IN THE SUPREME COURT OF FLORIDA

GROVER REED,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 70,069

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DWAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

WILLIAM A. HATCH
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 162540

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

The appellant (Defendant below) will be referred to by name or as appellant throughout this brief. References to the lower court's record will be designated with the prefix "R." References to the transcript of hearing and the trial will be designated with "TR."

STATEMENT OF THE CASE AND FACTS

Appellee hereby adopts the statement of the case and statement of the facts contained in the initial brief of appellant as being accurate to the extent stated.

SUMMARY OF ARGUMENT

AS TO ISSUE I

The State argues that defense counsel failed to rmeet his burden of demonstrating a strong likelihood that prosecution peremptory challenges of prospective black jurors were for racial reasons. The only argument made by defense counsel was that the numbers of prospective black jurors excused by the State were disporportionate. Case law in Florida is consistent that numbers alone do not demonstrate a strong likelihood sufficient to trigger a **Neil** inquiry. Appellee recognizes that any doubt as to whether the defense meets this burden should be resolved in favor of the defense but argues that the case law is very clear that numbers alone will not suffice.

In the alternative appellee argues that the reasons voluntarily given by the prosecutor were race neutral reasons which were in some respects applied to white prospective jurors who were also excused. Thus, even if this Court finds that a **Neil** inquiry was required or was in fact conducted the prosecutor met his burden of demonstrating valid race neutral reasons for the exercise of all peremptory challenges to prospective black jurors.

AS TO ISSUE II

Appellee argues that there is no requirement that a personal express waiver of lesser included offense jury instructions in non-capital offenses and therefore the waiver by defense counsel of lesser included offenses was valid and no error has

occurred. In addition the right to express personal waiver of lesser included offenses instructions even in capital cases is limited to those lesser offenses which are supported by the evidence. The evidence in the instant case does not support any lesser included offenses to sexual battery with great physical force using or threatening to use a deadly weapon. The evidence also does not support the lesser included offense of robbery with a weapon that is not a deadly weapon. Therefore, even if personal express waiver is required in non-capital cases the lesser included offenses enumerated by appellant are not supported by the evidence.

AS TO ISSUE III

Appellee argues that defense counsel made no objection to alleged improper comments to the jury by the trial judge and the prosecutor informing the jury of its advisory role at the sentencing phase nor were any curative instructions requested and thus this issue has not been preserved by appellant on appeal and is deemed to be waived. In addition the comments and standard jury instruction in question are an accurate statement of Florida law and similar statements have been deemed not to be error by the Florida Supreme Court.

AS TO ISSUE IV

Two of the aggravating factors found by the trial court to support the death penalty are not challenged on appeal and are sufficient to justify the death penalty absent any mitigating factors. One of the remaining aggravating factors is conceded to be improper in that it is improper to find appellant has

committed a prior violent felony when that felony is a contemporaneous conviction against the same murder victim.

Of the three remaining aggravating factors it is clear that the homicide was committed to avoid arrest in that the victim was well acquainted with Grover Reed and was the only witness to the sexual battery and robbery. Reed told a cell mate that he cut the victim's throat so she would not talk. Similar statements have been found by Florida courts to confirm this aggravating circumstance. The question of premeditation may be established by circumstantial evidence including the manner in which the homicide was committed and the manner and nature of the wounds. The fact that the victim received over a dozen slash wounds to the neck and strangulation after being tied up and beaten clearly establishes the element of premeditation. In addition Reed had threatened to "get even" with the victim several weeks prior to the murder.

The trial court properly found that the homicide was especially heinous, atrocious or cruel. The uncontraverted facts show that the victim was accosted in her own home, tied up and severely beaten and after pleading with Reed to let her go was strangled, brutally raped, and slashed to death with over a dozen severe knife wounds to the throat. These facts clearly support the aggravating circumstances of heinous, atrocious or cruel.

The trial court also properly found the homicide was committed in a cold, calculated and premeditated manner. Reed had threatened to get even with the victim several weeks before the murder and knew that she would be home alone on Thursday

nights because her husband taught a church class. Having planned his crime Reed encountered Betty Oermann at home alone on Thursday night as expected. He beat her and tied her up and ransacked the house. He then returned to the victim, untied her, severely beat her, raped her, strangled her and slashed her to death. This time sequence shows a cold and calculated premeditated design both before and during the crime in that Reed had ample time to reflect on his actions and their attendant consequences sufficient to evidence the heightened level of premeditation necessary for this aggravating circumstance.

AS TO ISSUE V

Appellee argues that the trial court committed no error in refusing to instruct the jury on the requested mitigating circumstance concerning Reed's alleged impaired capacity due to alcohol consumption. The trial court's ruling was proper because no evidence of intoxication or even consumption of alcohol by Reed immediately or reasonably preceding the murder was contained in the record. The evidence shows only that Reed drank some beer on the morning of the murder and that the murder was committed sometime after 5"40 p.m. Absent evidence of Reed's intoxication it was not error to refuse to give this instruction.

AS TO ISSUE VI

Appellee argues that defendant's counsel made no objection to the victim impact evidence contained in the presentenceing investigation (PSI) which was submitted to the trial judge. Appellant's failure to object at the trial level is a procedural bar to claiming relief on this issue on appeal. Even if

appellant can raise this issue the error, if any, is harmless. Such victim impact evidence has been held to be subject to harmless error analysis on a case by case basis. In the instant case the jury's recommendation for the death penalty was 11 to 1. The trial judge's written findings found six aggravating factors and no mitigating factors in support of the death penalty. The trial court's findings placed no reliance on the victim impact statement and thus it is clear beyond a reasonable doubt that the death sentence would have been imposed absent the victim impact evidence. Therefore, the receipt of such evidence by the trial judge was at most harmless error.

ISSUE I

THE TRIAL COURT COMMITTED NO ERROR WHERE DEFENDANT MADE NO SHOWING OF STRONG LIKELIHOOD THAT BLACK JURORS WERE EXCLUDED BECAUSE OF RACE AND WHERE THE STATE VOLUNTARILY STATED VALID REASONS OTHER THAN RACE FOR EXCLUDING BLACKS WHICH WERE UNCHALLENGED BY THE DEFENDANT.

In State v. Neil, 457 So.2d 41 (Fla.1984) this Court held that a party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of race. If the trial court finds that there is a substantial likelihood that the peremptory challenges are being exercised solely because of race, the burden shifts to the complained-about party to explain his reasons and show that the peremptory challenges were based on non-racial or race neutral reasons. However, if the trial court finds there is no substantial likelihood that the challenges are based on race, then no inquiry need be made and the matter is closed. Neil at 486-487.

In the instant case appellant made a motion for mistrial upon the sole ground that of nine peremptory challenges exercised by the State, six were used against blacks and that those numbers alone demonstrated a racial basis for the exercise of those challenges:

> Defense attorney Nichols: The motion is for a mistrial based on the fact that the peremptories have been used in such a fashion as to systematically exclude blacks and there is no rational basis for it, that the proportions of the conclusions, six out of nine, is dramatically different and the distribution of the number of blacks on the jury and I think it's incumbent upon the State to demonstrate a racial basis for the exercise of those challenges.

(TR 308 .

No other grounds or argument were presented by defense counsel on this issue. Appellant's only argument in support of the motion for mistrial was based on numbers alone.

This Court has repeatedly held that the mere exclusion of a number of blacks is not sufficient to warrant a Neil inquiry. Parker v. State, 476 So.2d 134 (Fla.1985); (where exclusion of four blacks, standing alone is insufficient to satisfy "strong likelihood" test); Woods v. State, 490 So.2d 24 (Fla.1986) (where exclusion of five blacks, by itself, was held insufficient to trigger a Neil inquiry); see also Rose v. State, 492 So.2d 1353 (Fla.5th DCA 1986), and Taylor v. State, 491 So.2d 1150 (Fla.4th DCA 1986). This principle was recently reaffirmed in State v. Slappy, Case No. 70,331, Supreme Court March 10, 1988:

> Unfortunately, deciding what constitutes a "likelihood" under Neil does not lend itself to precise definition. It is impossible to anticipate and articulate the many scenarios that could give rise to the inference required by Neil and Batson. We know, for example, that number alone is not dispositive, nor even

> the fact that a member of the minority in question has been seated as a juror or alternate. (Emphasis supplied)

Similarly this Court found numbers alone to be insufficient to trigger an inquiry in Neil at 487 n. 10:

> We agree with Thompson that the exclusion of a number of blacks by itself is insufficient to trigger an inquiry into a party's use of peremptories.

In the instant case the trial court made no finding of a substantial likelihood that the prosecutor's peremptory challenges were based on race and specifically stated that the court was making no finding that such a showing had been made (TR 314). Since the motion for mistrial was based on numbers alone and the trial court made no finding of substantial likelihood based on race, appellant failed to meet his burden and thus the burden never shifted to the prosecution to explain his reasons under Neil. Nevertheless, the prosecution voluntarily stated his reasons for exercising the peremptory challenges against prospective black jurors (TR 309-315). No argument or challenge to the race neutral reasons given by the prosecution was made by the defense (TR 314).

Appellant now complains that the reasons given in exercise of six peremptory challenges of prospective black jurors by the prosecution were invalid. Three of these, Eddie Wesley, Octavia Madison and Benny Campbell, were struck because of their youthful age. Eddie Wesley was 22 years old, Octavia Madison was 20 years old and Benny Campbell was 18 years old. The prosecutor stated

that his criteria for picking prospective jurors in a first degree murder case was for individuals who had some experience with life and a degree of maturity which would allow that juror to make the hard decisions that would be required in a first degree murder case. In that regard the prosecutor stated that as a general rule he believed that individuals below the age of 25 often do not have the maturity about them to make the hard decisions of life and death which occur in first degree murder cases (TR 309-310). The prosecutor stated that he excused Mrs. Wesley because she was 23 years old and seemed to have a lack of maturity (TR 310). Mrs. Madison was excused because she was only 20 years old. An additional reason for excusing Mrs. Madison was that she was a hair operator or cosmetologist and this case involved hair evidence which she might misinterpret in light of her profession (TR 310). The prosecutor struck Benny Campbell because he was 18 years old and also because of his appearance which struck the prosecutor as a person who lacked maturity and would have difficulty dealing with the factual issues in a mature way (R 311-312).

Appellant contends that the striking of these prospective jurors because of their youth and perceived lack of maturity fails to meet the race neutral test mandated by **Neil.** The **Neil** decision however is limited solely to peremptory challenges of distinct racial groups and does not address the question of age. **Neil** at **487.** Appellant apparently believes that the use of youthful age and lack of maturity was a mere pretext for striking prospective black jurors solely because of race. Appellant has

failed to note that the prosecution struck prospective white jurors because of youthful age which clearly indicates a race neutral reason based solely on youth and lack of maturity. Prospective juror Teresa Patton was a white female age 24 who was struck by the prosecution which is consistent with the race neutral reasons given for striking the prospective black jurors because of their youth (TR 228,248,301). Prospective juror Vassar Hinson, a white male, was also struck by the prosecution (TR 218). Although the record does not give Mr. Hinson's age, it is probable that Mr. Hinson was under age 25 and was struck for that reason consistent with the prosecutor s policy. Mr. Hinson's work history was only five years which would make him 23 years old after leaving high school (TR 151-154 . Mr. Hinson was single and had never been married (TR 153).

Appellant argues that the case of Floyd v.State, holds that youth is not a legitimate race neutral reason for exercising a peremptory challenge. In Floyd the court noted that the prosecutor was the same individual involved in the Slappy case, apparently concluding that his credibility was somewhat in question. The Supreme Court of Florida recently observed that part of the trial judge's role is to "evaluate both credibility of the person offering the explanation as well as the credibility of the asserted reasons." State v. Slappy, supra. There is no reason to suggest that the credibility of the prosecutor was at issue in the instant case. In Floyd the prosecutor had struck a black student (age not stated). During a Neil inquiry the prosecutor stated that he did "not like having young students on

my juries for superstitious reasons." The Third District Court of Appeal held that a "superstition" against young students standing alone would not meet the constitutional requirement that the removal of black jurors be for legitimate reasons. It is significant to note that Floyd was charged only with automobile theft and not first degree murder.

In the instant case the prosecutor stated race neutral reasons far beyond a mere "superstition" against young jurors. The instant case is a brutal murder case in which the State asked for the death penalty rather than a simple automobile theft as in **Floyd.** The prosecution expressed a legitimate race neutral reason for wanting mature people to make the hard decision of life and death required in a capital murder case. This race neutral reason for striking young and immature appearing prospective jurors was applied to both black and white individuals. That was not the case in **Floyd.** In **Floyd** the court noted:

> More significant however is the fact that a white student was not challenged by the state, which is strong evidence that the state attorney's explanation was a subterfuge to avoid admitting discriminatory use of the peremptory challenge.

In the instant case whites were challenged and thus **Floyd** is distinguishable. The prosecution stated valid race neutral reasons for striking prospective jurors Wesley, Madison and Campbell and thus no error has occurred.

Appellant further complains that two prospective black jurors, Peggy Humphreys and Carl Strickland were excused for improper reasons based on their employment history. Peggy Humphreys was a therapist assistant who was on workman's compensation and who had been unemployed for approximately one year. (TR 169). The prosecutor excused Mrs. Humphreys because she had been unemployed for over a year when there was a real demand for trained physical therapists. He felt that reflected on her character (TR 311). Carl Strickland was a 30-year old single man who had been employed as a messenger for the last five years at St. Luke's Hospital (TR 260-261). The prosecutor excused Mr. Strickland because he felt that the fact that he was still employed as a messenger boy after five years reflected on his intelligence, motivation and maturity (TR 313). As previously stated the prosecution also struck two prospective white jurors because of a perceived lack of maturity based on age. Appellant argues that Peggy Humphreys and Carl Strickland were excused for impermissible reasons related to their employment and cites **Slappy** v. **State,** 503 So.2d **50** (Fla.3rd DCA 1987). In **Slappy v. State** a prosecutor struck two elementary school assistants on the premise that elementary school teachers are liberal and more likely to be lenient to defendants. The District Court ruled that this explanation was merely a pretext and that no questions had been asked of the two individuals to determine whether they were in fact political liberals who would favor the defense. That decision was recently upheld by this Court in **State v. Slappy, supra.** The instant case is clearly

distinguishable from **Slappy.** There was no automatic bias against physical therapists in Peggy Humphreys' case or against hospital messengers in Carl Strickland's case. Peggy Humphreys was excused not because of some alleged trait in the physical therapy profession but because the prosecutor perceived her to be a slacker in apparent good health who remained on either unemployment compensation or workman's compensation when jobs in her field were believed by the prosecutor to be readily available. (There appeared to be some confusion in the prosecutor's mind as to whether Mrs. Humphreys was simply unemployed or was on workman's comp, TR 311). Mr. Strickland was excused not because of any bias against messengers but because he was a 30-year old adult who remained only a messenger boy after five years. The reasons given by the prosecutor for excusing Mrs. Humphreys and Mr. Strickland are supported by statements made by them at voir dire. Appellant may disagree with the State's conclusions but it is the trial court's function to decide if the prosecutor's stated reasons in a Neil inquiry "are such that some reasonable persons would agree." **State v. Slappy, supra.**

Appellant complains that two other jurors, Juanita Davis and Laura Kates, were acceptable to the State even though they had not worked within the last five years. In fact Laura Kates stated that she had worked as an accounting assistant at Independent Fair & Casualty Company within the last five years. She is married and has a two year old daughter which easily explains taking time out from her career (TR 229). Although

Juanita Davis has not worked in the last five years she has raised four grown children which explains her absence from the work place (TR 116). Peggy Humphreys on the other hand had a chosen profession which she was not pursuing.

Appellant also complains that prospective juror Gregory Adams was excused improperly. Adams was employed by Plumbers and Pipe Fitters Local Union 234 as a pipe fitter. His wife was a cosmetologist (TR 235). The prosecutor's reasons for excusing Mr. Adams were threefold. First, Adams' wife was a cosmetologist and some of the State's evidence regarded hair samples. The striking of Mr. Adams on this ground is consistent with the prosecutor's excusing of Octavia Madison in part because she was a cosmetologist (TR 310). Secondly, the prosecution excused Mr. Adams because the prosecutor had personal knowledge of illegal activities within that union and had prosecuted individuals for criminal activities in the past (TR 314). This was not a sweeping generalization that all plumbers were crooks (or all elementary schoolteachers liberal as in Slappy) but was based on his personal knowledge of this particular union and its members. Admittedly the prosecutor did not ask Adams if he was involved in these illegal activities within the union for the obvious reason that the chances of Adams or anyone admitting illegal activities during voir dire are remote. The fact that the prosecutor had personal knowledge of the illegal activities of the union and its members provides a reasonable basis to exercise a peremptory challenge to Mr. Adams. Thirdly, the prosecutor sensed an "uneasy chemistry" with Mr. Adams and got

the impression that Adams was hostile or did not like the prosecution (TR 313-314). Although not the primary reason for excusing Mr. Adams it is certainly not unreasonable to allow a prosecutor to consider the perceived hostility of a prospective black juror in conjunction with other valid race neutral reasons such as exist in Mr. Adams' case.

The defense failed to meet its burden of establishing in the record a substantial likelihood that the peremptory challenges of blacks by the prosecution were for racial reasons and the court never made a finding in that regard. Consequently, the burden never shifted to the State to explain its reasons for exercising peremptory challenges to prospective black jurors. The prosecution voluntarily gave its reasons which were valid race neutral reasons and thus the jury panel was properly chosen.

ISSUE II

TRIAL COURT DID NOT ERR IN ALLOWING REED'S TRIAL COUNSEL TO WAIVE INSTRUCTIONS TO LESSER INCLUDED OFFENSES OF THE NON-CAPITAL OFFENSES OF ROBBERY AND SEXUAL BATTERY WITHOUT REED'S PERSONAL WAIVER OR RATIFICATION OF HIS LAWYER'S ACTIONS.

Prior to the jury charge conference Grover Reed personally and expressly waived his right to be present (TR 604-605). During the conference appellant's attorney waived jury instructions on any lesser included offenses to the robbery with a deadly weapon and sexual battery charges. (TR 610-619). Defense counsel later requested an instruction on theft as a lesser included of robbery. (TR 798). The court later instructed the jury on two lesser offenses of the robbery count, i.e., simply robbery and theft. (TR 809-813). As to the sexual battery count the only instruction was for the charged offense of sexual battery while using actual physical force or using or threatening to use a deadly weapon (TR 809). No objections were made to these instructions and no curative instructions were requested by defense counsel (TR 829).

Appellant argues that the case of Harris v. State, 438 So.2d 787 (Fla.1983) should control. The Harris holding was in part based on Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) which held that a state cannot prohibit the giving of lesser included offenses in a capital offense without violating due process requirements. In Harris this Court

reasoned that the procedural right to instructions on lesser included offenses in capital cases enunciated in **Beck** was a right that could be waived only by an express waiver knowingly and intelligently made by the defendant. Significantly, Beck preferenced this procedural right to lesser included instructions to "when the evidence would have supported such a verdict" 65 L.Ed.2d 396, 402. Furthermore, the **Harris** decision did not consider personal waiver in the context of non capital cases. That question was considered in **Jones v. State,** 484 So.2d 577 (Fla.1986) in which this Court considered the following certified question:

> "Harris v. State, 438 So.2d 787 (Fla.1983), recognizes a constitutional right of an accused in a capital case to have the jury instruction as to necessarily and lesser included offenses and that the violation of that right constitutes fundamental error, a waiver of which, to be effective, must be made on the record knowingly and intelligently by the accused personally rather than by counsel. Do those charged with non-capital crimes enjoy this constitutional right as well as those charged with capital crimes?"

In **Jones** this Court held that those charged with non-capital crimes do not enjoy the rights enunciated in **Beck** and **Harris.**

Appellant argues that the rule in **Harris** requiring express personal waiver should apply to the non-capital offenses of robbery and sexual battery. No authority is cited by appellant for this position. Appellant's argument is directly contrary to this Court's ruling in **Jones** that no personal and express waiver

is required in non-capital offenses. In addition the **Beck** decision only requires an express personal waiver if the evidence supports a verdict for the lesser included offense. In the instant case the only lesser included not given on the robbery with a deadly weapon charge was that of robbery with a weapon that is not a deadly weapon. (TR 809-813). The medical evidence is conclusive that the victim's throat was cut over a dozen times with a serrated knife. (TR 453-454). Since the victim was nearly decapitated it would be ludicrous to claim that the evidence supports a verdict of the lesser included offense of robbery with a weapon that is not a deadly weapon. Since there is no evidence to support such a verdict there was no error in not giving this instruction or obtaining an express personal waiver under **Beck.** The same is true of the sexual battery count in that the evidence does not support any lesser included offense other than the charged offense of sexual battery while using actual physical force or using or threatening to use a deadly weapon. The evidence is only consistent with the fact that the victim was brutally beaten, strangled, raped and slashed to death (TR 444-445,452-454,458). Since there is no evidence to support a verdict of any lesser included offense to the sexual battery count as charged, there has been no error.

Even if error has been committed, it is clearly harmless error. The only lesser included instruction not given on the robbery count was for robbery with a weapon not a deadly weapon §812.13(2)(b), Fla.Stat. That offense is a first degree felony which would still leave appellant subject to the death penalty

under felony murder. As to the sexual battery even if, contrary to the evidence, the jury returned a verdict of simple battery, appellant would still be guilty of felony murder based on his robbery conviction and subject to the death penalty.

ISSUE III

THE TRIAL COURT AND PROSECUTOR DID NOT ERR IN INFORMING THE JURY OF THE ADVISORY NATURE OF ITS SENTENCING RECOMMENDATION AND GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION AND DEFENSE COUNSEL'S FAILURE TO OBJECT TO THESE REMARKS OR REQUEST A CURATIVE INSTRUCTION CONSTITUTES A WAIVER OF THIS ISSUE ON APPEAL.

Appellant complains that comments made to prospective jurors by the trial court and prosecutor during jury selection concerning the advisory nature of the sentencing recommendation coupled with the standard jury instruction on that subject and a similar statement by the prosecutor during the penalty phase impermissibly diminished the jury's role in violation OF **Caldwell v. Mississippi,** 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 31 (1985). In **Caldwell** it was held it is constitutionally impermissible to rest a death sentence on a sentencer who has been led to believe that the real responsibility of deciding whether the death sentence is proper rests elsewhere.

A similar question arose in **Copeland** v. **Wainwright,** 505 So.2d 425 (Fla.1987). In **Copeland** the court noted that most of the judge's statements were made to prospective jurors during jury selection and were not improper and that defense counsel failed to object to any of these comments on the ground that they erroneously minimized the importance of the judge's sentencing role. In the instant case not only were no objections raised and

no curative instructions requested but defense counsel even made similar comments to the jury emphasizing the advisory nature of their role. (TR 879).

In **Copeland** appellant argued that failure to object at trial did not preclude consideration of the issue because **Caldwell** v. **Mississippi, supra,** was a fundamental change in the constitutional law of capital sentencing. This Court rejected that argument and held that the issue was waived for failure to object at the trial level.

In **Combs** v. **State,** 13 F.L.W. 142, No. 68,477 (Fla. Feb. 18, 1988) this Court noted that **Caldwell** does not hold that the misleading statement concerning the jury's responsibility constituted fundamental error. In the instant case appellant did not object at trial or request a curative instruction and since no fundamental error has occurred appellant may not raise this issue on appeal.

Even if no waiver has occurred, this Court has recently decided the merits of this issue contrary to appellant's position in **Combs** v. **State, supra.** In that case Combs contended that the prosecutor minimized the jury's role and misstated Florida law during ~~voir~~ ~~dire~~ and final argument that their decision would be advisory and that the ultimate decision rested with the trial judge. Combs asserted that the trial judge erred under **Caldwell** in failing to instruct the jury that a life sentence recommendation carries substantial weight and that a jury recommendation could only be overridden if no reasonable person could differ. Combs further claimed that the trial judge erred

in instructing from Florida's standard jury instruction that "the final decision as to what punishment should be imposed rests solely with the judge of this court." As in the instant case Combs relied on **Adams** v. **Wainwright,** 804 F.2d 1526 (11th Cir.1986) and **Mann** v. **Dugger,** 817 F.2d 1471 (11th Cir.1987) to support his argument. This Court rejected Combs argument and found that **Caldwell** did not apply. This Court first noted that the sentencing procedure in Mississippi as construed in **Caldwell** is fundamentally different from Florida's sentencing procedure. In Mississippi the jury is empowered with the final decision as to sentencing while in Florida the jury advises and the trial judge makes the final decision. Telling a jury that its sentencing role is advisory is an accurate statement of the law in Florida but not in Mississippi where the jury's decision is binding.

In **Mann** the Eleventh Circuit concluded that since a Florida jury had been told that its role was "advisory" the jury was misled as to the significance of their role because they were not instructed that the recommendation would be given great weight. The **Mann** court further found that the trial judge's responsibility was over emphasized. In **Combs** this Court disagreed with the **Mann** court's interpretation of Florida's death penalty instructions. This Court also noted that **Mann** has been set aside pending rehearing en banc. This Court found the phraseology of S921.141, Fla.Stat., which expressly states that the jury role is "advisory" was apparently not taken into account and that the standard jury instructions appear to taken out of

context by the Mann court. This Court also noted that both the Mann and Adams decisions focus on the term "advisory" and find it improper even though the United States Supreme Court has accepted Florida's jury role as "advisory" in Spaziano v. Florida, 468 U.S 447 (1984).

The Combs decision also holds that a simply reading of S921.141, Fla.Stat. (1985), explains why such statements are made to the jury regarding its role to render an advisory sentence. That statute provides in part:

> (2) Advisory Sentence By The Jury.-- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> (A) whether sufficient aggravating circumstances exist as numerated in section (5):
> (B) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (C) based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This Court found in Combs and in Grossman v. State, 13 F.L.W. 127, 68,096 (Fla. Feb. 18, 1988) where identical issues were raised, that statements which are accurate statements of Florida law as to the advisory nature of the jury's role and which have been upheld by this Court and the United States Supreme Court are not error. Spaziano v. State, 433 So.2d 508 (Fla.1983); Spaziano v. State, 468 U.S. 447 (1984).

Appellant also complains that the standard jury instructions do not mention the special significance of a life recommendation

under Tedder v. State, 322 So.2d 908 (Fla.1975). In Combs this Court noted that the standard jury instructions found objectionable in the Mann and **Adams** opinions (which are the same ones challenged in the instant case) had been adopted four months after the Tedder decision and that the court had no intention of changing the clear statutory directives that the jury's role is advisory in that decision. This court held that the standard jury instructions had been taken out of context in Mann and **Adams** but that the instructions taken in their entirety properly explain the jury's role under S921.141, Fla.Stat., and that these instructions do not violate the dictates of Caldwell. See also Grossman v. State, supra. Appellant's claim to the contrary is without merit.

ISSUE IV

THE TRIAL COURT PROPERLY FOUND FIVE VALID AGGRAVATING CIRCUMSTANCES IN SENTENCING GROVER REED TO DEATH.

The trial court found six aggravating circumstances in the sentencing weighing process as follows: 1) previous conviction for a violent felony based on the contemporaneous convictions for sexual battery and armed robbery; 2) the homicide was committed during the commission of a sexual battery: 3) the homicide was committed for the purpose of avoiding arrest; 4) the homicide was committed for pecuniary gain; 5) the homicide was especially heinous, atrocious or cruel: and 6) the homicide was cold, calculated and premeditated. (R 389-391, TR 934-937). The trial court found no mitigating circumstances.

Of the six aggravating factors appellant does not challenge the trial court's finding that the homicide was committed during the commission of a sexual battery or that the homicide was committed for pecuniary gain. Even one of these unchallenged aggravating circumstances raises a presumption that the death sentence is proper unless overridden by mitigating circumstances. State v. Dixon, 283 So.2d 1 (Fla.1973). The trial court found no mitigating circumstances in the instant case although appellant now argues that an instruction as to mitigation based on impaired capacities should have been given. Appe1lant challenges the four remaining aggravating circumstances.

A

APPELLEE CONCEDES NO PRIOR VIOLENT FELONIES WERE COMMITTED.

Appellant claims that the trial court improperly found that Reed had a prior conviction for a violent felony on the basis of his contemporaneous convictions for robbery and sexual battery in the instant case. Appellee concedes that this Court ruled in Wasko v. State, 505 So.2d 1314 (Fla.1987) that a contemporaneous conviction for a violent felony committed on a murder victim could not be used to support this aggravating circumstance. However, since there are five other valid aggravating circumstances and none in mitigation, the lack of this one aggravating circumstance would not have changed the outcome or affected the sentencing weighing process.

B

THE HOMICIDE WAS COMMITTED TO AVOID ARREST.

Appellant also challenges the trial court's finding that the homicide was committed to avoid arrest. Appellant admits that three facts support this finding:(1) The victim knew Grover Reed. (2) The victim was the only witness to the sexual battery and robbery. (3) Reed told a cell mate that he cut the victim's throat *so* she would not talk.

These three factors clearly support the trial court's finding that the homicide was committed to avoid arrest. Grover Reed had actually lived in the victim's home and there is no doubt that she could have identified him. She was the only witness to the robbery and sexual battery. Grover Reed confessed

to a cell mate that he cut the victim's throat "so that she wouldn't talk.'' (TR 597). In Kokal v. State, 492 So.2d 1317 (Fla. 1986), this court considered a statement made by the accused to a friend that the victim was killed during a robbery because "dead men can't tell lies." In Kokal, the appellant argued that the aggravating circumstance that the murder was committed to avoid arrest was not proven beyond a reasonable doubt. This court disagreed and held:

> Kokal's own statement to his friend to the effect that dead men can't talk confirms that the murder was committed to avoid or prevent arrest. Id. at 1319

This court reached a similar result in Johnson v. State, 442 So.2d 185 (Fla. 1983), cert. denied. 466 U.S. 963, 104 S.Ct. 2182, 80 L.Ed.2d 563 (1984) and Herring v. State, 446 So.2d 1049 (Fla. 1984), cert. denied., 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d. 330 (1984).

Appellant argues that Reed's statement to cell mate Hackshaw that Reed cut the victims throat so that she wouldn't talk is not sufficient for a finding of homicide committed to avoid arrest because Reed allegedly told Hackshaw he did not intend to kill the victim. The question of premeditation is a question for the trier of fact and may be established by circumstantial evidence and evidence from which premeditation may be inferred includes the manner in which the homicide was committed and the manner and nature of the wounds. Heiney v. State, 447 So.2d 210 (Fla.1984). In Heiney this Court found that seven separate hammer blows to the head constituted sufficient evidence of

premeditation. In **McKennon** v. **State,** 403 So.2d 389 (Fla.1981) the victim suffered multiple slice wounds to the throat, strangulation and blows to the head. This Court concluded that "the record reflects that there is not only sufficient but overwhelming evidence of premeditated murder." Id. at 391.

In the instant case there is also overwhelming evidence of premeditated murder. Grover Reed's neighbor, Lisa Smith, testified that Reed had threatened to "get even" with the Oermanns because they made him stop living at their home due to Reed's drug use. (TR 519). Medical testimony established that a serrated steak-type knife was used to cut the victim's throat over a dozen distinct times. (TR 452). It was explained that a serrated knife requires more effort to cut the skin and muscles than a smooth blade knife (TR 453). Despite the difficulty of quickly cutting through the skin with a serrated knife Reed made repeated attempts to cut the victim's throat. The victim was also strangled with significant force which contributed to the cause of death. (TR 457-458) In order to convict an individual of premeditated murder the State must prove a fully formed conscious purpose to kill which exists in the mind of the perpetrator for a sufficient length of time to permit reflection and in pursuance of which the acts of killing ensued. **Gurganus** v. **State,** 451 So.2d 817 (Fla.1984). In the instant case the victim was severely beaten followed by strangulation and over a dozen distinct knife wounds to the throat. (TR 444,454,458,471). Grover Reed obviously had a fully formed conscious intent to kill for a sufficient length of time to

permit reflection sufficient for a finding of premeditation. The medical evidence as to the manner and nature of the victim's wounds can leave no doubt that Grover Reed intended to kill his victim regardless of what he told his cell mate his intentions were. This evidence along with Reed's statement to his cell mate that he cut the victim's throat to keep her from talking clearly support the trial court's finding that the homicide was committed to avoid arrest. There can be no doubt that this was his primary motive for killing Betty Oermann

C.

THE TRIAL COURT PROPERLY FOUND THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The facts in the instant case overwhelmingly support the trial court's finding that the homicide was especially heinous, atrocious or cruel. The uncontraverted sequence of events are that Reed entered the victim's home and demanded money. Reed then slapped the victim and tied her up. (TR 596). Reed then ransacked the house. The victim pleaded w th Reed to untie her and if he would leave the house she wouldn t tell anyone he was there. (TR 596-597). Reed then severely beat the victim causing a number of bruises over the chin, left upper arm, left side of the rib cage, right mid thigh, the right knee, and over the left upper thigh (TR 444). Very shortly before her death Reed committed sexual battery on the victim (TR 459). Reed then strangled Mrs. Oermann with significant force causing hemorrhaging and bruising around the neck and inside the victim's mouth (TR 457-458). Medical testimony revealed that the

strangulation and physical beating occurred before the slashing of the victim's throat because after such massive bleeding from the throat wounds there would be no blood pressure and no bruises could be formed (TR 471). The sexual battery probably occurred after the strangulation of the victim (TR 472). The medical evidence concluded that the victim's throat was then cut over a dozen times with a serrated-type knife plus a stab wound thru the throat a quarter of an inch into the backbone (TR 452-454). It was explained that a serrated type knife does not cut easily into the skin and that more effort must be expended with that type of weapon. Nevertheless, the victim's throat was slashed over a dozen times severing the jugular vein, the caritod artery and the trachea (TR 453-454). The death of Betty Oermann was caused by massive external hemorrhage with strangulation as a contributing cause of death. (TR 461). One can only shutter at the horror, pain and fear Betty Oermann must have suffered while Grover Reed tied her up, severely beat her, strangled, sexually assaulted and methodically and deliberately slashed her to death. During this horrible sequence of events, Reed actually stuffed the victim's panties into her massive neck wounds. (TR 421). Reed actions are even more heinous, atrocious and cruel when one considers that the victim had opened her home to Reed when he needed a place to live. Grover Reed repaid this kindness and charitable assistance with robbery, brutal sexual assault and cold-blooded murder.

The state submits that if the above facts do not qualify as heinous, atrocious and cruel, nothing would. **Harris** v. **State,**

438 So.2d 787 (Fla. 1983); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Peek v. State 395 So.2d 492 (Fla. 1980), cert.denied. 101 S.Ct. 2036, 451 U.S. 964, 68 L.Ed.2d 342.

Appellant complains that the victim's character was improperly considered in the court's finding that the homicide was especially heinous, atrocious or cruel and cites Jackson v. State 498 So.2d 906 (Fla. 1986). In Jackson this court found that the record on appeal revealed no evidentiary basis for finding that the murder was especially heinous, atrocious or cruel. In the instant case, although slight reference is made to the victim's identity and character for clarity's sake, the trial court's finding is clearly supported by an evidentiary basis as reflected in the reasons for the finding as follows:

> On the date of the murder, the defendant invaded the sanctity of her home and brutally attacked her while she was alone. The evidence clearly indicates that she was beaten, robbed, sexually battered, murdered and left dead. The manner of the death was by choking and slashing of her throat. The evidence clearly established that 12 separate slash marks were made on the neck of the victim. Any doubts as to the heinous, atrocious, or cruel manner in which the victim was killed may be resolved by the viewing of the photographs of the victim at the scene of the crime and at the medical examiners office. One may only speculate as to the fear and terror that may have existed in the mind of the victim immediately preceding her death, ... (R 390-391)

The instant case is distinguishable from Jackson in that the trial court's finding is clearly supported by an evidentiary

basis in the record. The trial court's finding was clearly supported by evidence other than the victim's character which standing alone justified the finding that the homicide was especially heinous, atrocious or cruel.

D

THE TRIAL COURT PROPERLY FOUND THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

The trial court found as an aggravating circumstance that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 391) The court found that a number of factors contributed to the unalterable conclusion that Reed clearly contemplated the killing of Betty Oermann. The trial court noted that Reed told a cell mate that he killed the victim to keep her from talking and that the manner of the killing -- twelve separate slash marks -- and the intensity of the attack justified this finding. Another factor supporting the trial court's finding of cold, calculated and premeditated is the fact that Grover Reed stated to at least one witness several weeks before the murder that he would "get even'' with the Oermanns for making Reed move out of their home because of drug use. (TR 519). Reed coldly calculated his crime several weeks prior to its execution. It was surely not coincidence that Reed arrived at the Oermann home on a Thursday evening when he knew the Reverend taught a class every Thursday night. Reed was aware of this fact because he had lived in the Oermanns' home and the supper hour was changed on Thursday evenings because of the Reverend's class. Reed also attended

Reverend Oermann's church and the Thursday class was announced after the worship service. (TR 384-385). These factors alone indicate a cold, calculated and premeditated design. Once Grover Reed gained entry to the Oermann house he found Mrs. Oermann alone as expected and after striking her he tied her up. He then ransacked the house for some period of time. Then he severely beat Mrs. Oermann, raped her and methodically strangled and slashed her to death. The trial court also found that Grover Reed executed Betty Oermann in order to eliminate her as the only witness to his crimes, a finding supported by Reed's own statements to a cell mate following his arrest. Taken together these factors show a heightened degree of premeditation supporting a finding that the murder was committed in a cold, calculated and premeditated manner. Such a finding is appropriate in witness-elimination killings. **Hansbrough v. State,** 509 So.2d **1081,** 1086 (Fla.1987) and is not limited to "execution or contract murders." **Scott** V. **State,** 494 So.2d 1134,1139 (Fla.1986).

The facts in the instant case show a premeditated design to harm Mrs. Oermann based on several weeks of reflection. In addition Reed had ample time both before and during the crime to reflect on his actions and their attendant consequences sufficient to evidence the heightened level of premeditation necessary under §921.141(5)(i), Fla.Stat. The fact that Reed tied up his victim while he ransacked the house gave him ample time to reflect and proves that the murder was committed in a cold, calculated and premeditated manner. **Jackson** V. **State,** 13 F.L.W. 46, Case No. 68,097 (Fla., Feb. 18, 1988)

ISSUE V

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THE MITIGATING CIRCUMSTANCE CONCERNING REED'S ALLEGED IMPAIRED CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT SINCE THERE WAS NO EVIDENCE IN THE RECORD TO SUPPORT THIS INSTRUCTION.

Appellant argues that the trial court's refusal to give a requested jury instruction on the mitigating circumstance of substantially impaired capacity was error. The trial judge denied the request on the basis that there was no evidence in the record to support that instruction (R 893-894). Appellant argues that this ruling was incorrect because there was evidence that Reed had been drinking beer all day to the point of intoxication. The record does not bear out this claim.

Witness Michael Shelburne testified that on the day of the homicide he got off work at approximately 8:30 a.m. picked up some beer and went to Grover Reed's house. Shelburne and Reed drank beer for an hour and a half to two hours (TR 46-47). There was no testimony as to the number of beers consumed by Reed that morning. Shelburne then returned to his home and took a nap. Around lunch time he and Reed drove to Albertsons and got some cigarettes and beer and drove to a friend's house. They only stayed at the friend's house for 15 to 30 minutes and then departed. While returning from the friend's house their car broke down. After a brief attempt to restart the car the two men parted company. This was "around lunch or near." (TR 488-491). Shelburne did not see Grover Reed again until later that

night when it was dark. The murder of Betty Oermann took place some time after 5:40 p.m. when Reverend Oermann left his wife alone at home to teach a class at the church (TR 385). The last person to see Grover Reed for the five or six hours preceding the murder was Michael Shelburne around lunch time or early afternoon. There is no evidence in the record that Grover Reed did anything other than drink some beer in the early morning on the day of the homicide. There is no evidence of intoxication at any time during the day, much less immediately preceding or during the commission of the crimes.

The two-part test to be applied when evaluating a request for an intoxication instruction was enunciated in **Gardner** v. **State, 480** So.2d 91 (Fla.1985) when this Court said:

> It is not error to refuse instructions regarding intoxication when there is no evidence of amount of alcohol consumed during hours preceding a crime and no evidence that defendant was intoxicated.

Thus it is not error to refuse to give the charge if there is evidence of drinking but not of intoxication. The only evidence in the instant case is that Grover Reed drank an undetermined amount of beer many hours before the crime with no evidence of intoxication. Although no evidence was presented that Reed consumed alcoholic beverages reasonably preceding the commission of the homicide if that evidence had been presented there was still no evidence that Reed was intoxicated. As this Court stated in Jacobs v. State, 396 So.2d 1113,1115 (Fla.1981):

> The jury instructions regarding intoxication, however, need not be given in every case in which evidence has been adduced at trial that the defendant consumed alcoholic beverages prior to the commission of the offense. Shaw v. State, 228 So.2d 619 (Fla.2d DCA 1969). There was evidence that Jacobs had used intoxicating beverages, but there was no evidence Jacobs was intoxicated. There is no evidence as to the amount of alcohol consumed during the several hours Jacobs drove around prior to the robbery.
>
> In this case the record reveals that the trial judge did not commit reversible error in denying the requested jury instructions.

In the instant case appellant failed to establish consumption of alcoholic beverages preceding or intoxication at the time of the murder. This Court recently held in Hardwick v. State, 13 F.L.W. 83 (Feb. 12, 1988):

> Fifth, Hardwick contends that he had a right to a jury instruction on intoxication. We find no error in the trial court's decision to deny such an instruction, since Hardwick failed to establish on this record that he was intoxicated at the time of the murder. See Link v. State, 429 So.2d 836,837 (Fla.3rd DCA 1983).

In the instant case the record is clear that no evidence was presented that Reed had consumed alcoholic beverages reasonably prior to the commission of the murder or that Reed was intoxicated when the crime was committed. Therefore, the trial judge committed no error in denying the requested jury instruction regarding substantially impaired capacity.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN CONSIDERING A PRESENTENCING INVESTIGATION WHICH CONTAINED VICTIM IMPACT INFORMATION OR THE ERROR WAS HARMLESS AND APPELLANT'S FAILURE TO OBJECT TO THIS INFORMATION IS A PROCEDURAL BAR TO RAISING THE ISSUE ON APPEAL.

At the request of the defense a presentence investigation (PSI) was prepared and submitted for the trial judge's consideration which contained an opinion from the victim's husband that appellant be put to death. The PSI and victim impact statement were not presented to the jury at any time. Upon presentation and consideration of the PSI by the trial court defense counsel did not object to the victim impact information. (TR 918-919). The failure to object is a waiver to raising this issue on appeal.

The question of whether this issue can be raised on appeal when no objection was made in the trial court was considered in **Grossman** v. **State,** supra. In **Grossman** appellant argued that victim impact evidence submitted to the sentencing judge violated the dictates of **Booth** v. **Maryland,** 107 S.Ct. 2529 (1987) which held that introduction of such evidence to a sentencing jury violated the Eighth Amendment to the United States Constitution. In both **Grossman** and the instant case no objection was made to such evidence whereas in **Booth** there was a timely objection. In **Grossman** this Court noted that the **Booth** opinion does not suggest that it be applied retroactively in cases in which victim impact information has been received without

objection and that absent fundamental error the appellate court will not consider an issue unless it was presented to the lower court. Steinhorst v. State, 412 So.2d 332 (Fla.1982). This Court found that Grossman's failure to object to the victim impact evidence in the lower court was a procedural bar to claiming relief under Booth. In the instant case no objection was raised and appellant is procedurally barred from raising this issue on appeal.

Even if appellant can raise this issue on appeal the error, if any, is harmless. In Grossman this Court concluded that the erroneous introduction of a victim impact statement is subject to harmless error analysis on a case by case basis. This Court noted that in Booth the victim impact evidence had been heard by the sentencing jury while in Grossman, as in the instant case, such evidence was presented to the sentencing judge who is mandated by case law to give great weight to the jury's recommendation of death. Tedder v. State, supra. This Court analyzed the fact that the jury in Grossman recommended death 12-0 and that the judge found four valid statutory aggravating factors and no mitigating factors. The trial court's written findings in support of the death sentence showed no reliance whatsoever on the victim impact evidence. This Court concluded that Grossman would have received the death penalty beyond a reasonable doubt absent the impermissible victim impact evidence and that the receipt of such evidence by the trial judge was harmless error.

In the instant case the jury's recommendation for the death penalty was 11-1. (R **308**). The trial judge's written findings in support of the death sentence found six statutory aggravating factors and no mitigating factors. (R **389-393**). These written findings placed no reliance on the victim impact evidence. Based on the jury's recommendation and the trial court's written findings it is clear as in Grossman that beyond a reasonable doubt the death penalty would have been imposed absent the alleged impermissible victim impact evidence. Clearly the receipt of such evidence by the trial judge was at most harmless error.

CONCLUSION

Based on the foregoing argument and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

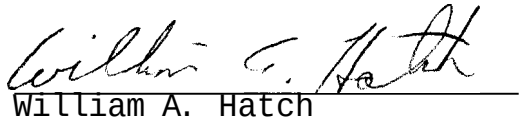
ROBERT A. BUTTERWORTH
Attorney General

WILLIAM A. HATCH
Assistant Attorney General
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been forwarded to W. C. McLain, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. 28th. Mail, this 28th day of March 1988.



William A. Hatch
Assistant Attorney General