IN THE SUPREME COURT OF THE STATE OF FLORIDA

HAROLD LEE HARVEY, JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 69,101
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

LIST OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Appellee may be referred to as the "State" or the "prosecution", and Appellant may be referred to by name when appropriate.

The following symbols will be used:

R	Record on Appeal
AB	Appellant's Brief.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Appellee accepts Appellant's Statement of the Case and his Statement of the Facts to the extent that they present an accurate, non-argumentative recitation of proceedings in the trial court, with the following additions and clarifications:

Gary Robbins testified that he knew Appellant for some twelve to thirteen years and that one day he was going to borrow some of Appellant's tools (R 1885-1886). Appellant opened his trunk up and showed witness Robbins the rifle that was in his trunk, under the rug. Robbins noted that it was a military rifle similar to the State's Exhibit A (R 1887). Appellant's car was described as a black Trans Am (R 1887-1888).

William Joseph Brady (R 1888) was asked by Appellant to convert his AR-15 rifle to an automatic (R 1890). Brady refused to do that for Appellant (R 1891). Mr. Brady further told Appellant that it would be illegal for him to change over the rifle into an automatic (R 1892). Mr. Brady also noted that an AR-15 was a semi-automatic, single shot rifle, while an M-16 is a fully automatic rifle (R 1893-1894).

Ronald Trent was a salesman in a gun shop in Okeechobee (R 1907). On Saturday, February 23, 1985, Mr. Trent sold some ammunition of a .223 caliber (R 1907). State's Exhibit A, that is the AR-15 rifle, is a rifle that Mr. Trent testified is compatible with the .223 caliber ammunition (R 1909).

Lewis Lafeyette Blevins next testified for the State (R 1915). Mr. Blevins testified that he lives in Okeechobee (R 1915).

Mr. Blevins knows of Harold Lee Harvey, Jr. because Mr. Harvey's family lives one tenth of a mile south of him (R 1916). On February 23, 1985, the witness heard rapid fire gun shots (R 1917-1918). The witness had never heard that kind of fire before (R 1918). Mr. Blevins saw Appellant's vehicle in the vicinity of the Boyds' house (R 1918-1919). Cross-examination of Mr. Blevins revealed that he saw Lee Harvey's black Trans Am but was not certain that the black Trans Am was actually the one belonging to Mr. Harvey (R 1923-1924). On redirect examination, however, Mr. Blevins also stated that it appeared that Appellant was in the vehicle that Mr. Blevins observed (R 1924, 1925).

Wayne E. Boyd was the brother of the victim William Boyd (R 1925). On Saturday, February 23, 1985, Wayne E. Boyd went to his brother's house at approximately 5:30 p.m. with his wife to pick up some tickets for a supper they were having that night (R 1926). His brother William had hurt his back and could hardly get up and down out of a chair. Therefore, he decided he could not make the trip and told the witness to come and get the tickets for the supper (R 1927). The witness, Wayne E. Boyd, testified that his sister-in-law, Mrs. Boyd, had a habit of going out with the trash and burning it soon after she had done her cleanup (R 1930-1931).

Rita Larson testified (R 1935-1936) that she had discussed on February 23, 1985 with Louise Boyd, Louise's offer of her tickets to the Kentucky Club dinner that night (R 1936-1937).

Clay Boyd, brother of deceased victim William Boyd, came by the victims' house between 8:30 and 9:00 o'clock on Monday morning, February 25 (1939-1940). Clay Boyd let himself in the victim's house

and discovered the bodies (R 1944).

Charles E. Flynn, Jr. was a Detective Lieutenant with the Okeechobee Sheriff's Office (R 2117). Mr. Flynn spoke with Defendant Lee Harvey and took a confession from him. Before he took that confession, he read Mr. Harvey his Miranda rights from a card (R 2121-2122). Mr. Harvey replied that he understood his rights (R 2122). Lieutenant Flynn testified (R 2123) that he did not promise Mr. Harvey anything to get the statement from him, and that he did not threaten him, nor did he use any physical force on him, and to the best of his knowledge, on one else did either (R 2123).

For approximately two hours, Appellant denied participation in the murders of Mr. and Mrs. Boyd (R 2124). However, there came a time when Appellant admitted that he had been lying to the police (R 2124). Mr. Harvey first stated that Scott Stiteler, the co-defendant, was inside of the house, too. That was his first incriminating statement (R 2125). Harvey also mentioned that Scott had a gun, too, and then said he was sorry that he had lied and then also told the police to "tell my wife to sell out" (R 2126). Appellant then said, referring to his wife, "It's all over". He then indicated to Lieutenant Flynn that he was willing to continue by saying, "I'll tell you what you want to know after I see my wife" (R 2128-2129). At that point, his wife had already been called for (R 2129). Cassette tapes were subsequently played to the jury, tapes on which the contents of Mr. Harvey's confessions were put (R 2140). Written transcripts of the taped confession were given out to the jury and a verbatim copy of the transcript was reproduced onto the record (R 2170). The following is

material from the transcripts of the tapes:

Appellant stated, "I wanted to go rob him you know, well I needed the money you know". He stated that he left his house at 6:30 and then he cut the Boyds' telephone line (R 2171). When they came up to the house, Scott Stiteler knocked on the front door and Appellant had his pistol out. At that point, Mrs. Boyd walked around the side of the house, and Appellant went up to her while Scott then got his gun out of the car. Appellant grabbed Mrs. Boyd and took her in the house, telling her that he wanted her money (R 2172). They came into the living room where Mr. Boyd was seated, and told Mr. Boyd that they needed some money (R 2172-2173). In the meantime, Scott was running around in the house. Then they got the money from the victims, and they all came back out in the game room (R 2173). At that point, Appellant traded guns with co-defendant Stiteler and then had the automatic rifle. Stiteler and Appellant discussed how much money they got, while the victims were listening, and then Appellant stated that he did not know what they were going to do, however, both of the defendants then decided that they had to kill the victims (R 2174). The victims started to get up, acted they were trying to run away, and so Appellant said he had to shoot them (R 2175). Appellant admitted pulling the trigger and seeing the victims go down. At that point, however, Appellant stated that he believed that Mrs. Boyd was still alive because she was moaning (R 2175-2176).

Lieutenant Flynn then asked Appellant where he threw out the guns (R 2177). Appellant replied that they would never be found (R 2178). Lieutenant Flynn then pressed for an answer, stating that,

"now I did my obligation and got your wife here. Now, where did you throw the guns? Are you going to back up on me now?" Appellant replied, "No, I'm just trying to remember where I throwed them ... throwed them in the ditch" (R 2178).

Tape No. 3 of the Appellant's confession begins on page 2180. This tape No. 3 consisted of Appellant's discussion with both Flynn and Detective Hargraves. Appellant stated that he had intended on wearing a mask, a stocking mask, and that he did bring one with him (R 2183). He discussed the possibility that the Boyds might resist. Appellant stated that he figured that they would both back out on the plan to rob the Boyds, but that Scott wanted to get ahead with it (R 2184). Appellant stated that he intended to use the masks but he didn't know why they never did use the masks (R 2185). He stated that he was "sort of" surprised to see Mrs. Boyd around the west end of the house as Scott was knocking on the door (R 2185). He further stated that he parked his car right in front of the Boyds' car at the front door (R 2186). Scott was driving the black Pontiac Trans Am (R 2186). When Mrs. Boyd saw them, she said, "Hello" (R 2187), and Appellant stated then it was too late for him and Scott Stiteler to put their masks on, as she had "done seen us" (R 2188).

Defendant then pulled out the .357 pistol (R 2188) and told Mrs. Boyd to go into the house. Mr. Boyd was sitting in the living room watching TV, and he asked what was going on (R 2189). Defendant told Mr. Boyd that he needed money, and Boyd replied, "okay, I'll give it to you" (R 2190). Appellant then escorted the victims back to their bedroom (R 2191). Mr. Boyd said, "let me get my wallet", so the

Boyds went to get their wallets out of their dresser (R 2192-2193). Appellant stated that he really wasn't paying close attention because he was scared and that Mr. Boyd could have shot him right there for all he knew (R 2193). When the Boyds got out their wallets and brought them over to Appellant, so they could take the money out, the Boyds asked if they could keep a little money for church (R 2194). Shortly thereafter Appellant, after discussing what to do with the Boyds with co-defendant Scott Stiteler, came to the decision that they had to shoot the Boyds because the Boyds had seen them (R 2197-2198). The Boyds heard the conversation and looked at each other. Stiteler and Appellant then traded guns (R 2199), and at that point the victims got up as if they were going to run and so Lee Harvey shot them (R 2199) as they were running away (R 2199). Both victims fell to the floor, and Appellant heard Mrs. Boyd still moaning and groaning (R 2200).

Tape No. 4 begins at page 2202. Next, Appellant picked up the shell cases. Appellant then ran out of the house while co-defendant Scott Stiteler was pulling the car around (R 2203-2204). Subsequently, however, Appellant went back in the house in order to pick up additional shell casings, and found that Mrs. Boyd was still breathing, so he shot her again (R 2204) in the head (R 2204-2205). Later, Appellant threw the guns in a little canal on Ferrell Road (R 2213). He disposed of the shell casings somewhere on the road past the Boyds' school (R 2214).

Appellant also told Detective Hargraves that the co-defendant said to him, "I guess we'll have to kill them, shoot them (R 2226). At that point, once it was determined that they were going to have to

shoot the victims, the two defendants exchanged guns (R 2227-2228). Appellant reiterated the fact that he returned to shoot Mrs. Boyd in the head.

Lieutenant Flynn testified that the Dade Public Safety Department dove and recovered the weapon that Mr. Harvey had described to him, in the location of the Ferrell Road area (R 2244-2245).

When excusing prospective juror, Ms. Keneven, the trial court concluded:

> THE COURT: ... had neither lawyer moved I would have excused her on the court's own motion, so I think the record is clear that she is disqualified as a juror, whether we talked to her father or not.
>
> (R 1045).

A review of the colloquy between Ms. Keneven and the Court, illustrates the reasons why the trial judge concluded that she was not qualified to serve as a juror:

> THE COURT: I'll explain just a couple of the laws that I will explain fully to the jury that must be followed and applied in reaching the jury's verdict; can you follow all of the laws that I'll explain to the jury that the jury must follow and apply in reaching their verdict, in reaching a verdict in this case? Any hesitancy in saying that you can do that?
>
> MISS KENEVEN: I wanted to say my father is vice president of the Chase Manhattan Bank retired.
>
> THE COURT: Would that have any affect on your ability to be fair and impartial in this case?
>
> MISS KENEVEN: Well, what I wanted to say in this case is that, Your Honor, I don't work. I don't work. I mean I don't work outside.

THE COURT: All right.

MISS KENEVEN: Outside work. I stay at home, at home. And then I watch, then I play my piano and then I play the organ and then I do horseback riding.

THE COURT: Is there any family member that came here with you this week?

MISS KENEVEN: My father came with me.

THE COURT: Is he here now?

MISS KENEVEN: Yes.

THE BAILIFF: He was here earlier this morning. I don't know whether he was outside or not. I think he's outside the room.

THE COURT: Let me see the lawyers and this lady's father also in chambers for a moment. Not right now. After the next recess.

THE BAILIFF: I'll just check if he's outside. Okay.

MISS KENEVEN: But, Your Honor, what I meant to say is I don't work. I don't work and I have a lot of telephone stock.

THE COURT: Would any of that affect your ability to be fair and impartial here?

MISS KENEVEN: In this case? I would say no, it wouldn't affect my ability.

THE COURT: Thank you.

MISS KENEVEN: I believe that the defendant is guilty, but right then and there --

THE COURT: Let me let the lawyers talk with you a little bit further as we go along here.

Is there anything about this type of a case that any of the three of you all might find it to be difficult to be fair and impartial because of the type of case?

MISS KENEVEN: In this type of case, Your Honor, I watch Divorce Court.

(R 1030-1032).

As reason for seeking disclosure of the identity of the State's confidential informant, defense counsel stated that:

> Counsel are naturally interested so as to determine if the evidence obtained by the confidential informant for law enforcement was obtained in a lawful manner.
>
> (R 3230).

Defense counsel stated that he wanted an in-camera hearing to determine what information the confidential informant had (R 175-176). The prosecutor stated that he would not call the confidential informant as a witness, that the confidential informant was not present when the murders were committed, that the confidential informant would not be mentioned at trial, and that the confidential informant's only purpose was to direct the police to an individual whose name was known to Appellant (R 177, R 180).

Prospective juror, Mrs. Roach explained her opposition to the death penalty as follows:

> MR. WATSON: Why do you have a strong opposition to the death penalty?
>
> MRS. ROACH: Well, I don't believe it's any more right for society to kill somebody than it is for that person to kill in the first place.
>
> MR. WATSON: Reverend Foster indicated that he felt that that was society's job. That society has an obligation to set up a system of laws and a system of punishment; do you feel that society's right to do that transcends your right to feel differently?

> MRS. ROACH: I just don't believe it's right for one person to do something and not society, you know, and for society to do the same thing.
>
> MR. WATSON: You pretty much follow the expression and perhaps the logic that why do we kill people who kill people to show that killing people is wrong?
>
> MRS. ROACH: Right. Right.
>
> (R 1009).

When the State challenged Mrs. Roach for cause, her aforementioned statements prompted the following response from defense counsel:

> MR. WATSON: I object knowing all the way the weight of the authority is totally against me (R 1027).

When the State moved to excuse prospective juror, Mrs. Rogers, for cause, defense counsel replied:

> MR. WATSON: We object. We don't think her answers were that complete although I've got to say that her answer probably fell within Witt.
>
> (R 932).

Regarding the excusal of prospective juror, Mr. Meadors, for cause, the record shows the State maintained that there was a "very good chance" that certain witnesses might be called who Mr. Meadors knew personally (R 1769).

The record reflects the prosecutor's having informed the jury of its "advisory" role in Florida capital sentencing as follows:

> MR. COLTON: ... Do you understand that the verdict, if you reach a verdict of first degree murder, that your second verdict or your second recommendation is a recommendation to the Judge as to whether he should in his judgement sen-

tence this defendant one way or the other? In other words, your verdict the first time there as to guilty or not guilty is your verdict in the case but your second verdict that you decide is a recommendation. Does everyone understand that?

Is there anything at all again that we haven't asked you or that we have asked another juror that you think would be pertinent to you or anything that I haven't asked that you feel we should know about you? Okay.

MRS. STRUCK: You're saying even though we recommend one type of punishment the Judge has the right to change that?

MR. COLTON: The Judge is not bound by your recommendation, okay. And he will explain that in greater detail later on but at this point suffice it to say that it is not a binding recommendation. It's just a recommendation

(R 913-914).

The record also reflects the trial court's sustaining the State's objection to Appellant's question, as follows:

MR. WATSON: So let me ask you this: If you were placed in the position where you had to make that decision as to whether or not a person lived or died in a case, do you think that you might later be haunted with whether or not you sat on a jury that you didn't feel that you were fair and impartial a hundred percent?

MR. MORGAN: Your Honor, may I object to that question? Because that will never be the situation in the State of Florida, that's just not the law. That the juror will be in a position to make the ultimate decision.

THE COURT: The objection is sustained.

(R 1360).

Appellant reformed his question, as follows:

MR. WATSON: To make a verdict which may very well be the law of the State of Florida soon. I you were placed ...

MRS. NEWTON: I feel it would be very uncomfortable.

(R 1360).

Appellant, the record reveals, signed no less than five forms waiving his rights under Miranda v. Arizona (R 554). Appellant admitted that he signed a rights card that informed him that no threats or promises could be made to induce a statement (R 551). Appellant further stated that he never told Detective Flynn he would not confess unless his wife was brought to him (R 566).

Detective Flynn testified that Appellant expressed a desire to take a polygraph test (R 631), that Appellant knew he did not have to take one (R 630), that Appellant was again read his Miranda rights (R 633), that he said he understood his rights (R 633), and that he then signed a polygraph consent form (R 634).

After administering the polygraph test, Flynn told Appellant that he had lied and Appellant started to cry (R 635). Flynn then told Appellant that Scott Stiteler had indicated Appellant had done it all, and asked Appellant if he was going to take the whole blame for the incident. Appellant replied that "Scott had a gun too" (R 635-636). After making this incriminating statement, Appellant asked to see his wife (R 637). Detective Flynn responded that he would try to get her there (R 637). Flynn then advised Appellant he could terminate the interview, but Appellant said nothing (R 640). Detective Flynn left, momentarily, and when he returned he told Appellant that someone had

called for his wife (R 640). Flynn then continued to question Appellant, who cried again saying, "It's all over" between him and his wife (R 640-642). Appellant then said, "I'll tell you what you want to know after I see my wife" (R 642).

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT ERRED IN QUESTIONING PROSPECTIVE JUROR KENEVEN'S FATHER WITHOUT APPELLANT'S BEING PRESENT?

POINT II

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT?

POINT III

WHETHER THE TRIAL COURT PROPERLY GRANTED THE STATE'S MOTION AND CHALLENGE FOR CAUSE OF PROSPECTIVE JURORS ROACH, ROGERS, AND MEADORS?

POINT IV

WHETHER THE TRIAL COURT CORRECTLY PRECLUDED APPELLANT FROM PROFOUNDING HYPOTHETICAL QUESTIONS TO THE VENIRE CONCERNING THEIR VIEWS AS TO THE APPLICABILITY OF THE DEATH PENALTY IN DIFFERING FACT SITUATIONS?

POINT V

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION IN LIMINE, BECAUSE THE STATUTES IN FORCE CLEARLY PROVIDE FOR THE POSSIBILITY OF PAROLE?

POINT VI

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO STRIKE AND HIS NONSPECIFIC REQUEST FOR A CURATIVE INSTRUCTION?

POINT VII

WHETHER THE TRIAL COURT PROPERLY ALLOWED IN EVIDENCE REGARDING APPELLANT'S ESCAPE AND SUBSEQUENT CRIMINAL ACTIVITY AND WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON EVIDENCE REGARDING FLIGHT?

POINT VIII

WHETHER THE TRIAL COURT FOUND FACTS WHICH FULLY SUPPORTED THE IMPOSITION OF THE DEATH PENALTY?

POINT IX

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS?

POINT X

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S REQUESTED JURY INSTRUCTIONS?

SUMMARY OF THE ARGUMENT

POINT I. The trial court did not err in questioning prospective juror Keneven's father without Appellant being present, because this was not a stage of the trial where fundamental fairness might be thwarted. The record reveals that Miss Keneven was found not to be competent as a juror and the trial judge reached that conclusion before speaking with her father. Moreover, Appellant suffered no resulting prejudice from the dismissal of Miss Keneven as she had previously stated her belief that Appellant was guilty of the crime charged.

POINT II. The trial court correctly denied Appellant's motion to disclose the identity of the confidential informant, because Appellant did not allege, nor did the record later reveal, that there were sufficient reasons to justify an exception to the general rule of non-disclosure.

POINT III. The trial court properly granted the State's motion and challenge for cause of prospective jurors Roach, Rogers, and Meadors. In the cases of both Mrs. Roach and Mr. Rogers, the record reveals that there was a reasonable doubt as to whether either could impartially recommend the appropriate punishment. The record further reveals the fact that a reasonable doubt existed as to the ability of Mr. Meadors to lay aside any possible prejudice towards prospective State witnesses.

POINT IV. The trial court correctly precluded Appellant from propounding hypothetical questions to the venire concerning their views as to the applicability of the death penalty in differing fact situations. It is settled law that hypothetical questions are not com-

petent when their evident purpose is to have the jurors indicate in advance what their decision will be under a certain state of the evidence. In addition, the proffered questions improperly concerned the venire's views were as what laws should exist. This form of inquiry has also held to be improper.

POINT V. The trial court correctly denied Appellant's motion in limine, because the statutes in force at the time of trial clearly provided for the possibility of parole. Appellant's argument that parole would be eliminated was pure speculation and reversible error cannot be predicated on conjecture.

POINT VI. The trial court correctly denied Appellant's motion to strike and his non-specific request for a curative instruction. Prosecutorial comments made to the jury were proper and not misleading as the prosecutor did nothing but appropriately inform the jury of its "advisory" role in Florida capital sentencing. Comments which accurately explain the respective functions of the judge and jury are permissible under Caldwell v. Mississippi, infra.

POINT VII. The trial court properly allowed in evidence regarding Appellant's escape and subsequent criminal activity and the trial court properly instructed the jury on evidence regarding flight. Case law specifically holds that flight to avoid prosecution may be shown as evidence inferring guilt. Since this evidence was properly admitted, the pertinent jury instruction was also proper.

POINT VIII. The trial court found facts which fully supported the imposition of the death penalty. The facts in the record amply support the trial court's conclusion that the murders as committed were

heinous, atrocious, and cruel. The fact that both victims were aware of their impending deaths and in desperation tried to run away, supports the trial court's conclusion. Also, there was sufficient evidence that the murders were committed by Appellant to avoid a lawful arrest. Appellant himself admitted the fact that he murdered the Boyds because they had seen him. The trial court also had ample support for the conclusion that the murders were committed in a cold, calculated and premeditated manner. Again, Appellant admitted his purpose in murdering the Boyds was to eliminate them as witnesses. Therefore heightened premeditation was present.

POINT IX. The trial court correctly denied Appellant's motion to suppress. The record reveals that Appellant signed no less than five forms waiving his rights under Miranda. Appellant himself admitted that he signed a rights card that informed him that no threats or promises could be made to induce a statement, and he further stated that he never told Detective Flynn that he would not confess unless his wife was brought to him. Thus, the record supports the trial court's finding that no promise was made which induced Appellant's confession.

POINT X. The trial court correctly denied Appellant's requested jury instructions. The prosecutor in no way intimated that the law prevented the jury from opting for mercy. Moreover, the standard jury instruction read by the trial judge stated that the jury could consider any aspect of Appellant's record or character, and any other circumstances of the offense. Thus, the jury was not misled regarding the permissibility of considering any and all mitigating evidence.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN QUESTIONING PROSPECTIVE JUROR KENEVEN'S FATHER WITHOUT APPELLANT'S BEING PRESENT (restated).

Appellant argues that his absence from proceedings held in chambers, at which prospective juror Keneven's father was questioned, requires the granting of a new trial. He argues that, "because the extent of the resulting prejudice cannot be assessed, the error was reversible..." (AB 5). To support his argument, Appellant chiefly relies on Francis v. State, 413 So.2d 1175 (Fla. 1982), wherein the Florida Supreme Court held that the defendant's involuntary absence from the exercising of peremptory challenges could not be considered harmless error. The Court reasoned that the exercise of peremptory challenges is one of the most important rights afforded a defendant:

> It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Swain v. Alabama, 380 U.S. 202, 85 S.Ct 824, 13 L.Ed.2d 759 (1965).

413 So.2d at 1179.

Appellee submits that Appellant's reliance upon Francis is misplaced because his absence in the instant case was not during a crucial stage of the trial where fundamental fairness might be thwarted. The rec-

ord at bar clearly shows that Miss Keneven was not competent to be a juror, and that the trial court reached that conclusion, even before speaking with her father:

> THE COURT: ... had neither lawyer moved I would have excused her on the Court's own motion, so I think the record is clear that she is disqualified as a juror, whether we talked to her father or not. (R 1045).

Thus, Appellee submits that Miss Keneven was excused by the trial court, pursuant to Fla.R.Crim.P., Rule 3.300(c), which states:

> (c) Prospective Jurors Excused. If, after the examination of any prospective juror, the court is of the opinion that such juror is not qualified to serve as a trial juror, the court shall excuse such juror from the trial of the cause. If, however, the court does not excuse such juror, either party may then challenge such juror, as provided by law or by these rules.

A quick perusal of Miss Keneven's non-responsive answers provides ample support for the trial judge's conclusion that she was not qualified to serve as a juror:

> THE COURT: I'll explain just a couple of the laws that I will explain fully to the jury that must be followed and applied in reaching the jury's verdict; can you follow all of the laws that I'll explain to the jury that the jury must follow and apply in reaching their verdict, in reaching a verdict in this case? Any hesitancy in saying that you can do that?
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> MISS KENEVEN: I wanted to say my father is vice president of the Chase Manhattan Bank retired.
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> THE COURT: Would that have any affect on your ability to be fair and impartial in this case?

MISS KENEVEN: Well, what I wanted to say in this case is that, Your Honor, I don't work. I don't work. I mean I don't work outside.

THE COURT: All right.

MISS KENEVEN: Outside work. I stay at home, at home. And then I watch, then I play my piano and then I play the organ and then I do horseback riding.

THE COURT: Is there any family member that came here with you this week?

MISS KENEVEN: My father came with me.

THE COURT: Is he here now?

MISS KENEVEN: Yes.

THE BAILIFF: He was here earlier this morning. I don't know whether he was outside or not. I think he's outside the room.

THE COURT: Let me see the lawyers and this lady's father also in chambers for a moment. Not right now. After the next recess.

THE BAILIFF: I'll just check if he's outside. Okay.

MISS KENEVEN: But, Your Honor, what I meant to say is I don't work. I don't work and I have a lot of telephone stock.

THE COURT: Would any of that affect your ability to be fair and impartial here?

MISS KENEVEN: In this case? I would say no, it wouldn't affect my ability.

THE COURT: Thank you.

MISS KENEVEN: I believe that the defendant is guilty, but right then and there --

THE COURT: Let me let the lawyers talk with you a little bit further as we go along here.

> Is there anything about this type of a case that any of the three of you all might find it to be difficult to be fair and impartial because of the type of case?
>
> MISS KENEVEN: In this type of case, Your Honor, I watch Divorce Court. (R 1030-1032)(emphasis added).

It is obvious from the above colloquy that the lawyers did not even get to the stage of challenging Miss Keneven for cause, when the trial judge realized something was amiss with this prospective juror. Thus, the only logical conclusion to be made from this record is that the examination of Miss Keneven's father was not a crucial stage of the proceedings, hence the absence of Appellant at that time was not error. Herzog v. State, 439 So.2d 1372, 1375-1376 (Fla. 1983); see also, Muehleman v. State, 12 FLW 39, 41 (Fla.Sup.Ct January 8, 1987).

Moreover, Appellee contends that even if Appellant's absence were considered error, the record clearly shows that he suffered no resulting prejudice. See, Garcia v. State, 472 So.2d 360, 364 (Fla. 1986). Miss Keneven's stated belief that Appellant was guilty (R 1031-1032) was made in Appellant's presence and the record shows no subsequent attempt made to rehabilitate her. Thus Appellant, had he desired Miss Keneven to be a juror, could have communicated this thought to defense counsel who, instead of acquiescing to the State's challenge for cause (R 1045), could then have sought to rehabilitate Miss Keneven.

Appellant does not even claim that he differed with his trial counsel's assessment of Miss Keneven and Appellee submits that an objection should have been made to properly preserve this particular issue for appeal. Maggard v. State, 399 So.2d 973, 975 (Fla. 1981). Moreover,

the record at bar reveals Appellant had actual notice of the nature and purpose of the in-chambers examination of Miss Keneven's father. Therefore, the inference to be drawn from this record is that Appellant's absence was voluntary. State v. Melendez, 244 So.2d 137, 140 (Fla. 1971).

Altogether, this Court, in Lowman v. State, 80 Fla. 18, 85 So. 166, 170 (1920), (cited in Herzog v. State, supra), summed up the validity of a claim such as this:

> To hold that this is a denial to the defendant of his organic rights "to be heard by himself or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face," and not to "be deprived of life or liberty without due process of law" and to "the equal protection of the laws," or a denial of the defendant's statutory or common-law right to be personally present "during the trial" or at every stage of or step taken in his trial for a felony, is to put vain technicalities above the substantial requirements of justice and security to the defendant, and to impair the integrity and power of the courts in administering the law and in securing to the defendant all of his rights in the premises.

POINT II

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

Appellant contests the trial court's denial of his motion to disclose the identity of a confidential informant who provided the police with information regarding a witness whose identity was known to both parties (R 177, 180). As reason for seeking disclosure, defense counsel merely stated that:

> Counsel are naturally interested so as to determine if the evidence obtained by the confidential informant for law enforcement was obtained in a lawful manner. (R 3230).

Appellee submits this reason is not sufficient to require disclosure of the identity of the confidential informant.

It is settled law that:

> Unless a defendant can establish that it will be necessary for the prosecution to refer to the informer in the presentation of its case, or that he was an active participant in the offense with which the defendant is charged, or there is no independent evidence of the defendant's guilt, the state is not required to disclose the name of its confidential informant. Spataro v. State, 179 So.2d 873 (Fla. 2nd DCA 1965).

State v. White, 418 So.2d 411, 412 (Fla. 2nd DCA 1982). In the instant case, Appellant does not even allege that the prosecution referred to the informant, when presenting its case. At the pre-trial conference, it is difficult to categorize defense counsel's reason for requesting disclosure as even a "bare assertion" that disclosure was needed to insure a full and adequate defense. See, State v. Acosta, 439 So.2d 1024, 1026

(Fla. 3rd DCA 1983). Defense counsel merely stated he wanted an in-camera hearing to determine what information the confidential informant had (R 175-176). The prosecutor stated that he would not call the C.I. as a witness, that the C.I. was not present when the murders were committed, that the C.I. would not be mentioned at trial, and that the C.I.'s only purpose was to direct the police to an individual whose name was known to Appellant (R 177, 180).

The fact that the informant may have provided police with information which ultimately led to Appellant's arrest is not enough to overcome the privilege of non-disclosure. Acosta, supra. Moreover:

> [M]ere speculation as to the usefulness of the informant's testimony to the defendant is insufficient to justify disclosure of his identity."

State v. Carnegie, 472 So.2d 1329, 1330 (Fla. 2nd DCA 1985). The fact is, Appellant's motion for disclosure did not allege reasons sufficient to justify an exception to the general rule of non-disclosure.

> A motion for disclosure or the evidence must show that the informant's testimony is relevant and material to the establishment of a defense the defendant has or proposes to present. Doe v. State, 262 So.2d 11 (Fla.App.1972).

Hawkins v. State, 312 So.2d 227, 230 (Fla. 1st DCA 1975); see also, State v. Matney, 236 So.2d 166 (Fla. 1st DCA 1970); Ruiz v. State, 436 So.2d 956 (Fla. 3rd DCA 1983).

Since the instant record reveals no allegation regarding the materiality of the information sought to be disclosed, Appellee submits the trial judge's decision was correct. See, Jackson v. State, 307 So. 2d 188 (Fla. 3rd DCA 1975); State v. Anderson, 329 So.2d 424 (Fla. 3rd

DCA 1976). Without an allegation regarding the materiality of the sought after information, Appellee submits an in-camera hearing was not necessary. See, State v. Jimenez, 428 So.2d 356, 357 (Fla. 3rd DCA 1983).

Thus, the trial court's decision should be affirmed.

POINT III

THE TRIAL COURT PROPERLY GRANTED THE STATE'S MOTION AND CHALLENGE FOR CAUSE OF PROSPECTIVE JURORS ROACH, ROGERS, AND MEADORS.

Appellant contends that three prospective jurors were improperly excluded, in violation of the standards articulated in Wainwright v. Witt, 83 L.Ed.2d 841, 105 S.Ct 1415 (1985). (AB 16). Appellee disagrees with this conclusion, and would first reply that this Court has repeatedly held:

> The competency of a challenged juror is to be determined by the trial court in its discretion, and the court's decision will not be disturbed unless manifest error is shown. Christopher v. State, 407 So.2d 198 (Fla. 1981), cert.denied, 456 U.S. 910, 102 S.Ct 1761, 72 L.Ed.2d 169 (1982); Singer v. State, 109 So.2d 7 (Fla. 1959).

Ross v. State, 474 So.2d 1170, 1173 (Fla. 1985); Hooper v. State, 476 So.2d 1253, 1256 (Fla. 1985); see also, State v. Williams, 465 So.2d 1227, 1231 (Fla. 1985). The instant record clearly shows no manifest error occurred by the exclusion of any of the three prospective jurors.

Appellant accurately sets forth a colloquy in which prospective juror, Mrs. Roach, expressed the sentiment (R 977) that, under no circumstances could she recommend the death sentence (AB 16-18). Conceding that this first colloquy indicated Mrs. Roach was incompetent to serve, Appellant nonetheless maintains that her status was rehabilitated by subsequent statements in which she indicated there was a remote chance that her beliefs might change (AB 18-19; R 1008-1009). After saying that she might be able to consider the death penalty, Mrs. Roach explained her opposition to the death penalty:

MR. WATSON: Why do you have a strong opposition to the death penalty?

MRS. ROACH: Well, I don't believe it's anymore right for society to kill somebody than it is for that person to kill in the first place.

MR. WATSON: Reverend Foster indicated that he felt that that was society's job. That society has an obligation to set up a system of laws and a system of punishment; do you feel that society's right to do that transcends your right to feel differently?

MRS. ROACH: I just don't believe it's right for one person to do something and not society, you know, and for society to do the same thing.

MR. WATSON: You pretty much follow the expression and perhaps the logic that why do we kill people who kill people to show that killing people is wrong?

MRS. ROACH: Right. Right.

(R 1009).

Mrs. Roach twice more insisted that her personal convictions would deter her from following the judge's instructions (R 1012). When the State challenged Mrs. Roach for cause, her aforementioned statements prompted the following response from defense counsel:

MR. WATSON: I'll object knowing all the way the weight of the authority is totally against me.

(R 1027).

In fact, the weight of authority is squarely against Appellant. As Wainwright v. Witt, 83 L.Ed.2d at 851-852 explains:

That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

The Supreme Court went on to note that deference must be paid to the trial court's decision, because determinations of demeanor and credibility are peculiarly within his province. Supra, at 854, 858. This Court has previously held:

> A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause. See Thomas v. State, 403 So.2d 371 (Fla. 1981).
> (emphasis added).

Hill v. State, 477 So.2d 553, 556 (Fla. 1985). Surely in the instant case there was a reasonable doubt as to whether Mrs. Roach could impartially recommend the appropriate punishment.

As for prospective juror Rogers being excused for cause, Appellee would submit that the aforementioned case law applies with equal force to support the trial judge's decision. See also, Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985). Appellant admits that the decision to excuse Mrs. Rogers has even greater support in the record than the decision to excuse Mrs. Roach (AB 26).

Moreover, when the State moved to excuse Mrs. Rogers for cause, defense counsel replied:

> MR. WATSON: We object. We don't think her answers were that complete although I've got to say that her answers probably fall within Witt.
>
> (R 932).

Thus, Appellee would submit the issue of Mrs. Rogers' excusal was not properly preserved for appellate review. François v. State, 407 So.2d 885, 889 (Fla. 1981); Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979).

Likewise, the excusal of Mr. Meadors for cause was also not properly preserved for appellate review. The record at bar shows that defense counsel's only objection was that he could not "imagine any circumstances" under which the Stokes would be called as witnesses (R 1768-1769). The State responded that there was a "very good chance" that those witnesses might be called, and the trial court accepted that response as a good faith representation (R 1769). Thus, the trial court was not apprised of the putative error now being presented in the instant initial brief. See, Castor v. State, 365 So.2d 701, 704 (Fla. 1978); Lucas, supra. This claim is also without merit, because the record reveals a reasonable doubt existed as to Mr. Meadors' ability to lay aside any possible prejudice towards the prospective witnesses. Leon v. State, 396 So.2d 203, 205 (Fla. 3rd DCA 1981); Hill v. State, supra.

POINT IV

THE TRIAL COURT CORRECTLY PRECLUDED APPELLANT FROM PROPOUNDING HYPOTHETICAL QUESTIONS TO THE VENIRE CONCERNING THEIR VIEWS AS TO THE APPLICABILITY OF THE DEATH PENALTY IN DIFFERING FACT SITUATIONS. (restated).

Appellant takes issue with the trial court's decision to preclude him from asking hypothetical questions concerning whether the venire would "favor the death penalty" (R 967), in a variety of factual situations (R 967-968). It is, however, settled law that the extent to which parties may examine prospective jurors on voir dire lies within the trial judge's discretion. Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325, 1331 (Fla. 1981); Essix v. State, 347 So.2d 664 (Fla. 3d DCA 1977); Mizell v. New Kingsley Beach, Inc., 122 So.2d 225 (Fla. 1st DCA 1976).

A review of the proffered questions reveals that their purpose was to have the prospective jurors indicate in advance what their decision would be upon a certain state of facts. This type of questioning is prohibited.

> A prospective juror's bias or prejudice may be elicited through specific questions and answers but their disposition as to whether or not they would entertain a particular defense is not appropriate. Dicks v. State, 83 Fla. 717, 93 So. 137 (1922); Saulsberry v. State, 398 So.2d 1017 (Fla. 5th DCA 1981).

Lavado v. State, 469 So.2d 917, 918 (Fla. 3rd DCA 1985). Furthermore, this Court has stated:

> It is a rule that the examination of persons called to act as jurors is limited to such matters as tend to disclose their

> qualifications in that regard, under the established provisions and rules of law; and hypothetical questions are not competent, when their evident purpose is to have the jurors indicate in advance what their decision will be under a certain state of the evidence, or upon a certain state of facts, and thus possibly commit them to certain ideas or views when the case shall be finally submitted to them for their decision."

Dicks v. State, supra.

In addition, the proffered questions improperly concerned what the venire's views were as to what laws should exist. This Court has held this form of inquiry to be improper. King v. State, 390 So.2d 315, 319 (Fla. 1980), cert.denied, 450 U.S. 989 (1981).

Thus, the trial court's decision should be affirmed. See also, Smith v. State, 253 So.2d 465, 470 (Fla. 1st DCA 1971).

POINT V

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION IN LIMINE, BECAUSE THE STATUTES IN FORCE CLEARLY PROVIDE FOR THE POSSIBILITY OF PAROLE. (restated).

Appellant argues that the prosecutor's reference to Fla.Stat., Section 775.082(1)(1985), misled the jury into believing that he could be paroled after 25 years if given a life sentence. (AB 36, 38). Appellant speciously contends that §947.03, Fla.Stat. (1985), should be interpreted as terminating the parole commission as of July 1, 1987 (AB 37). Bootstraping his argument, based on this false a priori assumption, Appellant then argues that the termination of the parole commission would preclude the granting of parole (AB 38). Appellee submits this argument is suppositional and must therefore fall from its own weight.

First, Appellee would state the uncontroverted fact is that §775.082 was the law in force at the time of the instant trial. Therefore, no misrepresentation was made to the jury as to the existing law. Next, the fact that §947.03 is scheduled for review by the legislature in 1987, does not mean that the parole commission will cease to exist at that time. Chapter 83-131, §35, Laws of Fla., states:

> Section 35. Legislative committee review of the Parole and Probation Commission shall begin July 1, 1984, and shall include consideration of the following criteria:
>
> (1) The role of parole release in the corrections system.
>
> (2) The role of parole supervision in the corrections system.
>
> (3) The relationship of parole release to the sentencing system.
>
> (4) The cost to the state of eliminating parole release and other criminal justice

> mechanisms which could be adjusted to ameliorate this cost.
>
> (5) Those functions performed by the Parole and Probation Commission which must be continued.
>
> (6) The procedural and substantive effect of eliminating parole on the inmate population.
>
> (emphasis added).

Clearly there is no language in the above Chapter that would imply that the parole commission will be eliminated. To the contrary, the above language clearly contemplates the continuation of the commission.

Moreover, even if the parole commission were eliminated, this would not necessarily preclude otherwise eligible prisoners from the possibility of parole. Altogether Appellant's argument is speculative at best, and this Court has held that reversible error cannot be predicated on conjecture. Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974). Furthermore, even if §947.03 were to be supplemented by another statute, that statutory language would have to specifically repeal the sentences meted out under §775.082, in order for Appellant to have a real claim, because repeal of a statute by implication is not favored. State v. Dunman, 427 So.2d 166, 168 (Fla. 1983); Town of Indian River Shores v. Richey, 348 So.2d 1 (Fla. 1977).

The intent of the Legislature in reviewing §947.03 is clearly to streamline the parole system as a result of the creation of the Sentencing Guidelines. It should be noted, however, that first-degree murder is not a crime covered by the Guidelines. See, Fla.R.Crim.P., Rule 3.701(c); see also, Fla.Stat. §921.001(4)(a)(1985). It is therefore illogical to assume that crimes not covered by the Guidelines will

be the ones for which no parole will be available.

POINT VI

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO STRIKE AND HIS NON-SPECIFIC REQUEST FOR A CURATIVE INSTRUCTION.

Appellant argues that the prosecutor's statement during voir dire, that the judge was not bound by the jury's sentence recommendation (R, 913, 914, AB 40), rendered his death sentence unreliable. Appellant cites Caldwell v. Mississippi, 86 L.Ed.2d 231 (1985), and Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), as support for the proposition that the prosecutor's comment was improper.

Appellee would submit that the comments to the jury were proper and not misleading, under this Court's definitive holding in Pope v. Wainwright, 496 So.2d 798 (Fla. 1986). In examining Appellant's references to the trial transcript, none of the complained-of statements, during voir dire, or at any subsequent time, did anything but appropriately inform the jury of its "advisory"role in Florida capital sentencing:

> MR. COLTON: ...Do you understand that the verdict, if you reach a verdict of first degree murder, that your second verdict or your second recommendation is a recommendation to the Judge as to whether he should in his judgement sentence this defendant one way or the other? In other words, your verdict the first time there as to guilty or not guilty is your verdict in the case but your second verdict that you decide is a recommendation. Does everyone understand that?
>
> Is there anything at all again that we haven't asked you or that we have asked another juror that you think would be pertinent to you or anything that I haven't asked that you feel we should know about you? Okay.

> MRS. STRUCK: You're saying even though we recommend one type of punishment the Judge has the right to change that?
>
> MR. COLTON: The Judge is not bound by your recommendation, okay. And he will explain that in greater detail later on but at this point suffice it to say that it is not a binding recommendation. It's just a recommendation.
>
> (R 913-914).

It is clear from the above record excerpt that the prosecutor appropriately observed the jury's proper statutory role, in a way that did not diminish their sentencing responsibilities. The record also clearly shows that there was no contemporaneous objection made to the challenged remarks. Appellant first noted his objection some time later (R 964-965), and Appellee asserts the subsequent objection was not timely. See, Castor v. State, 365 So.2d 701, 703 (Fla. 1978); see also, Steinhorst v. State, 412 So.2d 332, 339 (Fla. 1982).

In addition, Appellee takes issue with Appellant's assertion that "the trial court denied the request for a curative instruction because it wished that Caldwell wouldn't have happened..." (AB 40). The record at bar shows that the trial court thought Caldwell was inapplicable to the instant situation, but that the judge left open the possibility of using a curative instruction, had Appellant provided one (R 965). No proposed curative instruction was submitted to the trial court until some 10 days later, and that was in the form of a requested jury instruction (R 3587). Thus, this Court has additional grounds for holding this issue was not properly preserved. Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979).

Assuming, ad arguendo, that this issue is to be decided on the merits, this case significantly differs from the factual circumstances presented in Caldwell and Adams, supra. It is clear that both Caldwell and Adams were primarily based on comments by the trial participants which were found to have actively mislead the jury, as to their role in capital sentencing. Caldwell; Adams, at 1532; see also, Darden v. Wainwright, 477 U.S. ___, 106 S.Ct ___, 91 L.Ed. 144, 158-159, n. 15 (1986). Thus, the comments of the trial court, which went way beyond the standard instructions, advising the jury of their advisory role in capital sentencing, were deemed misleading, because of the trial court's insistence therein that only he need worry, and not the jury at all, about the "conscience part" of imposing the death penalty, thereby "representing them [those statements] to be an accurate description of the jury's responsibility." Adams, at 1528, 1532. This conclusion is reinforced by the Adams court's observation that subsequent remarks, appropriately delineating the jury's sentencing responsibilities, did not remove the taint of the earlier misleading references. Adams, at 1531-1532, n. 7. In this case, there is no comparison, in effect or in magnitude, between the challenged references herein, merely explaining and instructing the jury as to the Florida capital sentencing procedure and the respective roles of judge and jury in it, with those in Adams, which mislead the jury on its role, and were reinforced by some nine to eleven repetitions. Adams, at 1528; 1528, n. 2; 1531-1532, n. 7; 1532-1533, n. 8.

In addition, the trial court correctly sustained the prosecu-

tor's objection to Appellant's question, as follows:

> MR. WATSON: So let me ask you this: If you were placed in the position where you had to make that decision as to whether or not a person lived or died in a case, do you think that you might later be haunted with whether or not you sat on a jury that you didn't feel that you were fair and impartial a hundred percent?
>
> MR. MORGAN: Your Honor, may I object to that question? Because that will never be the situation in the State of Florida, that's just not the law. That the juror will be in a position to make the ultimate decision.
>
> THE COURT: The objection is sustained.
>
> (R 1360).

Appellant had no trouble reforming his question to correctly state the law:

> MR. WATSON: To make a verdict which may very well be the law of the State of Florida soon. If you were placed---
>
> MRS. NEWTON: I feel it would be very uncomfortable.
>
> (R 1360).

Appellee submits there was no error committed by the trial court in informing the jurors of their role in sentencing. This Court has held so in Pope, supra, at 805:

> We find nothing erroneous about informing the jury of the limits of its sentencing responsibility, as long as the significance of its recommendation is adequately observed. It would be unreasonable to prohibit the trial court of the State from attempting to relieve some of the anxiety felt by jurors impaneled in a first-degree murder trial. We perceive no Eighth Amendment requirements that a jury whose role it is to advise the

> trial court on the appropriate sentence should be made to feel it bears the same degree of responsibility as that borne by a true sentencing jury.

Most recently, the United States Eleventh Circuit Court of Appeals has issued the opinion of Harich v. Wainwright, Case No. 86-3167 (March 18, 1987), in which that Court agreed with the Pope decision, holding that "comments which accurately explain the respective functions of the judge and jury are permissible under Caldwell. The instant trial record reflects nothing more than accurate explanation of Florida law made for the jury. (R 913-914, 1376-1377, 2623, 3038-3039). See, Aldridge v. State, 12 FLW 129 (Fla.Sup.Ct, March 12, 1987).

Therefore, the trial court's decision should be affirmed.

POINT VII

THE TRIAL COURT PROPERLY ALLOWED IN EVIDENCE REGARDING APPELLANT'S ESCAPE AND SUBSEQUENT CRIMINAL ACTIVITY AND THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON EVIDENCE REGARDING FLIGHT.

Appellant contends that evidence introduced against him regarding his escape, during which he stole a police car and was involved in a high speed chase, should have been ruled inadmissible. He likewise contends that the jury instruction, regarding flight to evade prosecution, was error (AB 45). Appellant concedes that cases such as Daniels v. State, 108 So.2d 755 (Fla. 1959), and Spinkellink v. State, 313 So.2d 666 (Fla. 1975), have held that flight to avoid prosecution may be shown as evidence inferring guilt, but he attempts to distinguish the instant case on the basis of the time elapsed between commission of the crime and the subsequent escape.

Appellant cites United States v. Myers, 550 F.2d 1036 (5th Cir. 1977), for the proposition that when flight is not immediate, the inference of consciousness of guilt weakens. Howevermuch this proposition may be true, the time delay between the commission of the crime and Appellant's escape does not render that evidence inadmissible. United States v. Ramon-Perez, 703 F.2d 1231, 1233 (11th Cir. 1983). Sub judice, as in Ramon-Perez, this is not a case where the evidence suggested that Appellant might have been fleeing from a different crime, or might not have been fleeing at all. The evidence at bar clearly shows that Appellant escaped from prison about one month before his trial (R 2306). It was at least a reasonable inference that Appellant was running away from his

pending trial. Id. This Court has repeatedly held that:

> When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance. State v. Young, 217 So.2d 567 (Fla. 1968), cert. denied, 396 U.S. 853, 90 S.Ct 112, 24 L.Ed. 2d 101 (1969); Daniels v. State, 108 So.2d 755 (Fla. 1959); Blackwell v. State, 79 Fla. 709, 86 So. 224 (1920).

Straight v. State, 377 So.2d 903, 908 (Fla. 1981); see also, Washington v. State, 432 So.2d 44, 47 (Fla. 1983); Mackiewicz v. State, 114 So.2d 684, 687 (Fla. 1959).

Appellee would submit that since the evidence regarding Appellant's escape was properly admitted, the pertinent jury instruction (R 2548) was also proper. See, Bundy v. State, 471 So.2d 9, 21 (Fla. 1985); see also, Proffit v. State, 315 So.2d 461, 465-466 (Fla. 1975); Daniels v. State, supra at 760.

Appellant's final contention, i.e. that testimony regarding his subsequent criminal activity prejudiced his case by showing bad character, is a contention without merit. In Denson v. State, 264 So.2d 442, the prosecutor introduced evidence of two sales of heroin made subsequent to the sale, for which Denson was convicted. The district court concluded that these subsequent sales became more of a feature of the trial than the crime charged. In the instant case, Appellant's escape was certainly not more of a feature of the trial than the brutal murders he confessed to having committed. In any event, evidentiary questions of materiality, relevancy and competency are for the resolution of the trial court in the

exercise of sound discretion. Ashley v. State, 370 So.2d 1191 (Fla. 3rd DCA 1979); Jent v. State, 408 So.2d 1024 (Fla. 1981). The trial court here did not abuse its discretion in allowing this testimony to be presented at trial. See, Blackburn v. State, 314 So.2d 634, 639 (Fla. 4th DCA 1975).

Therefore, the trial court's ruling should be affirmed.

POINT VIII

THE TRIAL COURT FOUND FACTS WHICH FULLY SUPPORTED THE IMPOSITION OF THE DEATH PENALTY.

The trial court found the following four aggravating circumstances, as enumerated in §921.141(5), Fla. Stat. (1985):

(1) The capital felony was committed while the defendant was engaged in the commission of or an attempt to commit robbery and burglary...

(2) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest...

(3) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretence or moral or legal justification...

(4) The capital felony was especially heinous, atrocious and cruel. (R 3465-3466; R3468-3469).

Appellant concedes the fact that the first aggravating circumstance, i.e. the murders were committed while a robbery was taking place, was appropriate (AB 51). Appellant argues, however, that the murders were not statutorily heinous, atrocious, and cruel. Appellee disagrees.

The trial court found that the Boyds "faced the prospect of [their] murder[s] as defendant and the co-defendant discussed the necessity of the impending death of Mr. and Mrs. Boyd within earshot of both victims." As the Boyds "made a pitiful attempt to run from the room, defendant, armed with the AR-15, shot both repeatedly." (R 3466, 3469). With respect to Mr. Boyd, the trial court held that his murder was "extremely wicked and committed with utter indifference to the suffering of

the victim." (R 3466). With respect to Mrs. Boyd, the trial court found:

> As defendant was leaving the house immediately thereafter, he heard Mrs. Boyd screaming and moaning in pain. He returned to the room and while Mrs. Boyd was lying face up and apparently still conscious, shot her in the head from extremely close range leaving powder marks on her clothing. The murder of Mrs. Boyd was extremely wicked and committed with utter indifference to the suffering of the victim.
>
> (R 3469).

The trial court concluded that the two murders were "both conscienceless and pitiless." (R 3466, 3469).

Appellee submits that the record amply supports the trial court's factual finding. (See, R 2174-2176, 2197-2200, 2204-2205). These facts supported the conclusion that the murder, as committed, was heinous, atrocious and cruel. Lemon v. State, 456 So.2d 885, 888 (Fla. 1984); Routly v. State, 440 So.2d 1257 (Fla. 1983), at 1265; Smith v. State, 424 So.2d 726 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied, 103 S.Ct 182, 74 L.Ed.2d 148 (1982); Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct 2260, 72 L.Ed.2d 864 (1982); Knight v. State, 338 So.2d 201 (Fla. 1976); Johnston v. State, 497 So.2d 863, 871 (Fla. 1986). The fact that both victims were aware of their impending deaths and, in desperation, tried to run away, supports the trial court's conclusion. Tompkins v. State, 12 FLW 44, 46 (Fla. Supreme Court, December 30, 1986); Cooper v. State, 492 So.2d 1059, 1062 (Fla. 1986). Moreover, there was evidence that Mrs. Boyd was alive for minutes after whe was initially shot, until Appellant returned to shoot her in the head at point blank range (see,

R 2033). Appellee asserts that death under these circumstances was heinous, atrocious, and cruel. Thompkins, supra.

Next Appellant argues that there was insufficient evidence that the murders were committed to avoid a lawful arrest (AB 52). The record at bar clearly shows that the dominant motive behind the murders was to eliminate the Boyds as witnesses who could testify against the defendants regarding the robbery. Appellant's taped confession reveals the fact that his original plan was to wear a mask (R 2183), but when Mrs. Boyd surprised the two defendants by being outside of her house (R 2185), it was too late to wear the masks. (R 2188). Appellant admitted that he murdered the Boyds because they had seen him. (R 2197-2198). Clearly, this aggravating circumstance was present. Kukal v. State, 492 So.2d 1317, 1319 (Fla. 1986); Cooper v. State, 492 So.2d 1057, 1062 (Fla. 1986); Hooper v. State, 476 So.2d 1253, 1261 (Fla. 1985); Garcia v. State, 472 So.2d 360, 367 (Fla. 1986). Here, unlike in Jackson v. State, 12 FLW 53, 54 (Fla.Sup.Ct December 24, 1986), the trial court did not merely assume the murders were committed to eliminate the witnesses, in the instant case the court simply recounted Appellant's confession.

The aggravating factor articulated in §921.141(5)(i), Fla. Stat., was also clearly established in the record. Here, as in Jackson v. State, 498 So.2d 406 (Fla. 1986), Appellant armed himself before he went to the victim's home, then after discussing the situation with the co-defendant, Appellant decided to murder Mr. and Mrs. Boyd. Appellant's confession supports finding the circumstance of heightened premeditation, as Appellant admitted his purpose in murder-

ing the Boyds was to eliminate them as witnesses. (R 2197-2198). See, Cooper v. State, 492 So.2d at 1062; Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986). In addition, further record support for the cold, calculated, and premeditated factor comes from Appellant's admission regarding his having cut the Boyd's telephone line before arriving, and from evidence of his conversion of AR-15 rifle into an automatic weapon (R 1890, 1893-1894, 1917-1918). It should be noted that Appellant made sure that he had the AR-15 rifle in his possession just moments before the murders (R 2199). Thus, the record supports his having planned this terrible crime in advance. Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986).

Last, even if this Court should conclude that any single aggravating circumstance did not exist, Appellee would submit that the remaining aggravating circumstances would still be sufficient to support the sentence imposed. Peede v. State, 474 So.2d 808, 818 (Fla. 1985); Kennedy v. State, 455 So.2d 351, 355 (Fla. 1984).

POINT IX

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS.

It is settled law that a trial court's ruling on a motion to suppress is clothed with the presumption of correctness on appeal, and the reviewing court will interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978). Given that standard of review, and the record in this case, Appellee maintains that there is no basis for reversal of the trial judge's determination of the issue raised here.

Appellant insists that his confession was extracted by the police promising him he could see his wife, in return for his confession. Appellee submits the record at bar refutes this assertion.

To begin with, Appellant signed no less than five (5) forms waiving his rights under Miranda v. Arizona, 384 U.S. 436 (1966) (R 554). Appellant admitted that he signed a rights card that informed him that no threats or promises could be made to induce a statement (R 551). Appellant further stated that he never told Detective Flynn he would not confess unless his wife was brought to him (R 566).

Detective Flynn testified that Appellant expressed a desire to take a polygraph test (R 631), that Appellant knew he did not have to take one (R 630), that Appellant was again read his Miranda rights (R 633), that he said he understood his rights (R 633), and that he then signed a polygraph consent form (R 634).

After administering the polygraph test, Flynn told Appellant

he had lied and Appellant started to cry (R 635). Flynn then told Appellant that Scott Stiteler had indicated Appellant had done it all, and asked Appellant if he was going to take the whole blame for the incident. Appellant replied that "Scott had a gun too" (R 635-636). After making this incriminating statement, Appellant asked to see his wife (R 637). Detective Flynn responded that he would try to get her there (R 637). Flynn then advised Appellant he could terminate the interview, but Appellant said nothing (R 640). Detective Flynn left, momentarily, and when he returned he told Appellant that someone had called for his wife (R 640). Flynn then continued to question Appellant, he cried again saying, "it's all over" between him and his wife (R 640-642), then Appellant said:

> I'll tell you what you want to know after I see my wife.
>
> (R 642).

Appellee submits the record supports the trial court's finding (see, R 718) that no promise was made which induced Appellant's confession (R 719, 720). This Court has held that:

> A reviewing court should defer to the fact-finding authority of the trial court and should not substitute its judgment for that of the trial court. State v. Melendez, 392 So.2d 587 (Fla. 4th DCA 1981).

De Coningh v. State, 433 So.2d 501, 504 (Fla. 1983). Because the instant record supports the trial court's ruling, that ruling should be affirmed. Id. Appellant's assertion that the record can be interpreted to imply that a "bargain" was established between Flynn and Appellant, is simply a reargument of facts which the trial court fairly rejected.

Here, unlike in Brewer v. State, 386 So.2d 232 (Fla. 1980), Appellant's initial statement was not coerced. Nowhere, in the case at bar, was it established that any of Appellant's statements were coerced. Thus, Brewer is clearly inappropriate to the facts sub judice. In viewing the record, it is clear that Appellant freely and voluntarily confessed after he had repeatedly been given full Miranda warnings. His constitutional rights were scrupulously observed. See, Norris v. State, 429 So.2d 688, 689-690 (Fla. 1983).

Thus, no reversible error has been demonstrated and the trial court's ruling should be affirmed.

POINT X

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S REQUESTED JURY INSTRUCTIONS.

Appellee relies on arguments made in Points V and VI pertaining to jury instructions regarding the possibility of parole and the Caldwell, supra, issue.

Appellant argues that the trial court's refusal to instruct the jury that pity, sympathy, and compassion could justify the exercise of mercy, was error. However, Appellant's cited cases of Rollins v. State, 148 So.2d 274 (Fla. 1963), and Piccott v. State, 116 So.2d 626 (Fla. 1960), do not stand for the proposition that the jury should be specifically instructed on mercy; those cases actually dealt with the issue of injecting the question of mercy in voir dire examinations. Thus, Appellant's chief cases have no applicability to the case at bar.

In Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985), the Court held the prosecutor's closing argument to be improper because he suggested that mercy towards the defendant would contravene established state law. Supra, at 1460. At bar, the prosecutor argued that there was no specific requirement that the jury should recommend a sentence based on sympathy for Appellant (R 3014). He further argued that sympathy for Appellant's family should not influence their recommendation (R 3015-3016). Lastly, the prosecutor argued that:

> ... [E]ven if you could garner some sympathy for this Defendant, I submit to you that whatever sympathy you reach for him as a result of the testimony you heard in no way outweighs the aggravating circumstances, let alone all of the aggravating circumstances that the State presented to

> you. It is not a reason to vote for life in this case.
>
> (R 3016).

Appellee notes that no objection to the prosecutor's closing remarks was made. Appellee further notes that while the prosecutor understandably did not wish the jury to be sympathetic to Appellant, he in no way intimated that the law prevented the jury from opting for mercy.

In any event, the standard jury instruction read by the trial judge stated that the jury could consider any aspect of Appellant's character or record, and any other circumstances of the offense (R 3040-3041). Thus, the jury was not misled on the permissibility of considering any and all mitigating evidence it found persuasive. See, Maxwell v. Wainwright, 490 So.2d 927, 931; Cave v. State, 476 So.2d 180 (Fla. 1985); Demps v. State, 395 So.2d 501, 505 (Fla. 1981).

Appellee therefore submits that no error occurred in giving the jury the standard instruction and the trial court's ruling should be affirmed.

CONCLUSION

Based on the foregoing argument, Appellee submits that no error was committed by the trial court and respectfully requests that the judgment and sentence of the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been mailed to ROBERT G. UDELL, ESQUIRE, 3601 S.E. Ocean Boulevard, Suite 205, Stuart, Florida 33494, on this 8th day of May, 1987.

Lee Rosenthal

Of Counsel