IN THE SUPREME COURT OF FLORIDA

PAUL CHRISTOPHER HILDWIN,

Appellant,

vs. CASE NO. 69,513

STATE OF FLORIDA,

Appellee.
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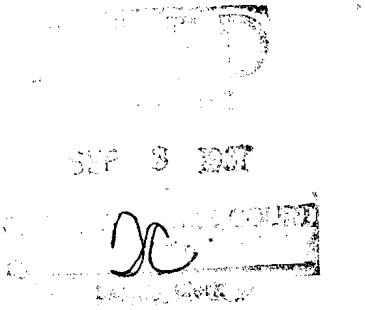

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR HERNANDO COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Paul Christopher Hildwin, hereinafter referred to as "the appellant," was tried by jury on a charge of first-degree murder before the Circuit Court of the Fifth Judicial Circuit, in and for Hernando County, Florida, the Honorable L.R. Huffstetler, Jr., presiding. This appeal follows the appellant's conviction as charged and the imposition of a sentence of death.[1] Throughout this brief, the State of Florida will either be referred to as "the appellee" or "the state." The Hernando County Circuit Court will be referred to as "the trial court." References to the record on appeal will be denoted parenthetically inclusive of the page number, e.g. (R 1).

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[1] §921.141(4), Fla. Stat. (1985).

STATEMENT OF THE CASE

On November 22, 1985, the appellant was charged by indictment with the offense of first-degree murder from a premeditated design[2] (R 1133). The indictment alleged that on or between September 1 through September 13, 1985, the appellant did commit premeditated murder by strangling to death one Vronzettie Cox. On November 23, 1985, the public defender was appointed to represent the appellant (R 1140). Subsequently, the public defender was permitted to withdraw from this case and on April 22, 1986, Daniel Lewan was appointed as a special public defender (R 1182-1184).

On April 25, 1986, the trial court granted appellant's motion for continuance and rescheduled the appellant's trial for the court's August 1986 trial term (R 1188). At a July 9, 1986 status hearing, the appellant announced that he was prepared for an August 25, 1986 trial date (R 1203). On August 8, 1986, the appellant filed thirteen motions including a motion to disclose the criminal records of the state's potential witnesses and a motion to declare that death was not a possible penalty (R 1226-1247).

The appellant's trial began as scheduled on August 25, 1986 (R 1-2). Prior to voir dire, the trial court instructed the jury concerning the guilt and penalty phases of a first-degree murder trial and the procedures pertinent to each phase (R 14-18). At that time, the trial court instructed the venire that there were

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[2] §782.04(1), Fla. Stat. (1985).

only two possible penalties in this case, life imprisonment without parole for twenty-five years and death (R 17-18). Voir dire commenced[3] (R 18). The appellant expended eight of his ten peremptory challenges (R 148, 156, 159). Alternative jurors were selected and the balance of the venire was excused (R 160-169). The trial court then recessed for the day (R 172).

On August 26, 1986, the second day of trial, the appellant called up his August 8, 1986 motions to be heard (R 173). With regard to the appellant's motion to disclose criminal records, the state argued that the appellant's motion was untimely, as the trial had already commenced; moreover, the prosecutor represented that his background check of a few of the state's potential witnesses had revealed "no indication" of prior criminal records and that the state did not have any rap sheets in its possession (R 189-190). Although the appellant believed at least one state witness, Robert Worgess, to have a criminal record, appellant conceded that this witness had previously been deposed concerning same (R 190-191). The trial court subsequently denied such motion subject to the state being required to furnish to appellant any criminal history records later coming into the state's possession (R 191). The trial court also denied the appellant's motion to declare that death was not a possible penalty (R 191).

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[3]The alternatives available for recommendation by the jury in the event of appellant's conviction as charged were later reiterated by the prosecutor during preliminary statements to the prospective jurors (R 34).

Following the hearing on the appellant's motions, but prior to the swearing of the jury, the appellant **moved to disqualify** Juror Potts (R 202-204). The basis for such a motion was Potts' alleged observation of the appellant "in shackles"[4] earlier that morning, along with the attendant possibility that such information had been conveyed to the other members of appellant's jury, thereby tainting the entire panel (R 204). Upon individual voir dire by the trial court, Juror Potts stated that, although he did see the appellant as he emerged from a sheriff's office van and was led into the courthouse, Potts did not notice anything particular about how the appellant was dressed and had not mentioned his observation to the other jurors. Moreover, Potts was not surprised by this scene (R 207-208). Potts explained that the only reason he had arrived early that morning was to find a parking space (R 208). Finally, in response to inquiry by the appellant, Potts stated that his observation of the appellant indicated "nothing in particular" to him (R 208).

The trial court instructed Potts not to relate the incident to the rest of the jury (R 208). The appellant then "challenged" Juror Potts upon the basis that he had been biased as a result of the viewing (R 209). However, the trial court specifically found that the juror had not even noticed "any type of restraints" on the appellant, concluding that Potts was not "tainted" (R 209,

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[4]It was subsequently revealed by the prosecutor, who also witnessed the appellant's arrival from the vantage point of a courthouse window, that the appellant was merely handcuffed "and not in shackles" as he was escorted into the courthouse "in the usual manner and though the usual door" (R 205).

720). Accordingly, the trial court denied the appellant's motion to disqualify (R 210). Significantly, the appellant never sought to exercise his two remaining peremptory challenges nor did appellant's trial counsel ever subsequently characterize his earlier motion to disqualify as an attempt to backstrike Potts with a peremptory challenge (R 204-210, 718, 907, 1431). The jury was sworn and the trial continued (R 211-212).

During the state's case-in-rebuttal, the state recalled William Haverty and inquired whether the witness ever had "any problems with the law" (R 837). The appellant objected on the grounds of improper rebuttal, which objection was overruled by the trial court (R 837-838).

During rebuttal the state also called Jane Phifer to testify regarding a series of statements made to her by the appellant (R 857-861). Initially, the appellant objected to such testimony upon the grounds of improper rebuttal, but later objected that the witness was reading her notes as opposed to testifying (R 863, 865). The state responded to the latter objection by stating that the witness was refreshing her memory; both objections were overruled by the trial court (R 864-866).

On September 5, 1986, the trial court proceeded with the penalty phase (R 1016-1017). When the state announced it was prepared to call a rebuttal witness, the appellant pre-emptively argued that the witness would testify as to collateral crimes for

which no convictions had yet been obtained[5]; however, the appellant did not state a specific objection to the prospective witness (R 1102). The witness subsequently testified without objection from the appellant (R 1103-1113).

On September 17, 1986, the trial court conducted the appellant's sentencing hearing (R 1480-1490). The trial court expressly indicated it considered all of the evidence presented as to aggravating and mitigating circumstances including evidence contained in the court file (R 1396, 1482, 1485-1486).

In his statement of the case, the appellant addresses that portion of the trial proceedings involving a jury question. The original record on appeal indicated that the jury communicated a question to the trial court and that the court responded to the question during an unrecorded portion of the proceedings (R 1010, 1382). In his initial brief, the appellant infers several "facts" from this gap in the record. However, pursuant to various motions filed by the appellee subsequent to the filing of appellant's initial brief herein (R 1531-1537), a supplemental record on appeal was filed in this court on July 10, 1987 (R 1492-1569). Therein, certain facts pertaining to the jury question issue were settled and approved by the trial court (R 1545-1551).

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[5]While the record neither confirms nor disputes appellant's bare assertion in this regard, the record at least suggests the possibility of a pending prosecution for the subject offense as revealed by Detective Decker's contact with the witness immediately prior to appellant's trial (R 1112).

STATEMENT OF THE FACTS

The appellee presents the relevant facts of this case as the evidence was adduced at trial during each stage of the proceedings below.

STATE'S CASE-IN-CHIEF:

Robert Haygood, a former crime scene technician for the Hernando County Sheriff's Office [HCSO], testified that he processed the scene where the victim's body was found (R 269-271). Haygood noticed pine needles in the trunk of the victim's car located underneath the body (R 272, 280, 290). In addition, some pine needles were found attached to the body, prompting Haygood to conclude that the pine needles were put into the trunk at the same time as the victim's body (R 290). Haygood noticed that there were no pine trees or pine needles on the ground in the immediate vicinity where the car had been abandoned (R 272, 288-289). There was, however, an area with pine trees some distance away (R 289).

Dr. Thomas Techman, a medical examiner and an expert in forensic pathology, testified regarding his autopsy of the victim's body on September 14, 1985, the day following the discovery of the body (R 292-295). Techman found it significant that the victim had been found with a "knit t-shirt-type of shirt" tied "rather tightly" around her neck (R 295). A superficial laceration of unknown origin discovered on the victim's neck under the shirt could have resulted from the tightening of the shirt around the victim's neck (R 296-297). Techman further concluded that the width of the shirt would have

contributed to a slower death of the victim than would have a narrower ligature such as a wire or belt (R 297). More pressure would have been required to be exerted over the wider area being compressed, and "depending on the pressure that was applied," the victim's loss of consciousness and eventual death would encompass "a fair range of minutes" (R 297).

William Haverty, the live-in boyfriend and business partner of the victim, testified that he last saw Vronzettie Cox alive on the morning of Monday, September 9, 1985 (R 305-306). Haverty positively identified certain evidence, e.g., the car, sandals, a radio, and a pearl ring as belonging to the victim (R 308-314, 323-326). Haverty stated he last saw the victim's radio, which had no batteries, in the back of the deceased's car on Sunday, September 8, 1985 (R 311-313). Haverty further stated that the victim's pearl ring was custom-made and that the victim "hardly ever took it off" (R 313-314, 326). From September 9 until September 12, 1985, Haverty searched for Vronzettie Cox (R 316-317). On September 12, 1985, Haverty and a sister of the deceased filed a missing persons report with HCSO (R 317, 355-356). Upon redirect examination, Haverty denied knowing the appellant (R 327).

During cross-examination of Haverty, the defense attempted to establish Haverty as a suspect in the victim's murder. Haverty denied having any troubles in his relationship with Vronzettie Cox (R 322-323). Although Haverty admitted that Cox had at times dated other men while she lived with Haverty, the last such event occurring a month before the victim's death when

she and Haverty were out of town, Haverty denied being jealous of this arrangement (R 326). Haverty stated he was at home throughout the morning and most of the afternoon of September 9, 1985, having checked in at work at 8:00 a.m. and returning home by 8:15 because no work was available (R 324-325). Cox left a short time later and Haverty went back to sleep but was awakened at 9:30 a.m. by the arrival of George Weeks who had come to mow the yard. Haverty then got up and watched television until noon. Haverty specifically recalled offering a drink to Weeks, who was there most of the day (R 315-316, 324-325). This alibi was subsequently corroborated by the testimony of George Weeks (R 848-855).

Ralph Decker, the lead investigator for HCSO, testified several times regarding various aspects of the murder case (R 373-374). During his investigation, Decker obtained the bank records of Vronzettie Cox (R 374-376). Check number 112 from the deceased's bank account, which was dated September 9, 1985, the day of the victim's disappearance, was made payable to the order of the appellant in the amount of seventy-five dollars (R 377). On the back of the check was a check cashing stamp containing information which corresponded to that contained on the appellant's driver's license (R 377-378, 384-386).

Decker also testified concerning numerous inconsistent voluntary statements made by the appellant during the course of the investigation (R 386-388). When asked about how he received check number 112, the appellant originally stated that his car had broken down, and while he was walking to the J.P. Mart on

Highway 19, Vronzettie Cox, with whom he was acquainted, picked him up and took him to the J.P. Mart (R 388). While purportedly sitting in the passenger seat of the victim's vehicle, appellant allegedly requested a loan; the victim then allegedly wrote out a check to the appellant and left (R 388-389).

Later, in response to questioning about a missing check[6], the appellant related that after he and the deceased arrived at the J.P. Mart, the appellant exited the vehicle and a man who appeared to be acquainted with the deceased known to the appellant only as "Jeff" got into the passenger seat of the vehicle (R 389). After the victim went into the store, the appellant asked Jeff for a loan, at which time Jeff removed two blank checks from the victim's purse, one of which was accepted by the appellant (R 389-390). When the victim returned, she and Jeff left (R 391). (Subsequent investigation regarding the suspect Jeff revealed that the appellant implicated one Eric McDaniel by identifying McDaniel's truck and photograph (R 437-441). McDaniel testified that he knew the appellant, but denied knowing the victim. In addition, McDaniel provided an alibi concerning his whereabouts on the day of the murder which was corroborated by his employer) (R 460-471).

After giving consent to search his home, and upon being asked if he had any other property belonging to the victim, the appellant related a third version of events. After the appellant told Cox his car was broken down, the victim purportedly loaned

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[6]Check number 111 was never recovered (R 383).

him her radio because she knew he liked music and didn't want him to have to work on his car without being able to listen to a radio (R 392). The appellant thereafter admitted possession of the radio at his house (R 391-392). Finally, upon being confronted by Decker with suspicions that check number 112 might have been forged, the appellant told a fourth version of events, admitting the forgery (R 394-399). (Expert testimony established that check number 112 was indeed forged) (R 448-460).

Randy Cramer, an HCSO detective, also testified regarding the voluntary statements made by the appellant during the course of the investigation (R 425-427). Cramer's testimony corroborated Decker's account of the appellant's four different versions of events (R 427-435). Cramer then explained that the appellant again changed his version of events when confronted with the absurdity of his contention that the victim suggested he listen to a radio containing no batteries (R 435).

Royce Decker, a crime scene investigator for HCSO, testified regarding his recovery of certain pieces of evidence (R 471-472). The witness described the scene where the body of Vronzettie Cox was found as being south of Centralia Road (R 476). Royce Decker further testified that he searched the pine forest north of Centralia Road and found various pieces of evidence: a silver-colored door molding which was later identifed by expert testimony as having come from the victim's vehicle (R 472-473, 652-662); a pair of sandals owned by the deceased (R 472-473); and a National Enquirer publication similar to those previously kept by Cox in her car (R 474-475, 506-

507). The witness subsequently charted the location of each piece of evidence on a diagram and also assisted in the search of the appellant's house (R 475-476, 489-491).

Helen Jean Lucash, the appellant's girlfriend, and Cynthia Wriston, a friend of the appellant, testified regarding the appellant's actions and whereabouts on Sunday, September 8, and Monday, September 9, 1985 (R 508-526). On Sunday night, the appellant transported Lucash, Wriston, and one Billy Oehling, to a drive-in movie in appellant's car (R 509-510, 520). The radio in the appellant's car was operable (R 510, 520). When the appellant's party left the drive-in, the appellant took Oehling home (R 511, 521). Then, shortly before midnight, the appellant's car ran out of gas near the Lone Star Bar (R 511, 521). Neither the appellant, Lucash, nor Wriston had any money, so the appellant took soda bottles to the J.P. Mart to exchange for gas (R 511-512, 521-522). When the appellant could not get his car started with the amount of gas he was able to purchase, everyone fell asleep in the appellant's car (R 512, 522-523).

Wriston awoke around daybreak, saw the appellant sleeping, and fell back asleep (R 523). Lucash awoke around 9:00 a.m. and saw that the appellant had left (R 512). When appellant returned to his car at approximately 10:00 a.m., he had cleaned up, had acquired cigarettes and money, and had returned from a northerly direction (Centralia Road being located to the north) (R 513-514, 523-524). The appellant then went to the Lone Star Bar for assistance and purchased sodas for the women (R 514, 525). Later that day Lucash saw the appellant in possession of the victim's

pearl ring and a radio similar to that owned by the deceased (R 515-516).

Charles Schelawske, the owner of the Lone Star Bar, testified that the appellant came to his establishment asking for assistance (R 527-530). Schelawske took the appellant to the Camp-A-Wyle store, where the appellant purchased two dollars' worth of gas with two one dollar bills at 10:44 a.m. (R 530, 532-536). During this time, the appellant told Schelawske that he had a check he was going to cash; the appellant also inquired whether Schelawske was interested in buying a radio (R 530-531).

Danny Spencer, an HCSO detective, testified that he searched a wooded area between the appellant's house and the scene of the crime (R 537-538). Beginning at the appellant's house and back-tracking to the pine forest which was believed to be the scene of the crime, Spencer recovered a woman's purse identified as belonging to the victim from a hole covered by leaves (R 506, 539-540). The purse was located on a direct route from the appellant's house to the location where the victim's sandals were recovered (R 541, 560-566). A brassiere with damaged hook-and-eye fasteners was found inside the purse (R 547, 555).

Expert testimony established that hair found on the driver's seat of the victim's car was microscopically indistinguishable from the known samples of the appellant (R 626-628, 632-642). Appellant's hair was characterized by the expert as "unique" due to its darkness at the root and blond appearance at the tip, a condition apparently caused by chemical treatment of the hair (R 515, 645-647).

Finally, Robert Worgess, a former cellmate of the appellant, testified regarding the appellant's jailhouse confession (R 706-716). Worgess, who was previously convicted of two grand thefts, as well as a violation of probation, testified that in late November of 1985, while both he and the appellant were incarcerated at the Hernando County Jail, the appellant suddenly threw down a book entitled "Maximum Security" which he had been reading and exclaimed, "They're going to fry my ass" (R 706-708). When asked if the appellant had killed "her," the appellant replied, "Yes, I did," also indicating that he stabbed his victim first (R 708-709).

APPELLANT'S CASE-IN-CHIEF:

The appellant recalled Schelawske for testimony regarding Haverty's relationship with the victim (R 732-734). Although Schelawske stated that he had seen Cox leave his bar in the company of other men, such a circumstance had not occurred recently (R 733-735). The appellant also questioned Schelawske regarding his knowledge of any specific instances of violence by Haverty (R 734). Schelawske described an incident where Haverty came to the Lone Star Bar on his birthday and disturbed the other patrons; although Haverty was drunk, he did not hurt anyone even though "a couple people might have hit him that night" (R 734-735).

The appellant also testified (R 752-803). On the stand, the appellant related yet another version of events which was completely different from any previous statement. This time, the appellant claimed that on the morning of September 9, 1985, he

was walking to his father's house when the victim, whom the appellant knew as "Ronnie," and Haverty stopped along the road to pick him up (R 757). After they agreed to drive the appellant north to the Centralia Road area, Haverty and Cox began arguing about Cox seeing other men (R 758-759). As Cox turned onto a sand road, the argument escalated to violence, whereupon everyone got out of the car and Haverty commenced beating the victim. When the appellant tried to intervene, he was forced away by Haverty. At that time, the appellant grabbed the victim's checkbook and left the victim on the ground while Haverty purportedly choked her (R 757-762). Although the appellant admitted forging check number 112, he insisted he was driving his own car at the time (R 766-767). In an attempt to explain his prior inconsistent statements, the appellant indicated that he was "trying to save [him]self from getting in trouble" by avoiding a parole violation (R 768). The appellant also admitted he was previously convicted of two felonies (R 769).

Upon cross-examination, the appellant admitted that, in the first of his three statements to Detective Jane Phifer[7], he had denied knowing Haverty (R 780). When questioned about his third statement to Phifer wherein the appellant told Phifer that he saw an unidentified male choking Vronzettie Cox, appellant could not

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[7]Although the appellant had on two separate occasions apparently indicated to Phifer that: 1) "Jeannie" Lucash was also in the victim's vehicle along with Haverty and himself, and 2) an unidentified fourth person was in the vehicle along with Haverty and himself, appellant could not recall making such statements (R 779, 782-783).

remember if he told Phifer that the victim turned blue; however, he did recall telling Phifer that Cox was screaming for help over and over again (R 784-785, 788). After the appellant admitted he had a tattoo of a heart on his back that looked like a cross[8], the court ordered the appellant to display his tattoo to the jury (R 788-791). The appellant further denied being under any compulsion to obtain money for his parole cost of supervision, stating that he had just obtained work and did not need the money (R 792-793).

STATE'S REBUTTAL CASE:

During rebuttal, the state called Lois Black, appellant's parole officer, who indicated that appellant was almost five months delinquent in his cost of supervision payments at the time of the victim's death (R 829-830, 836). According to Black, she had made arrangements on August 15, 1985, to have a conference with the appellant in her office on August 17, 1985, concerning his unsatisfactory progress while on parole (R 833). Although the appellant failed to appear for the August 17 appointment, he subsequently reported to Black's office on September 6, three days before the victim's murder, and was informed by Black that unless he caught up the delinquency immediately his parole was subject to revocation at any time (R 833-834).

The state then recalled Haverty regarding various aspects of the defense case (R 837). In response to the defense claim that

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[8]Appellant previously admitted to Phifer that the victim's murderer had a cross tattooed on his back (R 779-783).

Haverty had committed specific acts of violence, Haverty testified as to his prior "problems with the law," admitting several misdemeanor/traffic arrests (R 837-838). In response to the defense claim that the appellant knew Haverty, the witness denied having ever met the appellant (R 839). In response to the defense claim that Haverty was jealous of the victim's other male associates, Haverty denied same and stated he had never inflicted harm on Vronzettie Cox (R 840). Haverty further denied having a tattoo of a cross on his back and so demonstrated to the jury (R 841).

The state recalled Berniece Moore, the sister of the deceased, to testify that there was no history of violence by Haverty in his relationship with the victim (R 855-857). This testimony was admitted without objection from the appellant.

In response to the appellant's testimony regarding his statements to Phifer, the state called Phifer, a former Brooksville Police Department detective, to explain the appellant's prior statements (R 857-858). Phifer testified that the appellant requested to see her three times; on each occasion, the appellant was advised of his rights and voluntarily agreed to talk about his case (R 859-861). Phifer stated that on her third meeting with the appellant she took notes of the appellant's statements (R 861-862). During that interview, the appellant stated that he "saw the asshole kill her"; appellant also stated that the victim's murderer had a tattoo of a cross on his back (R 863-867).

STATE'S CASE-PENALTY PHASE:

During the penalty phase of appellant's trial, the state introduced evidence that the appellant had been convicted of violent felonies twice in New York, once in 1979 for first degree rape and again in 1979 for attempted sodomy in the first degree (R 1024-1039, 1258, 1292). The victim of the 1979 rape, [redacted] described how the appellant had attacked her at knifepoint (R 1039-1046). The state also presented the testimony of Lois Black, the appellant's parole officer, who indicated that the appellant was on parole and under sentence of imprisonment for his New York convictions at the time of the victim's murder (R 1021-1023).

DEFENSE CASE-PENALTY-PHASE:

The defense called numerous witnesses to testify about appellant's childhood and his character. Lucash, the appellant's girlfriend, stated that the appellant never inflicted physical harm on her and also described the appellant's recreational drug use (R 1048-1049). The appellant's father, John C. Hildwin, testified to the appellant's age and described the appellant's childhood (R 1050-1054). Hildwin, Sr. stated that the appellant was never hospitalized for psychiatric or drug problems and that he never knew his son to be a violent person (R 1055-1056). The appellant also testified on his own behalf (R 1090-1095). Finally, the appellant's foster parents, Violet and Henry Hoyt, testified concerning a portion of the appellant's childhood (R 1095-1101).

STATE'S REBUTTAL CASE-PENALTY PHASE:

In response to the defense case that the appellant was not a violent person, the state called [redacted] [redacted] (R 1103-1113). The witness testified that in March or April of 1985 she encountered the appellant while visiting at her sister's house (R 1104-1105). Later, when the two were out one evening, the appellant made sexual advances which were refused by the witness (R 1108). The appellant then choked [redacted] until she blacked out (R 1109). When [redacted] regained consciousness, appellant was attempting to undress both of them (R 1109-1110). In response to [redacted]' screams the appellant hit her in the right eye twice (R 1110). Although the witness tried to escape from the vehicle, the appellant caught up with her some thirty feet from the truck and forced her to perform fellatio on him (R 1110-1113). The incident was not reported to anyone except the witness' family prior to the witness being interviewed by Detective Decker (R 1112).

SUMMARY OF ARGUMENT

Point One: The trial court did not err by failing to disqualify a juror for cause on the basis of said juror's inadvertent observation of appellant in custody of the authorities during appellant's trial. Moreover, any error in this regard must be deemed harmless as a result of the failure of appellant to exhaust all peremptory challenges.

Point Two: The trial court did not err by admitting the presentation of penalty phase evidence rebutting the presentation of evidence offered by the appellant concerning his peaceful, non-violent nature. Any relevant evidence as to a defendant's character is admissible at sentencing. Moreover, because the subject evidence was not introduced in an attempt to prove the existence of a statutory aggravating circumstance, but rather to disprove the existence of a nonstatutory mitigating circumstance, any asserted error must be deemed harmless in light of the trial court's ultimate findings of fact in the instant case.

Point Three: The trial court did not commit reversible error in its disposition of a question propounded by the jury during the conviction phase of the appellant's trial. Even if the jury should have been returned to the courtroom for disposition of the jury inquiry, an in-court response was waived by defense counsel, thereby precluding the necessity of the appellant's presence during an in-chambers conference attended by counsel for the respective parties wherein the trial court's proposed response to the jury question was approved by appellant.

Point Four: Appellant's sentence of death was not

unconstitutionally imposed as a result of the failure of appellant's jury to unanimously determine the applicability of at least one statutory aggravating circumstance to appellant's crime; moreover, the instant claim of error was not properly preserved for appellate review. This court has previously held that a defendant possesses no constitutional right to be sentenced by a jury. Nevertheless, the jury's unanimous recommendation of death strongly suggests a unanimous agreement that at least one, although not necessarily the same, statutory aggravating circumstance which was not outweighed by circumstances in mitigation was applicable to the appellant's crime.

Point Five: No reversible error arising out of the trial court's refusal to instruct the jury on the maximum and minimum penalties for the offense of first-degree murder has been demonstrated. This court has previously declined to predicate reversible error upon a trial court's failure to give such an instruction under circumstances where the jury has otherwise been advised of the applicable penalties. Because appellant's jury was clearly apprised by the trial court concerning the maximum and minimum penalties for a conviction for first-degree murder prior to the commencement of voir dire in the instant case, no reversible error with respect to this issue has been demonstrated.

Point Six: The trial court did not err by permitting a state's witness to refresh her memory while testifying concerning prior inconsistent statements made to her by the appellant. The witness was being asked to recall verbatim statements made by the

appellant, his victim, and an unidentified third party, some eight months prior to trial. Because the record affirmatively demonstrates that the witness possessed an independent recollection of the events upon which she was called to testify, admission of the subject testimony was proper.

Point Seven: Appellant's conviction for first-degree murder is supported by competent, substantial evidence based upon both theories of premeditation and felony murder. However, because it is clear from the offense charged and the state's presentation of its case at trial that the jury convicted appellant based upon a theory of premeditation, in the absence of any reasonable hypothesis of innocence presented by the appellant, appellant's conviction as charged should be affirmed by this court.

Point Eight: The trial court did not err by finding that the victim's murder was especially heinous, atrocious, or cruel. This court has repeatedly upheld the existence of the subject aggravating circumstance in cases where the murderer's **modus operandi** involves strangulation of the victim. Evidence adduced at trial established that the victim was acutely aware of her impending death. Moreover, circumstantial evidence strongly suggested that the victim spent the last few moments of her life as the unwilling sex partner of her killer. Finally, assuming **arguendo** that the subject aggravating circumstance was improperly found by the trial court in the instant case, such error was harmless at worst because a sentence of death is presumptively proper herein.

Point Nine: The trial court did not err by finding that the

victim's murder was motivated by the appellant's desire for pecuniary gain. Circumstances adduced at trial established the appellant's need to obtain quick cash in order to avoid parole revocation. Appellant was penniless immediately preceding the victim's murder; however, only a few hours after the victim's disappearance, appellant was in possession of "pocket money", a ring and a radio owned by the victim, as well as a check drawn on the victim's bank account which, by his own admission, had been forged by the appellant. Moreover, circumstantial evidence established that the appellant cashed the victim's forged check in the **victim's** car. Finally, assuming **arguendo** that the subject aggravating circumstance was improperly found by the trial court in the instant case, such error was harmless at worst because a sentence of death is presumptively proper herein.

Point Ten: The trial court's jury instruction during the penalty phase which substantially followed the standard jury instruction concerning the weighing of aggravating and mitigating circumstances does not constitute reversible error in the absence of objection, especially where there is no record evidence that the jury was misled by such an instruction. The grammatical variance which forms the basis of the subject unpreserved claim of error requires this court's speculation that the jury merely counted aggravating and mitigating circumstances, as opposed to weighing them, in clear contravention of the other unambiguous instructions received by the jury. Because fundamental error has not been demonstrated, appellant is entitled to no relief with respect to this issue.

Point Eleven: The trial court did not err by permitting a state's witness to testify during rebuttal that he had no prior criminal convictions. In response to the defense claim that Haverty was a violent person capable both in terms of opportunity and predisposition of killing his girlfriend, Haverty was properly permitted to rebut the appellant's attempt to assail the character of the **appellant's** prime suspect in the victim's murder. By pointing an accusatory finger in the direction of Haverty, appellant opened the door to allow the witness to defend himself against the appellant's attempted depiction of Haverty as a violent drunk prone to jealous rage. Finally, any asserted error in this regard was harmless at worst since evidence adduced at trial established that Haverty could not have committed the murder of Vronzettie Cox.

Point Twelve: The trial court did not err by denying, in part, appellant's motion to disclose the criminal records of state's witnesses. This court has previously held that a defendant bears the initial burden of preparing his own case by attempting to discover the information requested to be supplied by the state. Because due diligence in the preparation of the appellant's own case has not been demonstrated and the requested information was not in the possession of the state in any event, appellant was not unfairly disadvantaged in the preparation of his defense herein.

Point Thirteen: The trial court did not err by failing to consider all the mitigating evidence presented on behalf of the appellant prior to imposition of appellant's sentence of death.

Significantly, the subject evidence alleged by appellant to have been overlooked by the trial court was presented on behalf of the state and not the appellant. Moreover, the record does not support appellant's contention that the subject information, whatever its probative value, was ignored by the trial court.

POINT ONE

THE TRIAL COURT DID NOT ERR BY FAILING TO DISQUALIFY A JUROR FOR CAUSE ON THE BASIS OF SAID JUROR'S INADVERTENT OBSERVATION OF THE APPELLANT IN CUSTODY OF THE AUTHORITIES DURING APPELLANT'S TRIAL; MOREOVER, ANY ERROR IN THIS REGARD MUST BE DEEMED HARMLESS AS A RESULT OF THE FAILURE OF THE APPELLANT TO EXHAUST ALL PEREMPTORY CHALLENGES.

Prior to addressing the merits of appellant's present assertion that the trial court's retention of Juror Potts on appellant's jury constitutes reversible error, the appellee would respectfully suggest that the argument advanced in appellant's brief is premised upon several erroneous characterizations and conclusions involving the appellant's challenge of Juror Potts. First, appellant insists that Potts actually observed the appellant in handcuffs as evidenced by Potts' "evasive responses" to questioning at the appellant's behest. See, Initial Brief of Appellant, pages 15-19. Second, the appellant presently characterizes his unsuccessful challenge of Juror Potts as an attempt on the part of defense counsel below to peremptorily backstrike said juror. Appellee must respectfully disagree with both premises.

The original basis for appellant's current claim of error was his assertion that Potts had observed appellant "in shackles" outside the courthouse immediately prior to commencement of the second day of trial (R 204). It was defense counsel's original concern that appellant's entire panel of jurors might have become tainted by such information in the event that Potts had

disregarded previous precautionary instructions (R 204). Following the state's suggestion that the juror be individually voir dired in order to avoid tainting the entire panel, and after inquiry concerning defense counsel's objective, defense counsel indicated that he was "...making a **motion to disqualify** [Potts]" (R 204). Defense counsel further stated that he would "...certainly welcome the court to inquire as to what the affect [sic] of seeing [his] client in shackles was and see if that would disqualify [Potts]" (R 204). At that time, the prosecutor indicated that the appellant was merely in handcuffs and not in shackles while being escorted into the courthouse during the incident in question (R 205). See, n.4, supra.

Subsequently, the following occurred in chambers:

> THE COURT: All right. Before we bring the juror in, what in particular do you all want me to ask him?
>
> [DEFENSE COUNSEL]: First of all, if he saw my client in handcuffs with the officer. I think if he did that would certainly indicate that he knows my client is in custody, which would prejudice and bias him. Secondly, I would like to know if he discussed that with any other jurors.
>
> THE COURT: All right. Of course it's, I think, something of a legal fiction to assume the jury doesn't know that your client is in custody. But let's see what he has to say.
>
> . . . .
>
> (WHEREUPON, Juror Potts was brought into chambers).
>
> THE COURT: Mr. Potts, it's been brought to my attention that you

were here early this morning. Did you see Mr. Hildwin enter the courthouse earlier?

JUROR POTTS: Yes.

THE COURT: Would you tell me what you observed when you saw him?

JUROR POTTS: He just came out of the van and was just led into the courthouse.

THE COURT: Did you notice anything in particular about the manner in which he was dressed or led into the courthouse?

JUROR POTTS: No.

THE COURT: Have you mentioned to any of the other jurors that you saw him come into the courthouse?

JUROR POTTS: No, no.

. . . .

JUROR POTTS: I was walking up from the parking lot when I saw them unloading. I turned around and walked back to the parking lot so I wouldn't be seen.

[PROSECUTOR]: Maybe, Judge, the court would let counsel inquire about it but he has to be as careful as he wants to be.

THE COURT: [Defense counsel], do you have any questions you would like to ask Mr. Potts beyond what the court has? I have one other, was it any surprise to you that he was brought up here by the sheriff's department?

JUROR POTTS: No, no. The reason I was here early was to find a parking space. That's why I was walking up.

[DEFENSE COUNSEL]: I would like to ask one question, Mr Potts. When you saw my client this morning, what

did that indicate to you?

JUROR POTTS: Nothing. Nothing in particular.

[DEFENSE COUNSEL]: I don't have any other questions.

(R 206-208). At the conclusion of the inquiry, Potts was instructed by the trial court not to mention his observation of the method of transportation by which the appellant had arrived at the courthouse (R 208). The trial court was assured by Potts that the juror "...wouldn't mention anything about the trial" (R 208).

After Potts had been excused from chambers, defense counsel made the following objection to the juror's continued service on appellant's jury:

> It's well known that that van that he was brought over here in has the sheriff's markings on it. The state has already said that he was in handcuffs. I think that it clearly shows that he is incarcerated for this crime. I think it would **bias** Mr. Potts, could only bias Mr. Potts and make him unable to reach a fair and impartial verdict in this case. I would **move to challenge** him (emphasis supplied).

(R 209). Following the state's argument that there was no indication that Potts could not follow his oath to be a fair and impartial juror or that he had done or said anything contrary to the court's instructions, the trial court made the following finding:

> All right. Based on his own statement that he saw nothing unusual about the dress or demeanor of the defendant, which I think the only clear meaning which one could

> give it was that **he did not observe that he was under any type of restraints**, I don't feel that either he as an individual juror or the panel has been tainted. I think, of course, it's common knowledge in Florida that persons charged with first degree murder are normally held without bond and would be in some type of custodial arrangement with the law enforcement agency. So I'll deny your **motion to disqualify** the jury (emphasis supplied).

(R 209-210).

Based upon the foregoing excerpts from the record on appeal, it is abundantly clear in appellee's view that defense counsel was attempting to challenge Juror Potts for **cause**.[9] Nevertheless, the argument presently advanced on appeal couches the alleged error in terms of the trial court's improper refusal to permit the **peremptory** challenge of Potts prior to the jury being sworn. See, Initial Brief of Appellant, page 16. To the extent that appellant is presently raising an issue which was not properly preserved for appellate review, since the trial court's alleged refusal to permit the backstriking of Potts was not announced as a basis for objection below, appellee would urge this court to refuse to address the instant claim of error. See, Hoffman v. State, 474 So.2d 1178 (Fla. 1985). Moreover, to whatever extent the instant claim of error has been properly

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[9]A trial court's erroneous refusal to excuse a juror for cause is harmless unless all peremptory challenges of the complaining party have been exhausted. Nibert v. State, 12 F.L.W. 225 (Fla. May 7, 1987); Hill v. State, 477 So.2d 553 (Fla. 1985). At the time of the subject challenge, appellant had two peremptory challenges remaining (R 148).

preserved for appellate review, an attempt to backstrike a prospective juror must be made in order to preserve a claim that backstriking was improperly prohibited. See, Johnston v. State, 497 So.2d 863 (Fla. 1986); Rivers v. State, 458 So.2d 762 (Fla. 1984).

Moving now to the merits of the instant claim of error, appellee would point out that a prospective juror is **presumed** to be impartial. Bundy v. State, 471 So.2d 9 (Fla. 1985). Moreover, even the "...existence of a preconceived notion as to guilt or innocence is insufficient in and of itself to overcome such a presumption." Bundy v. State, 471 So.2d at 20. "The test for determining a juror's competency is whether that juror can lay aside any prejudice or bias and decide the case solely on the evidence presented and the instructions given. Davis v. State, 461 So.2d 67 (Fla. 1984); Lusk v. State, 446 So.2d 1038 (Fla. 1984)." Stano v. State, 473 So.2d 1282, 1285 (Fla. 1985). In addition, the trial court's broad discretion in determining the competency of a prospective juror should not be disturbed upon appeal in the absence of manifest error. Hooper v. State, 476 So.2d 1253 (Fla. 1985); Mills v. State, 462 So.2d 1075 (Fla. 1985); Davis v. State, 461 So.2d 67 (Fla. 1984). In this regard, a trial court enjoys broad discretion in dealing with the conduct of jurors. Gore v. State, 475 So.2d 1205 (Fla. 1985); Doyle v. State, 460 So.2d 353 (Fla. 1984).

The pertinent facts of the instant case are similar to those presented for this court's consideration in Johnson v. State, 465 So.2d 499 (Fla. 1985), Heiney v. State, 447 So.2d 210 (Fla.

1984), and Neary v. State, 384 So.2d 881 (Fla. 1980). In all three cases, this court declined to predicate reversible error upon the defendants' claims that their momentary observation, by one or more jurors, while in custody either in handcuffs, shackles or both, necessitated a new trial.

Finally, in response to appellant's conclusion that the juror's statement in the instant case regarding his behavior following encountering the appellant in the courthouse parking lot, "...indicates not only that [Potts] was aware that he had done something improper, but more importantly that afterward he tried to conceal it," appellee would respectfully suggest an equally plausible explanation for the juror's conduct. In view of the trial court's previous precautionary instruction prohibiting any contact "...with the attorneys, witnesses or the defendant about any subject..." it would appear completely logical for the juror to attempt to avoid **being seen by the appellant** as opposed to attempting to avoid **being seen observing the appellant.** In this regard, the juror's candid responses to the court's inquiry undoubtedly contributed to the trial court's ultimate determination that a proper basis for a challenge for cause had not been demonstrated (R 209). As this court previously observed in Davis v. State, 461 So.2d at 70:

> Prospective jurors are frequently ambivalent, and their answers, as well as the questions asked of them, are, sometimes, not models of clarity. In such instances...it can be argued that the words on the cold record have several meanings and are subject to several interpretations. It is of great assistance to an appellate court if

> a trial court states on the record the reasons for granting or not granting a challenge for cause, and we encourage trial courts to do so.

In the instant case, it could not be clearer from the record on appeal that the trial court's refusal to disqualify Juror Potts for cause was proper, notwithstanding appellant's insistence that Potts observed him in handcuffs and thereafter became prejudiced as a result of such observation, or alternatively, that Potts became prejudiced as a result of the inquiry itself, irrespective of the actual substance of his observation. See, Initial Brief of Appellant, page 17. No manifest error in the trial court's exercise of discretion in this regard having been demonstrated, appellant's conviction must be affirmed.

POINT TWO

THE TRIAL COURT DID NOT ERR BY ADMITTING THE PRESENTATION OF PENALTY PHASE EVIDENCE REBUTTING THE PRESENTATION OF EVIDENCE REGARDING APPELLANT'S PEACEFUL, NON-VIOLENT CHARACTER.

Appellant presently predicates error upon the trial court's allegedly erroneous admission of testimony rebutting evidence presented by the appellant during the penalty phase of trial regarding his non-violent nature. Although appellee would steadfastly dispute any assertion that the trial court's ruling in this regard was improper, it is nevertheless maintained that appellant was not prejudiced by the subject evidence in any event and that the appellant's sentence of death should accordingly be affirmed.

Section 921.141(1), Florida Statutes (1985), provides in pertinent part:

> (1)SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082....In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received....

In this regard, this court has consistently recognized that

"...any relevant evidence as to a defendant's character...is admissible at sentencing." Stano v. State, 473 So.2d 1282, 1286 (Fla. 1985); See also, Mills v. State, 476 So.2d 172 (Fla. 1985); Herring v. State, 446 So.2d 1049 (Fla. 1984). Indeed, a capital sentencing proceeding contemplates "...a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977).

In the instant case, appellant argues that the admission of a collateral crime alleged to have been committed by him some six months prior to the murder herein was both improper and prejudicial. According to appellant, "...proof of specific acts of misconduct cannot be used to rebut the representation that the defendant is non-violent; rather, such rebuttal must be presented through testimony concerning the defendant's reputation in the community for peace or violence." See, Initial Brief of Appellant, page 25. Inasmuch as the appellee perceives the above-quoted statement to represent a concession on the part of the appellant that the question of appellant's non-violent nature was put into issue by the testimony of the appellant's girlfriend and father regarding their absence of knowledge of prior episodes of violent behavior by the appellant[10], this court's recent

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[10]Appellant's girlfriend testified that she had been in the company of the appellant on a daily basis since their introduction on May 9, 1985 and that appellant was always good to her, never having harmed her in any way (R 1048). Appellant's father also denied any personal knowledge of physical violence by the appellant (R 1056).

holding in Dragovich v. State, 492 So.2d 350 (Fla. 1986), substantially undercuts the appellant's contention that the state should have been confined to the use of reputation evidence to rebut the appellant's introduction of negative testimony[11] regarding his non-violent character. In Dragovich, supra, this court disapproved the state's attempt to prove the **absence** of a statutory mitigating factor through hearsay reputational evidence:

> The state is entitled to rebut defendant's evidence of no prior criminal activity by evidence of criminal activity. However, testimony that defendant had a reputation as an arsonist and was called "The Torch," without any evidence of actual involvement in criminal activity, does not rise to the level of evidence to criminal activity....None of the witnesses offered firsthand knowledge of appellant's participation in these crimes.

Dragovich v. State, 492 So.2d at 354-355.

As a consequence of the foregoing, appellee would respectfully submit that the admission of testimony regarding a specific instance of violent conduct by the appellant to rebut his assertions regarding non-violence was entirely proper in the instant case. See, Squires v. State, 450 So.2d 208 (Fla. 1984). The test for admissibility of evidence of collateral crimes is relevancy. Heiney v. State, 447 So.2d 210 (Fla. 1984). Furthermore, absent an obvious showing of error, an

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[11] See, Huff v. State, 437 So.2d 187 (Fla. 1983).

appellate court should not tamper with a trial judge's determination regarding the admissibility of evidence. Jones v. State, 440 So.2d 570 (Fla. 1983).

Finally, assuming **arguendo** that the trial court's introduction of the subject evidence was improper, appellee would urge this court to apply harmless error analysis in accordance with this court's recent decision in Rogers v. State, 12 F.L.W. 368 (Fla. July 9, 1987). Unlike Robinson v. State, 487 So.2d 1040 (Fla. 1986), and Dougan v. State, 470 So.2d 697 (Fla. 1985), relied upon by the appellant, the subject evidence was not introduced in the instant case in an attempt to **prove** the existence of a statutory aggravating circumstance[12], but rather to **disapprove** the existence of a nonstatutory mitigating circumstance, i.e., that despite appellant's criminal history, appellant had, at least during certain portions of his life, been capable of conforming his behavior in accordance with his essentially non-violent nature. In the instant case, the state had already established the existence of not one, but two, previous convictions for violent felonies by the time the subject testimony was admitted. Appellant's jury subsequently unanimously recommended a sentence of death for appellant's murder of Vronzettie Cox (R 1387). Moreover, the trial court ultimately found four statutory aggravating circumstances and no circumstances in mitigation to be applicable to the appellant (R 1394-1396). See, Points Eight and Nine, infra. In light of these

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[12]§921.141(5), Fla. Stat. (1985).

facts, the instant error, if any, can only fairly be characterized as prosecutorial overkill and should not form the basis for reversal of appellant's sentence herein.

POINT THREE

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ITS DISPOSITION OF A QUESTION PROPOUNDED BY THE JURY DURING THE CONVICTION PHASE OF THE APPELLANT'S TRIAL.

In his initial brief, appellant argues that the trial court's alleged violations of Florida Rules of Criminal Procedure 3.180 and 3.410 require reversal of appellant's conviction "...because the silent record fails to show that notice was provided to the parties prior to the judge issuing a response to a jury inquiry that concerns the testimony presented, and further because the silent record fails to demonstrate an adequate waiver by the defendant of his constitutional right to be present and participate during that critical stage of trial." See, Initial Brief of Appellant, page 31. Initially, it should be observed that the instant claim of error was briefed by counsel for appellant prior to this court's relinquishment of jurisdiction for reconstruction of the record as presently contained in the supplemental record on appeal (R 1528, 1544-1550). As a result of such supplementation, appellee would assert that most, if not all, of the objections to the trial court's disposition of the subject jury question contained in the initial brief of appellant have been resolved against the appellant by virtue of the reconstructed facts settled and approved by the trial court (R 1545-1550).

Briefly, the facts pertinent to disposition of the instant claim of error are as follows:

1. After the jury retired to deliberate, it submitted a written

> request to be informed of the distance from the appellant's home to the location where the victim's car was discovered (R 1546).
> 2. During an off-the-record conference in judge's chambers wherein both counsel for the respective parties were present, the trial court proposed that the jury should be advised that they would have to rely on their own recollection of the evidence presented (R 1546).
> 3. Appellant was not present during the aforementioned conference; however, defense counsel neither requested the appellant's presence nor objected to his absence (R 1546).
> 4. Following defense counsel's waiver of an in-court response to the jury question, the court wrote the aforementioned proposed response on the same piece of paper containing the jury question and sent it back to the jury (R 1547).

Appellant's argument with respect to the instant claim of error commences with a discussion of the mandatory requirements regulating the disposition of jury questions imposed by Florida Rule of Criminal Procedure 3.410. According to the appellant, the trial court should have returned the jury to the courtroom despite the fact that the actual response to the jury's inquiry neither involved the giving of additional instructions nor the court-reported re-presentation of trial testimony. Thus, in appellant's view, the mere failure of the trial court to return the jury to the courtroom for disposition of the jury's inquiry constitutes error.

Although appellee expressly disputes the appellant's contention that the subject question constituted either a request for additional instructions or a request for court-reported re-

presentation of testimonial evidence, assuming **arguendo** that the trial court's failure to conduct the jury into the courtroom in the instant case constitutes error under Florida Rule of Criminal Procedure 3.410, appellee would nevertheless maintain that any such error was harmless at worst. A violation of a Florida Rule of Criminal Procedure is not subject to automatic reversal in the absence of prejudice. Ross v. State, 474 So.2d 1170 (Fla. 1985). In the instant case, the trial court specifically found in its statement of reconstructed facts that both counsel concurred in the trial court's response to the jury question; moreover, defense counsel subsequently waived an in-court response to the inquiry (R 1547). In this regard, the facts of the instant case are analogous to those presented in Roberts v. State, 12 F.L.W. 325 (Fla. July 2, 1987), wherein this court approved defense counsel's waiver of the trial judge's mandatory[13] presence during a jury view. In light of the foregoing, appellee would urge this court to decline to predicate error upon an occurrence which lays the foundation for further claims of error to which the appellant, by his waiver of an in-court response to the jury question, undoubtedly contributed. This court has previously held that a defendant may not take

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[13] §918.05, Fla. Stat. (1985), provides in pertinent part: View by jury.--When a court determines that it is proper for the jury to view the place where the offense may have been committed or other material events may have occurred, it may order the jury to be conducted in a body to the place, in custody of a proper officer....The judge and defendant, unless the defendant absents himself without permission of court, **shall** be present, and the prosecuting attorney and defense counsel may be present at the view.

advantage on appeal of a situation in which he alone created below. See, McCrae v. State, 395 So.2d 1145 (Fla. 1980). "A party may not invite error and then be heard to complain of that error on appeal." Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983).

From his premise that the jury should have been summoned for the trial court's response to the jury's inquiry in the instant case, appellant next concludes that his own presence was required under Florida Rule of Criminal Procedure 3.180(a)(5), which provides that a defendant shall be present "[a]t all proceedings before the court when the jury is present." According to the appellant, "[a] critical stage of trial exists when the jury issues a question and receives instructions concerning the evidence and/or the law by which a defendant is to be found guilty or acquitted." See, Initial Brief of Appellant, page 28. To the extent that appellee perceives that the trial court's response in the instant case to be more appropriately characterized as a refusal to respond to the jury's inquiry, appellee does not dispute that appellant's presence, unless validly waived, **would** have been required had it become necessary to conduct the jury into the courtroom for further proceedings. Fla. R. Crim. P. 3.180(a)(5). However, a defendant is **not** required by Florida Rule of Criminal Procedure 3.180 to be present during an off-the-record conference concerning a response to a jury inquiry conducted in judge's chambers in the absence of a jury.

In Roberts v. State, supra, this court rejected the argument

that the defendant's absence from a conference, wherein a request for a jury view made during conviction-phase jury deliberation was discussed by the trial court judge and counsel for the respective parties, constituted reversible error. In reaching its holding, this court observed that "...both the prosecuting attorney and defense counsel were given notice of the request and both were given an opportunity to argue as to whether the request should or should not be granted." Roberts v. State, 12 F.L.W. at 328.

In the instant case, it has never been suggested by appellant that the trial court's response to the jury inquiry was itself improper (R 1547). This court must therefore determine whether, by the manner in which an otherwise correct response of the jury's inquiry, was handled, "...fundamental fairness has been thwarted." Garcia v. State, 492 So.2d 360, 364 (Fla. 1986). In this regard, it is readily apparent that the appellant's presence during counsel's concurrence in the propriety of the trial court's response to the jury inquiry would have made no material contribution to that inevitable determination.[14] As a consequence, any alleged errors should be deemed harmless in accordance with similar rulings of this court in Roberts v. State, supra; Garcia v. State, supra; Stano v.

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[14]At the most, appellant might have, for whatever reason, opposed the waiver of an in-court response to the jury question, thereby necessitating an on-the-record courtroom proceeding. Nevertheless, it is once again the appellee's contention that the manner by which the jury received the trial court's response would have made no difference to the ultimate outcome of the case.

State, 473 So.2d 1282 (Fla. 1985); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Francis v. State, 413 So.2d 1175 (Fla. 1982); and Lowman v. State, 80 Fla. 18, 85 So.166 (1920). As this court so eloquently reasoned in Lowman v. State, 85 So. at 170, to find reversible error with respect to this issue would, in appellee's view:

> ...put vain technicalities above the substantial requirements of justice and security to the defendant, and ... impair the integrity and power of the courts in administering the law and securing to the defendant all of his rights in the premises.

Because any reasonable possibility that appellant was prejudiced as a result of the alleged errors has not been demonstrated, appellant's conviction should be affirmed. Garcia v. State, 492 So.2d at 364.

POINT FOUR

APPELLANT'S SENTENCE OF DEATH WAS NOT UNCONSTITUTIONALLY IMPOSED AS A RESULT OF THE FAILURE OF APPELLANT'S JURY TO UNANIMOUSLY DETERMINE THE APPLICABILITY OF AT LEAST ONE STATUTORY AGGRAVATING CIRCUMSTANCE TO APPELLANT'S CRIME; MOREOVER, THE INSTANT CLAIM OF ERROR WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

Prior to addressing the merits of the instant claim of error, appellee notes that the argument presently advanced in the initial brief of appellant contains not a single citation to the record on appeal. Although appellant presently maintains that a sentence of death was unconstitutionally imposed upon him as a result of the failure of appellant's jury to unanimously determine the applicability of at least a single statutory aggravating circumstance to appellant's crime, review of the record on appeal reveals that this issue was never raised below. This court has previously observed that, unless the constitutionality of a statute as applied to a particular set of facts is first raised at the trial court level, such an asserted claim of error has not properly been preserved for appellate review. Trushin v. State, 425 So.2d 1126 (Fla. 1982). As a consequence, appellee would urge this court to decline to review the instant claim presently presented for the first time on appeal.

Assuming **arguendo** that appellate review of the instant claim has not been waived by virtue of the appellant's election to raise same for the first time upon direct review of his conviction for first-degree murder and sentence of death,

appellee would point out that a similar issue has recently been presented for this court's consideration in the case of Remeta v. State, Florida Supreme Court Case No. 69,040.[15] As in Remeta, appellant presently maintains that "...the Florida death penalty statutes necessarily and unequivocally establish a constitutional right to **jury determination** of the presence of statutory aggravating circumstances (emphasis supplied)." See, Initial Brief of Appellant, page 33. According to appellant's theory, since the applicability of at least one statutory aggravating circumstance to the appellant's crime must be proved beyond a reasonable doubt before a sentence of death may be imposed, statutory aggravating circumstances are hence elements of capital offenses, requiring unanimous jury determination of the existence of one such element[16] in order to afford due process to the criminal defendant charged with a capital felony. For the reasons expressed below, appellee must respectfully disagree with appellant's novel interpretation of Florida capital sentencing law.

Appellant incorrectly asserts that a defendant convicted of

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[15]Oral argument in the case is presently scheduled to be heard on September 2, 1987.

[16]It is unclear from appellant's argument whether the unanimous jury determination regarding the existence of a statutory aggravating circumstance must also be unanimous with respect to the applicability of a particular circumstance. Nevertheless, for purposes of the instant argument, appellee will assume that appellant's position requires the jury's unanimous agreement that at least one, although not necessarily the same, statutory aggravating circumstance is applicable to a capital felon's crime.

first-degree murder in Florida "...cannot receive the death penalty because he has not been convicted of a crime containing all the statutory elements defining an offense for which the death penalty may be imposed." See, Initial Brief of Appellant, page 33. While the elements required to be proved to support a conviction for first-degree murder remain the same, separate sentencing criteria define those instances where the imposition of a sentence of death is appropriate. However, section 921.141, Florida Statutes (1985), does not alter the maximum penalty for the offense of first-degree murder. In this regard, "[t]his court has long held that a capital crime is one in which the death penalty is **possible** (emphasis supplied)." Rusaw v. State, 451 So.2d 469, 470 (Fla. 1984). Every conviction for first-degree murder in Florida involves a **potential** sentence of death. See, State v. Bloom, 492 So.2d 2 (Fla. 1986). As this court observed in Lightbourne v. State, 438 So.2d 380 (Fla. 1983), the aggravating circumstances ultimately required to support the imposition of a sentence of death need not be alleged in an indictment charging a defendant with a capital felony in order to confer jurisdiction on the trial court to subsequently impose a sentence of death. This result obtains because, in Florida, it is the judge and not the jury who makes the ultimate determination concerning the appropriate sentence to be imposed in a given case.

Jury unanimity in recommending the death penalty is not required under Florida's capital sentencing scheme. James v. State, 453 So.2d 786 (Fla. 1984). Moreover, a jury

recommendation, be it for death or for life imprisonment, is not binding on the trial court judge, Lusk v. State, 446 So.2d 1038 (Fla. 1984), with whom the ultimate responsibility for determining the appropriate sentence is reposed by statute. Thomas v. State, 456 So.2d 454 (Fla. 1984); Thompson v. State, 456 So.2d 444 (Fla. 1984); Clark v. State, 443 So.2d 973 (Fla. 1983); Engle v. State, 438 So.2d 803 (Fla. 1983); Hoy v. State, 353 So.2d 826 (Fla. 1977); §921.141(3), Fla. Stat. (1985).

This court has previously held that a defendant possesses no constitutional right to be sentenced by a jury. Brown v. State, 497 So.2d 2 (Fla. 1986) [citing Spaziano v. Florida, ____ U.S. ____, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)]. "Appellant's argument that due process requires that a jury's recommendation for life or death be accompanied by reasons in writing is without merit. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)." Brown v. State, 473 So.2d 1260, 1271 (Fla. 1985). Although, under Florida's bifurcated system, the trial court is assisted and guided by the jury's recommendation in making its ultimate sentencing determination, the trial court's ultimate rejection of a jury's recommendation for life imprisonment does not subject a convicted capital defendant to double jeopardy. Brown v. State, 473 So.2d 1260 (Fla. 1985); Cannady v. State, 427 So.2d 723 (Fla. 1983).

It is respectfully submitted that by its unanimous recommendation of the appellant's death for the murder of Vronzettie Cox (R 1387), the jury was in unanimous agreement that at least one statutory aggravating circumstance which was not

outweighed by circumstances in mitigation was applicable to the appellant's crime. The trial court subsequently found four aggravating circumstances to have been proven beyond and to the exclusion of a reasonable doubt (R 1394-1396). Consequently, if any error whatsoever can be gleaned from the appellant's unpreserved claim concerning the unconstitutional application of Florida's capital sentencing scheme to his case, appellee would assert that any such error was harmless and should not entitle appellant to the requested resentencing. §§921.141(3) and 924.33, Fla. Stat. (1985). Appellant's sentence of death should therefore be affirmed.

POINT FIVE

NO REVERSIBLE ERROR ARISING OUT OF THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE MAXIMUM AND MINIMUM PENALTIES FOR THE OFFENSE OF FIRST-DEGREE MURDER HAS BEEN DEMONSTRATED.

No reversible error arising out of the trial court's refusal to instruct appellant's jury on the maximum and minimum penalties for the offense of first-degree murder prior to deliberation in the conviction phase has been demonstrated herein (R 919). This court has previously addressed the precise issue presently raised by appellant in Welty v. State, 402 So.2d 1159 (Fla. 1981), Walsh v. State, 418 So.2d 1000 (Fla. 1982), and McCampbell v. State, 421 So.2d 1074 (Fla. 1982). In all three cases, this court declined to predicate reversible error upon the trial court's failure to formally comply with the dictates of Tascano v. State, 393 So.2d 540 (Fla. 1981) and Florida Rule of Criminal Procedure 3.390(a)[17] under circumstances where the jury had otherwise been advised of the alternative penalties.

In Welty v. State, 402 So.2d at 1162, after noting that the jury was on several occasions during the defendant's trial for first-degree murder advised of the maximum and minimum penalties, this court reasoned that "[t]he trial court's failure to again

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[17]Although Florida Rule of Criminal Procedure 3.390(a) was amended subsequent to the establishment of the decisional authority relied upon by appellee with respect to this issue, such amendment does not affect the instant argument, since appellant would have been ostensibly entitled to the subject jury instruction under either version of the rule. See, Kocsis v. State, 467 So.2d 384 (Fla. 1985).

advise the jury what it had already been told was not reversible error." The Welty rationale was later extended in Walsh v. State, 418 So.2d at 1003, wherein this court observed the following:

> More than in any other criminal proceeding, the jury in a capital case knows the minimum and maximum penalties involved. At voir dire, the court or counsel inquires as to each juror's attitude toward the death penalty and each juror's ability to apply law which may result in a death sentence. Additionally, in a death case, the trial and sentencing phases are bifurcated; each juror participates in the sentencing process and must affirmatively recommend whether life or death is appropriate. Because the jury in a death case clearly knows the maximum and minimum penalties, the reasoning behind the Tascano decision is not present. Welty v. State, 402 So.2d 1159 (Fla. 1981).

Still later in McCampbell v. State, 421 So.2d at 1074, this court noted that the spirit of the Tascano rule had been satisfied in an instance where both counsel for the defense and the state had inquired of the prospective jurors during voir dire concerning their abilities to impose either a sentence of death or one of life imprisonment.

In the instant case, prior to the commencement of voir dire, the trial court instructed the prospective jurors concerning the guilt and penalty phases of appellant's trial for first-degree murder and the procedures pertinent to each phase (R 14-18). At that time, the trial court instructed the venire that there were only two possible penalties in the appellant's case, such

alternatives being life imprisonment without parole for twenty-five years and death (R 17-18). These alternatives were later reiterated by the prosecutor during preliminary statements to the prospective jurors (R 34). Appellant's jury was clearly apprised by the trial court concerning the maximum and minimum penalties for a conviction of first-degree murder in the instant case. As a consequence, no reversible error has been demonstrated. Accordingly, appellant's conviction must be affirmed.

POINT SIX

THE TRIAL COURT DID NOT ERR BY PERMITTING A STATE'S WITNESS TO REFRESH HER MEMORY WHILE TESTIFYING CONCERNING PRIOR INCONSISTENT STATEMENTS MADE BY THE APPELLANT.

In response to the appellant's testimony under cross-examination during the defense case-in-chief regarding three separate statements made to Detective Jane Phifer, the state called Phifer to rebut the appellant's general denial that certain statements had been made (R 857-868). After making an in-court identification of the appellant and explaining the circumstances in which the witness had come into contact with him, Phifer indicated that she had interviewed the appellant on December 10, 12, and 17, 1985 (R 858-859). On all occasions, the appellant related information which was inconsistent with previous accounts concerning events immediately preceding the victim's death (R 861).

In response to the state's inquiry regarding the final version of events related by the appellant on December 17, 1985, Phifer recalled that Brooksville Police Department Detective Chapman had been present during the interview (R 861). According to the witness, during this final interview the appellant claimed to have actually witnessed the victim's death (R 863). Following an objection by defense counsel concerning the proper scope of rebuttal, such objection being overruled by the trial court, the witness continued to relate the substance of the appellant's December 17, 1985 statement (R 863-865).

After testimony spanning some nine pages of the record on

appeal, the subject objection concerning the witness "...reading of some notes that she's made" was interposed (R 865). The prosecutor responded that the witness was using her notes to refresh her memory and that he did not "...see any problem with that," adopting a position with which the trial court ultimately concurred (R 865-866).

Of particular interest and arguably dispositive of the instant claim of error is the appellant's own characterization of the context in which the alleged error arose. According to appellant, "[w]hen Phifer began reading the notes..." the subject objection was interposed[18]. See, Initial Brief of Appellant, page 39.

In appellee's view, such a course of events documented by the record on appeal affirmatively demonstrates that witness Phifer was merely utilizing her notes to refresh her memory while testifying as authorized under section 90.613, Florida Statutes (1985).[19] Significantly, Phifer was being asked to recall verbatim statements made by the appellant, his victim, and an

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[18]Unless appellant is prepared to justify a failure to contemporaneously object to the asserted error herein, appellant should be bound by his own argument on appeal and the logical inferences to be drawn therefrom, i.e. that a timely objection was interposed as soon as the grounds therefor (the witness purportedly reading from her notes) arose.

[19]Parenthetically, the record also indicates that the witness' notes, which were made contemporaneously with the appellant's statements, had previously been made available to defense counsel, thereby permitting adequate opportunity for cross-examination of the witness as to the report's contents and the circumstances under which it was made (R 862, 865-866).

unidentified third party (the phantom murderer), some eight months after their occurrence. As a consequence, it is no small wonder that the witness required for stimulation of her otherwise independent recollection of events the notes made at the time of the interview. As this court observed in Middleton v. State, 426 So.2d 548 (Fla. 1982) [quoting Volusia County Bank v. Bigelow, 45 Fla. 638, 646; 33 So. 704, 706 (1903)]:

> There is a clear and obvious distinction between the use of a memorandum for the purpose of stimulating the memory and its use as a basis for testimony regarding transactions as to which there is no independent recollection. In the former case it is **immaterial what constitutes the spur to memory**, as the testimony, when given, rests solely upon the independent recollection of the witness (emphasis supplied).

On the basis of the foregoing argument, appellee would urge this court to decline to glean any error whatsoever arising out of the rebuttal testimony of witness Phifer in the instant case. However, in the event that any error has been demonstrated, this court should consider same harmless due to the fact that, contrary to the assertion of the appellant, testimony of this witness was **not** critical to appellant's ultimate conviction. See, Initial Brief of Appellant, page 42. Two state's witnesses, Ralph Decker and Randy Cramer, also testified regarding inconsistent statements made to them by the appellant (R 386-389, 427-435). Finally, Robert Worgess testified concerning the appellant's jailhouse confession wherein the appellant admitted that he had indeed killed the victim after

first stabbing her (R 708-709). Inasmuch as there is no reasonable possibility that any alleged error with respect to this issue affected the verdict below, appellant's conviction should be affirmed by this court. See, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT SEVEN

APPELLANT'S CONVICTION FOR FIRST-DEGREE MURDER IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE BASED UPON BOTH THEORIES OF PREMEDITATION AND FELONY MURDER, ALTHOUGH IT IS CLEAR FROM THE OFFENSE CHARGED, AS WELL AS THE STATE'S PRESENTATION OF ITS CASE AT TRIAL, THAT THE JURY CONVICTED THE APPELLANT BASED UPON THE THEORY OF PREMEDITATED FIRST-DEGREE MURDER.

Appellant maintains that evidence supporting his first-degree murder conviction is insufficient under either a theory of premeditation or felony murder. According to appellant, even if this court determines that the evidence supports a first-degree murder conviction under a single theory, "...the conviction must be reversed because it cannot be determined beyond a reasonable doubt that the jury did not base its verdict on the erroneous theory." See, Initial Brief of Appellant, page 44.

Initially, it should be noted that appellee disputes appellant's contention that the basis for the jury's conviction in the instant case cannot reasonably be ascertained from the record on appeal, a general jury verdict of guilt for first-degree murder notwithstanding (R 1383). Appellant was originally charged by indictment with the first-degree murder of Vronzettie Cox by **premeditated design** (R 1133). Moreover, appellee would contend that the state's presentation of its case from indictment through conviction phase closing argument unwaveringly sought to prove the appellant's commission of premeditated first-degree murder. During the state's closing argument, the prosecutor stated the following:

> We're here in this courtroom arguing this case because Paul Hildwin decided he would execute Vronzettie Cox last September. He is the one that described to you the method of that death when he told Investigator Phifer how it happened. He was injecting as much truth as possible into that statement. He just went a little too far and described that tattoo on his back.
>
> This lady, after stopping to offer him help in broad daylight, was taken into that pine forest, and even though she begged for mercy, even though she screamed for help, this shirt was slowly wrapped around her throat and tightened and tightened until she was dead, and she was relieved of all of her property. She was placed in the trunk of that car, that car that got stuck on the side of the road, and it took her, the doctor said, a considerable amount of minutes, or words to that effect, to die, and it was done with enough force to break the hyoid (sic) bone in three places while she begged for help. **Premeditated first degree cold-blooded murder** (emphasis supplied).

(R 987-988). As a consequence of the foregoing, Franklin v. State, 403 So.2d 975 (Fla. 1981), relied upon by appellant, is distinguishable in appellee's view because it cannot **reasonably** be stated that the state was seeking a conviction of first-degree murder on the dual theories of premeditation and felony murder. Moreover, so long as this court's review of the record on appeal reveals the existence of substantial, competent evidence to support appellant's conviction **as charged**, appellant's conviction should accordingly be affirmed. See, Frazier v. State, 107 So.2d 16 (Fla. 1958). See also, Bates v. States, 465 So.2d 490 (Fla. 1985); Rose v. State, 425 So.2d 521 (Fla. 1982).

With respect to the issue concerning evidentiary sufficiency of proof of premeditation in the instant case, appellee would first draw this court's attention to the appellant's jailhouse confession to Robert Worgess wherein appellant admitted that he had in fact killed "her" after stabbing his victim first (R 708-709). The credibility of such a confession is enhanced in appellee's view by the medical examiner's observation of a superficial laceration of unknown origin on the victim's neck under the ligature which was ultimately determined to be the instrument of death (R 296-297).

In addition, this court has repeatedly held that the element of premeditation may be established by circumstantial evidence. Brown v. State, 473 So.2d 1260 (Fla. 1985); Duest v. State, 462 So.2d 446 (Fla. 1985); Heiney v. State, 447 So.2d 210 (Fla. 1984); Oats v. State, 446 So.2d 90 (Fla. 1984); Preston v. State, 444 So.2d 939 (Fla. 1984). Furthermore, "[p]roof of the element of premeditation does not require that thought or reflection of any specific minimum duration be shown (citation omitted)." Middleton v. State, 426 So.2d 548 (Fla. 1982). Such intent may be formed a moment before the act, so long as "...a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act" exists. Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986).

In this regard, appellant concedes that the manner by which the victim met her death in the instant case is strongly suggestive of her murderer's intent. See, Initial Brief of Appellant, page 47. A chosen **modus operandi** of strangulation

affords the strangler sufficient opportunity to renounce his evil intent before the damage is irrevocable. See, Point Eight, infra. However, at trial, appellant's sole theory of defense was that the crime charged (premeditated murder) was committed by someone other than himself, namely Haverty. As a consequence, because appellant did not present any **reasonable** hypothesis of innocence at trial, the jury was properly entitled to conclude that the acts of the victim's murderer were premeditated. Huff v. State, 495 So.2d 145 (Fla. 1986); Williams v. State, 437 So.2d 133 (Fla. 1983).

Finally, with respect to the appellant's contention that proof of a contemporaneous robbery was insufficient in the instant case, appellee would refer this court to its discussion of the ample circumstantial evidence regarding same contained in Point Nine, infra. Indeed, it is extremely likely that the robbery was the catalyst for the formation of the appellant's intent to murder Vronzettie Cox. In specific response to appellant's contention that the absence of defensive wounds such as bruises on the victim's body supports his theory that "...the property was taken solely as an afterthought", appellee would merely point out that the marked state of decomposition of the corpse entailing an absence of skin over much of the victim's body precludes the drawing of such an inference in favor of the appellant (R 295). See, Initial Brief of Appellant, page 45.

In summary, appellee respectfully maintains that the evidence adduced against the appellant at trial is legally sufficient to support his conviction for first-degree murder

under either a theory of premeditation or one involving murder during the commission of a robbery. Nevertheless, because the evidence supports appellant's conviction **as charged**, appellant has failed to demonstrate that he is entitled to a new trial. As a consequence, appellant's conviction for first-degree murder must be affirmed.

POINT EIGHT

THE TRIAL COURT DID NOT ERR BY FINDING THAT THE VICTIM'S MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Appellant maintains that the trial court erred by finding the victim's murder to have been especially heinous, atrocious, or cruel. See, Initial Brief of Appellant, page 49. Following thorough review of the trial court's findings of fact with regard to this statutory aggravating circumstance[20] (R 1395), appellee must respectfully disagree with the appellant's assertion that the murder of Vronzettie Cox was not "...accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Tedder v. State, 322 So.2d 908, 910 n.3 (Fla. 1975) [quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)]; See also, Blanco v. State, 450 So.2d 520 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983).

In determining the applicability of the "heinous, atrocious, or cruel" aggravating circumstance to the appellant's crime, the entire set of circumstances surrounding the victim's murder may properly be considered. Magill v. State, 428 So.2d 649 (Fla. 1983). Prior to addressing the appellant's specific objections to the trial court's findings of fact below, appellee notes that this court has repeatedly upheld the existence of the subject aggravating circumstance in cases where the murderer's **modus**

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[20] §921.141(5)(h), Fla. Stat. (1985).

operandi involves strangulation of the victim. Tompkins v. State, 502 So.2d 415 (Fla. 1986); Deaton v. State, 480 So.2d 1279 (Fla. 1985); Johnson v. State, 465 So.2d 499 (Fla. 1985); Stano v. State, 460 So.2d 890 (Fla. 1984); Doyle v. State, 460 So.2d 353 (Fla. 1984); Lemon v. State, 456 So.2d 885 (Fla. 1984); Delap v. State, 440 So.2d 1242 (Fla. 1983); Adams v. State, 412 So.2d 850 (Fla. 1982), Alvord v. State, 322 So.2d 533 (Fla. 1975).

Appellant's primary attack upon the trial court's findings involves the expert medical testimony of Dr. Techman concerning circumstances surrounding the victim's death by strangulation. According to the appellant, Dr. Techman did not express any opinion concerning the length of time between the appellant's application of the ligature to his victim's neck and the victim's eventual loss of consciousness and ultimate death. See, Initial Brief of Appellant, page 50. Thus, the trial court's conclusions that "...the victim took several minutes to loose (sic) consciousness..." and "...the victim would have been conscious and aware of the fact that she was slowly dying at the hands of the defendant" represent nothing more than "sheer speculation" in appellant's view (R 1395). See, Initial Brief of Appellant, page 50.

Contrary to the assertions of the appellant, the state's medical expert **did** express an opinion concerning the horrendous circumstances surrounding the victim's death. Due to the width of the ligature utilized by the appellant to effectuate the strangulation of his victim, Dr. Techman surmised that the victim's loss of consciousness and eventual death would have

required "a fair range of minutes" (R 297). Such an opinion was based upon the expert's knowledge of the relative ineffectiveness of the instrumentality of death employed in the instant case as compared to a narrower ligature such as a wire or belt (R 297). According to Dr. Techman's theory, more pressure would have been required to be exerted over the wider area being compressed in order to accomplish the appellant's evil intent (R 297).

While appellee acknowledges that the precise duration of the victim's suffering in the final moments prior to her death was not established below and indeed may never be revealed in the wake of the appellant's steadfast denial of culpability for his victim's demise, this court has previously observed that a proper determination of the applicability of the "heinous, atrocious, or cruel" aggravating circumstance focuses upon "...the act itself that brought about the [victim's] death....Whether death is immediate or whether the victim lingers and suffers is pure fortuity. The intent and method employed by the wrongdoers is what needs to be examined." Mills v. State, 476 So.2d 172, 178 (Fla. 1985). Such analysis is consistent with this court's prior holding in Adams v. State, 412 So.2 at 857, that "[t]he fear and emotional strain preceding a victim's **almost instantaneous death** [by strangulation] may be considered as contributing to the heinous nature of the capital felony. Knight v. State, 338 So.2d 201 (Fla. 1976) (emphasis supplied)."

Moreover, the subject aggravating circumstance has been deemed by this court to have been properly found in those instances where the murder victims were "...acutely aware of

their impending deaths." Cooper v. State, 492 So.2d 1059, 1062 (Fla. 1986). As this court observed in Phillips v. State, 476 So.2d 194, 196-197 (Fla. 1985), "[t]he mindset or mental anguish of the victim is an important factor in determining whether [the "heinous, atrocious, or cruel"] aggravating circumstance applies." Furthermore, in an instance where the victim of strangulation is initially conscious, knowledge of impending death, in addition to extreme anxiety, fear, and pain, may properly be inferred. Tompkins v. State, 502 So.2d at 421; Johnson v. State, 465 So.2d at 507.

In the instant case, it was established by the appellant's own admission that the victim was acutely aware of her impending death as she repeatedly screamed for help to no avail while being choked by an unidentified male (R 784-785, 788). Appellant contends that such a statement does not adequately prove the existence of the subject aggravating circumstance in view of a well-established history of inconsistent statements with respect to his knowledge of and culpability for the victim's murder. See, Initial Brief of Appellant, pages 50-51. However, "[t]he fact that appellant gave several inconsistent statements to law enforcement authorities before trial does not preclude the use of those and other statements as evidence of aggravating circumstances **where they bear indicia of reliability** (emphasis supplied)." Johnson v. State, 465 So.2d at 506. In the instant case, appellant also indicated to Investigator Phifer that the victim's murderer had a tattoo of a cross on his back (R 863-867). At trial, it was subsequently revealed and admitted by the

appellant that he had a cross-shaped tattoo on his back (R 788-791).

Although the state admittedly bears the burden of proving the applicability of an aggravating circumstance beyond a reasonable doubt, Clark v. State, 443 So.2d 973 (Fla. 1983), such proof may be established by circumstantial evidence. Eutzy v. State, 458 So.2d 755 (Fla. 1984). Although appellant concedes the reasonableness of the negative inferences to be drawn from the sordid circumstances surrounding the victim's murder, appellant now asks this court to engage in the gratuitous speculation that the sexual contact between the victim and her murderer was consensual "...at least up to the point where the ligature was applied." See, Initial Brief of Appellant, page 50. Such a hypothesis of innocence flies in the face of appellant's own theory of defense at trial wherein any sexual contact between himself and the victim was steadfastly denied and the victim's boyfriend, Haverty, was expressly implicated as the victim's murderer.

According to testimony adduced at trial, the crime scene of the murder was so isolated that an individual would have to be completely familiar with the area in order to avoid becoming lost (R 578). The area was so densely wooded that a four-wheel drive vehicle utilized during the search following the discovery of the victim's body had difficulty traversing the area (R 578). Such a site is more conducive to life-taking than to lovemaking in appellee's view.

Moreover, a damaged brassiere found in the victim's purse

concealed in a hole covered by leaves strongly suggests that the recent sexual contact between the victim and a non-secretor such as the appellant was far from consensual. Had the victim been clothed at the time of her discovery, appellant's idle speculation that the victim might not have been wearing the brassiere at the time it became damaged would appear more plausible. However, the only logical conclusion to be drawn from the evidence adduced below is that the victim spent the last few moments of her life as the unwilling sex partner of her murderer.

After consummating the act, the victim's shorts and underpants were deposited with the victim's other dirty laundry. The brassiere was hidden in the victim's purse which was then concealed in a hole. The victim's t-shirt had, of course, already been put to innovative use by the time the victim's otherwise nude body was placed in the trunk of her own vehicle.

Finally, assuming **arguendo** that the subject aggravating circumstance was improperly found by the trial court in the instant case, it should be observed that the application of sections 921.141(5)(a) and 921.141(5)(b) to appellant's crime are not presently contested by the appellant. Moreover, this court has repeatedly held that a finding of both of the aforementioned circumstances does not constitute an improper doubling of statutory aggravators. Mills v. State, 476 So.2d at 178; Bundy v. State, 471 So.2d 9 (Fla. 1985); Bundy v. State, 455 So.2d 330 (Fla. 1984); Lusk v. State, 446 So.2d 1038 (Fla 1984); Agan v. State, 445 So.2d 326 (Fla. 1983); Waterhouse v. State, 429 So.2d

301 (Fla. 1983); Peek v. State, 395 So.2d 492 (Fla. 1980). Where the existence of at least one valid aggravating circumstance is not outweighed by the evidence presented in mitigation, death is **presumed** to be the proper sentence. White v. State, 446 So.2d 1031 (Fla. 1984); White v. State, 403 So.2d 331 (Fla. 1981). As a consequence of the foregoing, appellant's sentence of death should be affirmed.

POINT NINE

THE TRIAL COURT DID NOT ERR BY FINDING THAT THE VICTIM'S MURDER WAS MOTIVATED BY THE APPELLANT'S DESIRE FOR PECUNIARY GAIN.

Appellant maintains that the trial court erred by finding the victim's murder to have been motivated by a desire for pecuniary gain (R 1395). In support of such a claim, appellant surmises that it was "...unreasonable to conclude from the evidence that Cox was killed only or primarily to take her radio, ring, and a check that required forging." See, Initial Brief of Appellant, page 53. To whatever extent the instant argument can fairly be characterized as a commentary on the part of the appellant's counsel concerning the utter incredulousness of the murderer's appraisal that the victim's life was worth less than the value of her radio, ring, and a forged check in the amount of seventy-five dollars, appellee is inclined to agree. However, the trial court's finding in this regard must be reviewed within the context of the circumstances unique to the instant case.

Only three days prior to the victim's murder, appellant had been informed by his parole officer that his parole was going to be revoked for failure to make satisfactory progress in the payment of his cost of supervision (R 833-834). Although at trial appellant denied having been under any compulsion to obtain money to rectify the delinquencies, stating that he had just obtained work and did not need the money (R 792-793), such a denial of motive was clearly refuted by the uncontroverted evidence that appellant was penniless immediately preceding the victim's murder, having had to resort to collecting soda bottles

along the roadside for gas money after being stranded when his car ran out of gas on the way home from the drive-in just hours prior to the victim's disappearance (R 511-512, 521-522). Within a matter of a few hours after the victim's disappearance, appellant was in possession of sufficient cash to purchase sodas and enough gas to start his vehicle (R 513-514, 523-524, 530, 532-536). Later that same day, the appellant was observed by his girlfriend to be in possession of a ring and a radio belonging to the deceased (R 515-516). Appellant attempted to sell the radio to an acquaintance prior to cashing the victim's forged check in the victim's car (R 530-531, 406-407, 411, 422-425).

In light of the appellant's desperate need to obtain quick cash by virtue of his own freedom being in jeopardy, it is completely plausible that appellant could have rationalized the cost-effectiveness of the victim's murder. Although the pearl ring and radio may have been taken as an afterthought, the appellant's attempt to pawn the victim's radio reinforces the trial court's findings concerning the circumstances under which the stolen items came to be in the appellant's possession in the first instance. See, Parker v. State, 458 So.2d 750 (Fla. 1984).

The subject aggravating circumstance has previously been upheld by this court under circumstances involving less compelling evidence of the motivation for pecuniary gain than those presently involved herein. In Lambrix v. State, 494 So.2d 1143 (Fla. 1986), this court upheld the application of the subject aggravating circumstance to the murder of one of the defendant's victims where, following the victim's murder, the

defendant stole the victim's car, using it to dispose of the murder weapon.

In the instant case, although the trial court did not expressly find as an aggravating circumstance that the victim's murder was committed while the appellant was engaged in the commission of a robbery, in likely contemplation of the potential merger of the two statutory aggravators in accordance with this court's previous holding in Provence v. State, 337 So.2d 783 (Fla. 1976), and progeny, the absence of such a perceived futile gesture on the part of the trial court should not be interpreted to establish that there was insufficient proof of the contemporaneous occurrence of the appellant's robbery of his murder victim below. Testimony adduced at trial established that the victim hardly ever removed from her finger the cherished custom-made ring which was subsequently found in the appellant's possession (R 313-314). Moreover, a damaged brassiere found in the victim's purse which was concealed in a hole covered by leaves, as well as a piece of door molding identified as having come from the victim's car, strongly suggest appellant's forceful acquisition of all of the profits of his victim's murder (R 472-473, 547, 555, 652-662).

Finally, assuming **arguendo** that the subject aggravating circumstance was improperly found by the trial court in the instant case, it should be observed that the application of section 921.141(5)(a) and 921.141(5)(b) to appellant's crime is not presently contested by the appellant. As a consequence, in accordance with the harmless error analysis advanced in Point

Eight, infra, appellant's sentence of death should be affirmed.

POINT TEN

THE TRIAL COURT'S JURY INSTRUCTION DURING THE PENALTY PHASE WHICH SUBSTANTIALLY FOLLOWED THE STANDARD JURY INSTRUCTION CONCERNING THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES DOES NOT CONSTITUTE REVERSIBLE ERROR IN THE ABSENCE OF OBJECTION, ESPECIALLY WHERE THERE IS NO RECORD EVIDENCE THAT THE JURY WAS MISLED BY SUCH AN INSTRUCTION.

Appellant's claim of error with respect to the instant issue commences with an excerpt from the record on appeal which appellant maintains was presented to the jury prior to penalty phase deliberations. According to appellant, with respect to the matter of weighing of aggravating and mitigating circumstances, the trial court instructed the jury as follows:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. The mitigating circumstance you may consider, if established by the evidence, is: any aspect of the defendant's character or record, and any other circumstance of the offense. (R 1384-1385).

See Initial Brief of Appellant, page 55. Appellant presently maintains that such an instruction "...is reasonably viewed as limiting the jury to only one mitigating circumstance..." thereby

misleading the jury and tainting the jury's ultimate recommendation of death. Id.

Parenthetically, prior to addressing the merits of appellant's claim, it should be observed that the record citation contained in appellant's brief refers to the **typewritten** instructions intended for presentation to the jury during appellant's penalty proceeding (R 1384-1385). In contrast, the trial court's **oral** instructions provided in pertinent part: "The mitigating **circumstances** you may consider if established by the evidence is any aspect of the defendant's character or record and any other **circumstances** of the offense (emphasis supplied)" (R 1122).[21]

Significantly, the subject instruction was presented to the jury without objection below as to its contents either as written or as read. This court has previously held that a failure to object to jury instructions as given precludes appellate review in the absence of fundamental error. Squires v. State, 450 So.2d 208 (Fla. 1984). "[O]bjections to instructions and the legal grounds therefor must be specifically stated before the jury

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[21]Such an instruction substantially follows the standard jury instruction which provides in pertinent part: "**Among** the mitigating circumstances you may consider, if established by the evidence, **are**...." Florida Standard Jury Instructions in Criminal Cases, page 80 (1981). The only deviations from the standard instruction in the oral instruction given below are the deletion of the word "among" and the absence of subject-verb agreement following "mitigating circumstances" (R 1122). Similarly, the typewritten instruction relied upon by appellant to support his claim of error is identical to the oral instruction with the exception of the subject-verb agreement following "mitigating circumstance" (R 1384-1385).

retires in order for the objection to be reviewable on appeal ...." Craig v. State, 12 F.L.W. 269, 272 (Fla. May 28, 1987); Fla. R. Crim. P. 3.390(d). As a consequence, to whatever extent error with respect to this issue may be gleaned from the arguments presently made for the first time on appeal, in the absence of demonstrated fundamental error, appellant is entitled to no relief herein.

With respect to the merits of the instant claim, appellee maintains that both the trial court's oral and written instructions substantially followed the Florida Standard Jury Instruction. See n. 21, supra. Contrary to the assertions of appellant, the jury was accurately apprised of the propriety of considering in mitigation any **circumstances** of the appellant's character or record, or of the offense charged, which circumstances were established by the evidence (R 1122). This court has repeatedly held that the standard jury instructions correctly apprise a jury that the list of statutory mitigating circumstances is not exhaustive. Puiatti v. State, 495 So.2d 128 (Fla. 1986); Lara v. State, 464 So.2d 1173 (Fla. 1985); Randolph v. State, 463 So.2d 186 (Fla. 1984); Mason v. State, 438 So.2d 374 (Fla. 1983); Peek v. State, 395 So.2d 492 (Fla. 1980). Moreover, even in those instances where jury instructions were fairly characterized as confusing, this court has refused to find reversible error in the absence of objection to or suggested modification of the inconsistency as well as record evidence of prejudice arising from such an erroneous instruction. Bush v. State, 461 So.2d 936 (Fla. 1984) (trial court's repeated

erroneous instruction that sentencing decision required a majority corrected by subsequent explanation that advisory sentence of life imprisonment mandated by six or more votes opposed to imposition of sentence of death); Harich v. State, 437 So.2d 1082 (Fla. 1983) (erroneous concluding sentence of penalty phase instruction which was inconsistent with balance of instruction harmless in light of nine-to-three vote recommending death, despite capability of depriving defendant of life recommendation in circumstance of tie vote).

In the instant case, no juror, with the possible exception of the most pertinacious student of grammar, could have possibly been confused by the inconsistency presently complained of for the first time on appeal. At worst, the jury was rather inartfully informed that its consideration of any aspect of the defendant's character or record, as well as any other circumstances of the offense charged, if established by the evidence, **is** a mitigating circumstance(s) (R 1122, 1384-1385).

Appellant's conclusion that the grammatical variance "... fatally tainted the reliability of the correctness of the [unamimous] jury recommendation [of death]..." requires the further speculation, also without record support, that the jury merely counted aggravating and mitigating circumstances, as opposed to weighing them, in clear contravention of the other

unambiguous instructions[22] which the jury was sworn to follow. See, Initial Brief of Appellant, page 55; (R 1121-1122, 1387). Because fundamental reversible error has not been demonstrated with respect to this issue, appellant's sentence must be affirmed. Perri v. State, 441 So.2d 606 (Fla. 1983); §924.33, Fla. Stat. (1985).

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[22]In the paragraph immediately following the objectionable portion of appellant's jury instruction, the jury was advised as follows:

> If any one or more aggravating circumstances are established, you should consider all the evidence tending to establish **one or more mitigating circumstances** and give that evidence such **weight** as you feel it should receive in reaching your conclusion as to the sentence that should be imposed (R 1122).

POINT ELEVEN

THE TRIAL COURT DID NOT ERR BY PERMITTING A STATE'S WITNESS TO TESTIFY DURING REBUTTAL THAT HE HAD NO PRIOR CRIMINAL CONVICTIONS.

During direct examination of Charles Schelawske, owner of the Lone Star Bar, defense counsel inquired concerning any problems the management may have encountered with patron William Haverty (R 734). When asked if Haverty had ever gotten into fights, the witness replied that Haverty had once been bounced from the premises during a birthday celebration when the inebriated Haverty began bothering other patrons (R 734). Although defense counsel repeatedly attempted to solicit from the witness disparaging remarks concerning Haverty's barroom decorum on the evening in question, Schelawske ultimately indicated that even though a few people may have become physically violent toward Haverty, Haverty never responded in kind (R 734). During subsequent cross-examination by the state, Schelawske characterized Haverty as "a pretty peaceful guy" (R 736).

Appellant subsequently took the stand in his own behalf and related a scenario wherein he had allegedly witnessed Haverty committing an act of violence upon the murder victim (R 757-761). According to appellant, in the midst of a jealous rage, Haverty allegedly grabbed the victim's arm, tried to slap her in the face, chased her when she attempted to escape, shook her, pushed her to the ground, hit her with his knee, and pinned her to the ground, smacking her several times in the face with one hand while the other hand was at her throat (R 759-761).

In response to the defense claim that Haverty was a violent

person capable both in terms of opportunity and predisposition of murdering his girlfriend, the state recalled Haverty to the stand to rebut the appellant's attempt to assail the character of the **appellant's** prime suspect in the victim's murder. Upon Haverty's denial of having had "...any problems with the law," appellant interposed an objection upon the basis that the testimony elicited exceeded the scope of proper rebuttal (R 837-838). Following the state's argument that the appellant had placed the witness' character in issue, the subject objection was overruled (R 838).

Prior to addressing the merits of the instant issue, appellee would point out that the objection to testimony regarding Haverty's criminal record presently raised on appeal was never announced as a basis for objection below. As a consequence, appellee maintains that the instant claim of error was not properly preserved for appellate review. See, Hoffman v. State, 474 So.2d 1178 (Fla. 1985).

Assuming **arguendo** that the instant issue was properly preserved below, appellee would assert that the subject testimony was admissible under section 90.405(2), Florida Statutes (1985).[23] By pointing an accusatory finger in the specific direction of the victim's live-in boyfriend and business partner, appellant opened the door to allow Haverty to defend himself

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[23] §90.405(2), Fla. Stat. (1985) provides: (2) SPECIFIC INSTANCES OF CONDUCT.--When character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may be made of specific instances of his conduct.

against the appellant's attempted depiction of Haverty as a violent drunk prone to jealous rage.

Although decisional authority in this area is sparse, this court's reasoning in Squires v. State, 450 So.2d 208 (Fla. 1984), is illustrative of the correct disposition of the instant claim of error in appellee's view. In Squires, supra, several witnesses (including the defendant) testified during the defense case-in-chief regarding the defendant's respect for human life and aversion to killing. After the defendant had opened the door by placing his character in issue, the state was permitted to introduce testimony that the defendant had, on several occasions, shot at persons other than the victim for whose murder the defendant was then on trial. In determining the admission of the contested evidence to have been proper, this court observed the following:

> Only after the accused entered these statements did the state produce the challenged testimony linking Squires with other shootings. By attempting to demonstrate his non-violent character, Squires had placed this alleged trait in issue. The trial court properly allowed the state to rebut these assertions of non-violent character by showing that Squires had fired deadly weapons at persons other than the victim (citations omitted).

Although the Squires decision specifically addressed the admissibility of character evidence against the **accused**, appellee would submit that Haverty's character was on trial in the instant case by virtue of the appellant's defense that it was Haverty, and not himself, who murdered Vronzettie Cox. Finally, even if

the admission of the subject testimony was improper, any such error was harmless at worst. Evidence adduced at trial established that Haverty could not have committed the victim's murder. Haverty's alibi that he was at home almost the entire day of the victim's disappearance was corroborated by the testimony of another state's witness (R 315-316, 324-325, 848-855). Moreover, semen found in the underpants believed to have been worn by the victim at the time of the murder eliminated Haverty as the victim's final sexual partner prior to her death (R 695-696). Because appellant suffered no prejudice by virtue of the jury's knowledge that Haverty was, in addition to not being a murderer, an otherwise fairly upstanding citizen, appellant's conviction should be affirmed. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT TWELVE

THE TRIAL COURT DID NOT ERR BY DENYING, IN PART, APPELLANT'S MOTION TO DISCLOSE THE CRIMINAL RECORDS OF STATE'S WITNESSES.

On August 8, 1986, appellant filed a motion to produce criminal records of state witnesses[24] (R 1243-1244). The aforementioned motion was subsequently heard on August 26, 1986, the second day of appellant's trial (R 173, 189-191). Following argument of counsel, said motion was denied subject to the state being required to furnish to the appellant any criminal history records subsequently coming into the state's possession (R 191).

Appellant presently maintains that the trial court's denial of his motion to compel the state's disclosure of the criminal records of state's witnesses Robert Worgess and William Haverty resulted in a denial of due process necessitating a new trial. See, Initial Brief of Appellant page 63. Appellee maintains that neither the record on appeal nor the decisional authority relied upon by appellant supports such a conclusion.

In Medina v. State, 466 So.2d 1046, 1049 (Fla. 1985), this court rejected the precise claim of error presently raised by the appellant on the following basis:

> Medina claims that the state has access to the criminal records of several witnesses and that the court committed reversible error by refusing to direct that the state provide this information to the

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[24]A month earlier, appellant had indicated during a status conference that he was prepared for an August 25, 1986 trial date (R 1203).

> defense. We disagree. The court granted the motion to the extent of information contained in the state's files, but properly held that the defense has the initial burden of trying to discover such evidence and that the state is not required to prepare the defense's case. State v. Crawford, 257 So.2d 898 (Fla. 1972).

Moreover, State v. Coney, 294 So.2d 82 (Fla. 1973), and Martinez v. Wainwright, 621 F.2d 184 (5th Cir. 1980), do not avail the appellant in appellee's view.

In State v. Coney, 294 So.2d at 87, this court observed that "[t]he requirement of Crawford as to the prosecuting attorney securing the information for defense counsel arises **only** upon a showing that defense counsel has first exerted his own efforts and resources and has pursued and concluded other available means and remedies available to him to obtain such information" (emphasis supplied). As a consquence, defense counsel must make a preliminary showing of due diligence in the preparation of his own case prior to requesting the state's assistance in the investigation of a defendant's potential defenses at trial.

In the instant case, although the appellant deposed state's witness William Haverty on May 22, 1986, the appellant never made inquiry into any possibility of a prior criminal history on the part of such witness (R 1492-1506). As a consequence, to whatever extent the appellant was indeed "at the mercy" of Haverty's representations at trial concerning his prior misdemeanor/traffic infractions, any ascertainable prejudice in this regard is fairly attributable to the appellant's own misfeasance in failing to adequately set the stage for

impeachment of this witness.[25] However, review of the record on appeal reveals that even a significant prior criminal history on the part of Haverty would not have directly supported appellant's theory that Haverty murdered Vronzettie Cox in view of Haverty's alibi which was subsequently corroborated by the testimony of state's witness George Weeks (R 315-316, 324-325, 848-855).

Moreover, as conceded by defense counsel at the motion hearing (R 190-191), appellant already had access to the criminal history of state's witness Robert Worgess by virtue of a deposition held on July 22, 1986 (R 1507-1527), wherein the witness admitted twice being convicted of grand theft (R 1518). The witness' subsequent testimony at trial was consistent with his prior sworn statement in deposition (R 706-707).

Assuming **arguendo** that appellant's request was timely (R 189), and that his inquiry of witness Worgess constitutes due diligence in the exhaustion of discovery means available to him as required by State v. Coney, supra, appellee maintains that appellant is still not entitled to relief in the absence of a showing that the information sought could reasonably be considered "...admissible[26] and useful to the defense in the sense that it is probably material and exculpatory." State v.

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[25]Under section 90.610(a), Florida Statutes (1985), a witness may only be impeached by evidence of prior **felony** convictions through introduction of the record of conviction, and **not** a rap sheet, introduced into evidence. Fulton v. State, 335 So.2d 280 (Fla. 1976).

[26]See, n.25, supra.

Coney, 294 So.2d at 85 [quoting Coney v. State, 272 So.2d 550 (Fla. 1972)]. This latter prerequisite to relief clearly distinguishes the instant case from Martinez v. Wainwright, supra, relied upon by appellant. In Martinez, not only had defense counsel timely requested the victim's criminal history record, after exhausting all other reasonably available means for discovery of same, but of paramount significance in that case was the fact that the victim's rap sheet could properly be considered "highly favorable to the accused", as it tended to corroborate the defendant's testimony concerning events immediately preceding the victim's murder as well as to refute the version of events related by an unfavorable eye-witness to the shooting.

Moreover, in further contrast to the instant case, in Martinez, supra, the requested rap sheet was subsequently demonstrated to have actually existed. In the instant case, the prosecutor represented that his background check on a few of the state's potential witnesses had revealed "no indication" of prior criminal records and the state did not have any rap sheets in its possession (R 189-190). (Although Robert Worgess obviously had a criminal record as evidenced by his incarceration at the time of appellant's trial, this information was otherwise obtained by the appellant as previously discussed above.)

Finally, in response to the appellant's assertion that he was at an unfair disadvantage in the preparation of his case by virtue of the alleged error, appellee would merely note the observations of this court in State v. Crawford, 257 So.2d 898, 900 (Fla. 1972):

> Discovery in criminal cases has tended to be heavily weighed in favor of the defendant, and it would be contrary to the general principle of advocacy, as well as fairness itself, to require the prosecuting attorney to perform any duties on behalf of the defendant in the preparation of [his] case.

No reversible error having been demonstrated with respect to this issue, the appellant's conviction must be affirmed.

POINT THIRTEEN

THE TRIAL COURT DID NOT ERR BY FAILING TO CONSIDER ALL THE MITIGATING EVIDENCE PRESENTED ON BEHALF OF THE APPELLANT PRIOR TO IMPOSITION OF APPELLANT'S SENTENCE OF DEATH.

Appellant presently asserts that the trial court failed to consider mitigating evidence contained in the court file prior to rendering its pronouncement of sentence in the instant case. In support of such a claim of error, appellant notes the trial court's reference to its rejection of the sole statutory mitigating circumstance concerning the appellant's age at the time of the commission of the murder[27] (R 1485). See, Initial Brief of Appellant, page 64. According to the appellant's theory, the trial court's statement as contained in its findings of fact that it considered "...the evidence presented in the records of both the trial and the sentencing proceedings in this cause..." prior to imposing a sentence of death in the instant case (R 1396), is entitled to no deference by this court, being "...too all-encompassing to warrant recognition as credible evidence that specific evidence was in fact considered and rejected...." See, Initial Brief of Appellant, page 65. The instant claim of error is totally without merit in appellee's view.

First, the failure of a trial court to determine the applicability of mitigating evidence to a defendant's crime does

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[27] §921.141(6)(g), Fla. Stat. (1985).

not establish that such evidence was overlooked by the trial court. Lusk v. State, 446 So.2d 1038 (Fla. 1984). Even the failure of a trial court's findings of fact to specifically address evidence presented in mitigation on behalf of the appellant does not demonstrate that such evidence was not considered. Brown v. State, 473 So.2d 1260 (Fla. 1985); Mason v. State, 438 So.2d 374 (Fla. 1983). Moreover, "...the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983).

In specific response to appellant's assertion that the trial court's purported failure "...to consider mitigating evidence which was contained in the trial court file but was not affirmatively presented as evidence during the trial or sentencing proceedings..." (Initial Brief of Appellant, page 65), appellee would point out that the subject evidence was actually presented on behalf of the **state** in conjunction with a request for judicial notice advanced in support of the finding of evidence in aggravation as opposed to mitigation (R 1257-1314). As a consequence, to whatever extent this court may deem the subject information to be mitigating in nature, appellee would assert that same was never sought to be presented on behalf of the **appellant** in any event. See, Craig v. State, 12 F.L.W. 269, 275 (Fla. May 28, 1987). Moreover, because there is not one shred of record evidence to support the appellant's contention that the subject information, whatever its probative value, was ignored by the trial court although contained in the lower court

file more than a month in advance of appellant's sentencing, the instant claim of error must fail and appellant's sentence of death must be affirmed. See, Rogers v. State, 12 F.L.W. 368 (Fla. July 9, 1987).

CONCLUSION

Based upon the arguments and authorities presented herein, appellee respectfully requests this honorable court to affirm the appellant's conviction for first-degree murder and the imposition of a sentence of death in all respects.

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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 furnished by mail to: Larry B. Henderson, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, on this 1st day of September, 1987.

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