerity, I don't see any mitigation in this particular case.
>
> Hall, supra at 774

The Hall court held:

> While the prosecutor's comment expressing his personal opinion to the jury is questionable, it is not unconstitutional.
>
> Hall, supra at 774

Appellant attacks comments by the prosecutor which he perceives, in effect, urge jurors to "send a message to the community" and potential robbers. (Appellant's Initial Brief, page 62). Appellee contests this characterization. Appellant acknowledges they only "came close to" prohibited comments addressed by the cases he cites in support of his argument: Williard v. State, 462 So.2d 102 (Fla. 2d DCA 1985); Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984); Perdomo v. State, 439 So.2d 314 (Fla. 3d DCA 1983); Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968).

Finally, Appellee argues that the prosecutor's comment that Appellant probably quit his Sunken Gardens job because he was lazy was, if error, harmless error.

Appellee notes (with reference to all of the prosecutors comments now under attack):

> Prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." Cobb, 376 So.2d at 232. The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 91967), and its progeny. We agree with the recent analysis of the Court in United States v. Hasting, ___ U.S. ___, 103 S.Ct. 1974, 76 L.Ed.2d (1983). The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.
>
> Murray v. State, 443 So.2d 955 (Fla. 1984)

Appellee respectfully suggests that an examination of the Record, well summarized by the trial court in its findings in support of imposition of the death penalty (R 309-315) reveals overwhelming evidence from which this honorable court may conclude that the cumulative effect of any improper statements by the prosecutor, if there are any, did not vitiate the entire trial.

Neither could they be said to substantially contribute to the jury's advisory recommendation of death. Teffeteller v. State, supra.

Appellant's Issue VIII is without merit. This honorable court should affirm Appellant's sentence.

ISSUE IX

THE COURT BELOW ERRED IN GIVING INCOMPLETE AND MISLEADING INSTRUCTIONS TO THE JURY.

A.

FAILURE TO INSTRUCT ON ALL STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES.

The trial court properly refused Appellant's request to instruct on all aggravating and mitigating circumstances (except the mitigating circumstance of no significant history of prior criminal activity, which was waived). Lemon v. State, 456 So.2d 885, 887 (Fla. 1984). The trial court correctly followed the Florida Standard Jury Instruction (Crim.) Penalty Proceedings - Capital Cases, 78, 80, which direct him to "Give only those aggravating [and mitigating] circumstances for which evidence has been presented." (R 2429-2431).

Cooper v. State, 336 So.2d 1133 (Fla. 1976) and Straight v. Wainwright, 422 So.2d 827 (Fla. 1982) cited by Appellant[10] precede the current Standard Jury Instruction (April 8, 1982) and are thus inapposite.

B.

FAILURE TO INSTRUCT ON CRIME HAVING BEEN COMMITTED WHILE DEFENDANT UNDER INFLUENCE OF MENTAL OR EMOTIONAL DISTURBANCE.

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10 This was a petition for a writ of habeas corpus and appeal from a circuit court order denying post conviction relief under Rule of Criminal Procedure 3.850. Straight's trial took place in 1981; Straight v. State, 397 So.2d 903 (Fla. 1981), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981).

Appellant was not entitled to an instruction on this statutory mitigating circumstance.

Dr. Mourer acknowledges that it was speculation on his part that Appellant had organic brain damage (R 973). Dr. Galloway acknowledged that recent neurological testing of Appellant failed to show any positive signs of organic disturbance. (R 1044).

As Appellant points out: Although Dr. Mourer testified initialy on cross-examination that Appellant was under the influence of extreme mental or emotional disturbance (R 970-971), upon further questioning he reversed himself and testified unequivocally that he was not (R 978-979). So too, Dr. Galloway's testimony is clear: He was not of the opinion that Appellant was under the influence of extreme mental or emotional disturbance. (R 1037).

Appellee respectfully suggests that Appellant's request for an instruction on this statutory mitigating factor with this limiting word "extreme" stricken is a tacit acknowledgment that there is no evidence in the record for the statutory factor as written (R 2433-2434).

Nothing otherwise prevented Appellant from arguing simple emotional distress or disturbance as a non-statutory mitigating factor.

C. INSTRUCTION ON PREMEDITATION

The circumstances of this trial are, in effect, no different from the standard bifurcated capital trial. There, the trial

court would read the definition of "premeditated" at the guilt phase.

Here, absent a guilt phase, the trial court read it in connection with the aggravating circumstances of "cold and calculated."

This honorable court has yet to hold, notwithstanding the "heightened premeditation" requirement, that the giving of the standard definition of premeditation at the guilt phase is infirm, for failure to distinguish "heightened premeditation" or that it otherwise gives "an improper reading" (R 2437) to this aggravating factor.

D. FAILURE TO GIVE DEFENDANT'S PROPOSED PENALTY PHASE INSTRUCTION NO. 8

Although the requested instruction may be congruent with Bates v. State, 465 So.2d 490 (Fla. 1985); Menendez v. State, 368 So.2d 1278 (Fla. 1979) and Riley v. State, 366 So.2d 19 (Fla. 1978) they by no means require an instruction on "intent to avoid arrest".

Appellee respectfully submits that, absent this instruction, the trial court's instruction on "intent to avoid arrest" channel the sentencer's discretion by "clear and objective standards" that provide the "specific and detailed guidance" contenanced by Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d. 398 (1980).

This honorable court should affirm Appellant's judgment and sentence. Appellant's Issue IX is without merit.

ISSUE X

THE TRIAL COURT ERRED IN SENTENCING JEFF MUEHLEMAN TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

The trial court properly found F.S. §921.141(5)(e) applied in that the dominant motive for the murder was to eliminate victim-witness Baughman. Riley v. State, 366 So.2d 19 (Fla. 1978), cert. denied ___U.S.___, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982); Routly v. State, 440 So.2d 1257 (Fla. 1983); Welty v. State, 402 So.2d 1159 (Fla. 1981).

Appellee distinguishes this case from Menendez v. State, 368 So.2d 1278 (Fla. 1979) on the same basis this court distinguished Routly, supra, from Menendez:

> The motive for the murder in Menendez could have been based on any number of reasons. For example, the victim may have resisted the robbery either physically or by attempting to attract attention. In the case sub judice, however, we know what transpired immediately prior to the murder. Therefore, the case at bar is like Riley and unlike Menendez in this respect. Although there is no express statement by the defendant that indicates the elimination of the eyewitness as his motive, the facts as found by the trial court support this finding. First, the defendant knew that the victim knew him and could later provide the police with his identity. Further, the defendant had no logical reason for binding

> the victim, kidnapping him and driving him to a secluded area except for the purpose of murdering him to prevent detection. In fact, defendant has not been able to assert any other explanation for this behavior in this appeal.
>
> Routly, supra at 1264.

Here, as in Routly and Welty the victim knew Appellant and could provide the police with his identity. Further: There was no need to attack, much less murder this ninety six year old man in order to rob him.

Appellant told police officers in his initial untaped confession that he killed Baughman because Baughman might be able to identify him as his assailant. (R 311, 816)

Appellant's argument that his statements indicate a desire to alleviate Baughman's suffering is unavailing. He would have this court re-weigh the evidence. That is not it's function.

B. THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The trial court properly described the pain, fear and mental anguish Baughman suffered as "incalculable." Routly, supra, at 1265.

Appellee respectfully submits that Appellant's argument that since "The only thing Baughman said during the incident was "Jeff, oh Jeff," (R 363) this was hardly begging for mercy, is, at best, unavailing.

Appellant's argument ignores the vicious beating Appellant inflicted at the outset of his attack on Baughman.

Even in circumstances where death was instantaneous, courts have upheld a finding of this factor where the victim experienced mental anguish and fear prior to the infliction of the fatal wounds. Routly, supra. Here, death was not instantaneous.

C. THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL LEGAL JUSTIFICATION.

The trial court's order clearly contemplates "the higher type of premeditation necessary for this aggravating circumstance (R 313).

While the length of time of initially planning the homicide is significant, so also is the length and breadth of the conduct in effectuating it. As stated in Preston v. State, 444 So.2d 939 At 946 (Fla. 1984):

> "This aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator.
>
> (emphasis supplied)

See also Middleton v. State, 426 So.2d 548 (Fla. 1982) (defendant confessed he sat with a shotgun in his hands for an hour looking at the victim as she slept and thinking about killing her); Johnson v. State, ___So.2d___, (Fla. Case No. 61,937, Feb 1985)[10 F.L.W. 123](when victim escaped from car, defendant chased her, caught her agains and had to resume

Appellant told witness Ronald Rewis he decided to kill Baughman on the afternoon of May 4 (R 738-739, 748). Appellant attempted to enlist Richard Wesley to help him kill Baughman well before the murder took place. (R 749-752)

Thus, the trial court justifiably rejected Appellant's explanation that he killed Baughman to put him out of his misery and to prevent him from living in a handicapped, brain damaged state.

Appellant would once again have this court re-weigh the evidence.

D. THE TRIAL COURT ERRED IN CONSIDERING LACK OF REMORSE IN SENTENCING JEFF MUEHLEMAN TO DEATH.

The prosecutor made his position clear when he stated "... I do not suggest that lack of remorse constitutes an aggravating circumstance, but certainly can be considered a mitigating circumstance that is presented by the defense." (R 1327)

In light of this clarification, the trial court's comment is surely a response to the defense argument that Appellant was remorseful.

Appellee respectfully submits that Appellant's laughter in the course of describing Baughman's murder to Ronald Rewis is indicative of the amount of remorse Appellant felt for what he did. (R 739)

E. THE TRIAL COURT ERRED IN FAILING TO GIVE ADEQUATE CONSIDERATION TO THE EVIDENCE MUEHLEMAN PRESENTED OF HIS SUBSTANTIAL MENTAL AND EMOTIONAL PROBLEMS.

Appellant's real complaint is that the sentencing authority did not give the same weight to the proffered evidence in mitigation that Appellant would desire. This argument is unavailing. See Smith v. State, 407 So.2d 894 (Fla. 1981); Hargrave v. State, 366 So.2d 1 (Fla. 1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Hitchcock v. State, 413 So.2d 741 (Fla. 1982); Michael v. State, 437 So.2d 138 (Fla. 1983); Johnson v. State, 442 So.2d 185 (Fla. 1983); Daugherty v. State, 419 So.2d 1067 (Fla. 1982); Lusk v. State, 446 So.2d 1038 (Fla. 1984); White v. State, 446 So.2d 1031 (Fla. 1984); Pope v. State, 441 So.2d 1073 (Fla. 1983); Wilson v. State, 436 So.2d 908 (Fla. 1983); Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). The lower court did consider and found non-persuasive that which was submitted by Appellant; since no palpable abuse of discretion has been established, affirmance is required. (R 313-315)

Appellant's second argument is a variation on his first. However, in it's order under "any other aspect of the defendant's character or record and any circumstances of the offense" ..."the Court has considered the psychiatric testimony as to the defendant's possible impairment... his past physical and emotional problems." (R 315). It thus makes clear that the Court did in fact consider the evidence proffered in mitigation as per its responsibility beneath Lockett, supra, and Eddings, supra. It simply did not reach the conclusion Appellant would have it reach.

F. THE TRIAL COURT ERRED IN REFUSING TO GIVE CONSIDERATION TO COMMENTS JEFF MUEHLEMAN'S FAMILY PRESENTED AT THE SENTENCING HEARING.

Appellant would turn the generosity of the court in allowing Patricia Muehleman to speak at sentencing into yet another opportunity to attack the sentencing process.

Appellant's opportunity to present his case in opposition to imposition of the death penalty came at the penalty phase of his trial. He would now extend it to his sentencing. He offers no authority for this extension.

Appellant might indefinitely stave off imposition of sentence if his argument here were to prevail.

In any event, Appellee, iterates its earlier argument (Issue VII) that the injunctions(s) of Lockett and Eddings remain subject to a trial court's threshold determination of relevancy.

Appellant does no more than point out that the trial court has obeyed the precepts of Lockett, Eddings and Songer v. State, 365 So.2d 696 (Fla. 1978) in allowing Appellant wide latitutde in putting on whatever evidence he chose.

G. THE COURT BELOW ERRED IN FAILING TO GIVE ADEQUATE CONSIDERATION TO THE EVIDENCE JEFF MUEHLEMAN PRESENTED OF NON-STATUTORY MITIGATING CIRCUMSTANCES.

The trial court need not consider Appellant's confession and guilty plea as a mitigating factor, where, as here, he only confessed when confronted with incriminating evidence (R 794).

Prior to that, Appellant lied about what happened, denied culpability; and even went so far as to infer that Richard Wesley was the murderer (R 792). Washington, supra.

> The fact that the sentencing order does not refer to the specific types of non-statutory "mitigating" evidence petitioner introduced indicates only the trial courts finding the evidence was not mitigating, not that such evidence was not considered.
>
> Dobbert v. Strickland, 718 F.2d 18 (11th Cir. 1983)
>
> While the sentencer must consider all evidence presented in mitigation, he also determines the weight to be given to relevant mitigating circumstances. Eddings v. Oklahoma, 455 U.S. 104, 114-115, 102 S.Ct. 869, 876-877, 71 L.Ed. 1 (1982)
>
> Hall, supra at 775

Appellant once again attacks the weight the trial court accorded to the mitigating evidence he introduced at trial.

There is, however, no doubt the trial court considered ..."the voluminous documents and other evidence presented by the defense." (R 315) Appellant is, understandably, unhappy the trial court found it insufficient to merit a finding of mitigation.

This honorable court should affirm Appellant's judgment and sentence. His Issue X is without merit.

CONCLUSION

Based on the foregoing argument and citations of authority, the Appellee submits that the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830-3798 this 24th day of May, 1985.

OF COUNSEL FOR APPELLEE.