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IN THE SUPREME COURT OF FLORIDA

WILLIE MITCHELL, JR.	)	
Appellant,	)	
v.	)	Case No. 70,074
STATE OF FLORIDA,	)	
Appellee.	)	

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APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLEE

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<u>PRELIMINARY STATEMENT</u>

WILLIE MITCHELL, JR., will be referred to as the "Appellant" or as he stood before the trial court in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal, which consists of 8 volumes, will be designated by the letter "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

I. Appellant is not entitled to relief based on the "death qualification" and exclusion of four jurors because he failed to object to the procedure at trial. The perfunctory objection gratuitously entered by the judge on behalf of the defense fails to meet the specificity requirement for contemporaneous objection. Defense counsel's failure to object to the procedure utilized during voir dire waives this issue for appellate review.

Should this Court find the failure to object is not a procedural bar to review, appellant is not entitled to relief because the jurors were properly excluded. The jurors were asked whether they could impose the death penalty; they said they could not. The questions and answers, coupled with defense counsel's acquiescence to their recusal, supports the trial judge's finding that these jurors' feeling would substantially impair the performance of their duties. Such finding by the judge is entitled to deference and should not be disturbed on appeal.

II. The prosecutor's statements to the jury about their role in the capital sentencing scheme were not misleading and did not minimize the importance of the jury's recommendation, and the appellant's failure to object to such statements bars relief on this issue.

If this Court doesn't find the lack of objection to be a waiver, such lack is further evidence that the statements did not violate the principles of Caldwell v. Mississippi, infra. The jury was accurately informed that their decision was an advisory

one that would be given great weight by the judge in ultimately imposing the sentence.

III. The admission of the testimony of the state's odontologist was not objected to at trial so appellant is barred from obtaining relief by objecting to Dr. Briggle's qualifications and procedures at this juncture. Besides that, the argument presented here is one of the credibility of the expert, not one of admissibility, and cannot support reversal.

Again, the lack of objection by defense counsel is further evidence of the fact that an objection would have been spurious. The science of odontology has been found reliable and therefore admissible in the courts of this state and Dr. Briggle has qualified as an expert witness in the field on previous occasions.

IV. The now objected-to closing remarks by the prosecutor were not objected to at trial. Besides being barred from relief for the lack of contemporaneous objection, the remarks were proper comments on the defense's theory of the case. Unobjected to prosecutorial comments cannot support reversal unless the comments could not have been overcome by rebuke or retraction. These comments are not of this ilk as they could have been retracted.

If this Court finds the statement improper, appellee asserts they were harmless because they did not derogate appellant's defense and because the subject of the remark, the victim's purported homosexuality, was not germane to a finding of guilt.

V. The issues raised by juror Woodward are no more than those which inhere in the verdict. Because they were merely reflections of the jury's deliberation process and did not indicate any outside influence, appellant is not entitled to relief on this point.

VI. Because this was more than a robbery gone awry, the lower Court was justified in finding the murder was aggravated by having been committed in a cold, calculated and premeditated manner. Appellant was not prejudiced by the intimation that the state was going to argue only four to nine possible aggravating circumstances and there is no authority for appellant's argument. Should this Court find that cold, calculated and premeditated circumstances were not supported by the record, death is still the appropriate sentence when three other aggravating circumstances and no mitigating ones were found.

VII. This Court and federal courts have consistently held that it is not error to include as an aggravating circumstance the fact that the murder was committed during another felony, even when the defendant is convicted of felony murder. See, Brown, infra, citing White, infra. Accordingly, appellant is entitled to no relief on this point.

VIII. The victim was stabbed 110 times while in his truck in an isolated area. His wounds indicate that he tried to defend himself and that he did not die after the first stab. The stabs were inflicted with enough force to bruise and fracture the victim's ribs and there was a great deal of pain associated with

the wounds. Therefore, the court did not err in finding the murder was heinous, atrocious and cruel and the appellant is entitled to no relief.

IX. The conflict in the bite mark testimony is exactly the sort of conflict juries are supposed to resolve. The role of this Court is not to reweigh such evidence, but to affirm the verdict where supported by substantial competent evidence. Since the evidence in this case, even without the bite mark evidence, is sufficient to support the imposition of the death penalty, the appellant is entitled to neither reversal or vacation of the death penalty.

ARGUMENT

ISSUE I (restated)

WHETHER THE TRIAL COURT ERRED IN EXCLUDING FOR CAUSE SEVERAL PROSPECTIVE JURORS BASED ON THEIR OPPOSITION TO CAPITAL PUNISHMENT.

Appellant contends that the state failed to establish constitutionally acceptable bases for the removal of four jurors. Specifically, appellant asserts that when questioning the venire as to whether they could impose the death penalty, the state did not adequately ascertain whether jurors Dewrell, Richardson, St. Charles, and Vilmure could set aside their opposition to the death penalty in deference to the law. However, appellant's argument must fail for two reasons: (1) the lack of a contemporaneous objection and (2) the fact that the jurors were properly excluded.

When the prosecutor questioned these four jurors as to their ability to impose the death penalty, their responses satisfied the judge that there was cause to remove them from the prospective jury panel. Defense counsel at no time interposed any objection to either the removal of the jurors or to the methods employed to ascertain their suitability as jurors. In each instance the trial judge merely said "I will note the defense objection", (R.942, 979, 1015, 1020) but defense counsel never articulated any true objection to the proceedings. Neither does it appear that counsel attempted to speak but was refused permission by the judge.

This pro forma objection does not satisfy the requirement

that a contemporaneous objection be specific enough to inform the judge of what is being objected to and allow him to cure the alleged error. See, Steinhorst v. State, 412 So.2d 332 (Fla. 1982). A sufficient objection is a prerequisite to appellate review and, in this case, the absence of an adequate objection precludes reversal of appellant's conviction.

This Court has in the past, and should in this case, enforce the contemporaneous objection rule when dealing with Witherspoon - Witt challenges. See, Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841, 856, fn. 11 (1985) citing Brown v. State, 381 So.2d 690, 693-694 (Fla. 1980). The requirement of a contemporaneous objection which adequately preserves the Witherspoon - Witt issue was reiterated in Maggard v. State, 399 So.2d 973, 975 (Fla. 1981), where this Court held:

> If a defendant does not want a prospective juror to be excused on the basis of **Witherspoon v. Illinois**, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), he should make his objection known before the juror is excused. This is not an unreasonable requirement in view of the fact that it is certainly possible that the defendant himself does not want the particular juror to serve and is perfectly content to have the juror excused for cause by the court so that he will not have to use one of his peremptory challenges. Additionally, if the defendant were allowed to raise this point for the first time on appeal, he would be in a position to "sandbag" the trial court and the State by giving the appearance by his silence that he concurs in the court's excusal for cause of a particular juror. He could then proceed, awaiting the outcome of the trial, secure in the knowledge that if he receives the death sentence it would be set aside on appeal.

It is apparent that appellant seeks to sandbag this Court into entering an undeserved reversal.

The necessity for an adequate objection is even stronger where, as here, the defendant is raising on appeal the procedure used to remove jurors and not merely the propriety of the removal. Defense counsel gave every indication that the procedure being employed was acceptable, especially when he did not object after the first juror, Dewrell, was excused. He should not now, on appeal, be heard to object to the procedure to which he more than implicitly acquiesced at trial.

Though case law does place the burden of demonstrating the jurors' lack of impartiality on the party seeking exclusion, Witt, at 851, it does not place upon the State the burden of reading defense counsel's mind. There is no way either the prosecutor or the judge could have divined defense counsel's dissatisfaction with the voir dire.

If this Court finds the lack of objection is not a procedural bar to review, (and the State in no way concedes this point) such lack of objection becomes substantively important. The absence of objection by defense counsel would indicate that he was satisfied that these four jurors would not be able to perform their duties and agreed they were excusable. Indeed, Justice Stevens found the lack of objection and/or attempt by cross-examination or by colloquy to demonstrate the juror could properly have served as a juror to be determinative of the Witherspoon problem in Witt. Witt, at 859, Justice Stevens

concurring. Clearly, in this case, defense counsel did not feel his client's rights were being trampled; he cannot, therefore, expect this Court to reverse the conviction for the alleged violation of such rights.

Besides not being entitled to relief due to the failure to adequately object below, appellant is not entitled to reversal of his conviction because these jurors were not erroneously excluded. The jurors were asked if they could, under the proper circumstances, vote to recommend a man be put to death. The question succinctly made the operative inquiry required by Witt. The answers were unequivocal; these jurors would not vote to impose the death penalty. They expressed more than general opposition to capital punishment.

The entire venire, including these jurors, had heard the voir dire of Mrs. Jarbor. They were aware that the court was seeking to know if they could do their job in spite of their feelings on capital punishment; whether they could act fairly and impartially in spite of misgivings about the death penalty (R.888). Their answers made it clear to the judge (and apparently to defense counsel) that their feelings would prevent or substantially impair the performance of their duties as jurors.

While the jurors were not made to say the magic words once required under Witherspoon, there is no evidence that the Witt standard was not met. Witt and progeny do not require that a juror's bias be proved with unmistakable clarity. See, Witt, at

852. Neither does the case law require the formalized, ritualistic inquiry system envisioned by the appellant, especially where it was clear to all parties that the jurors were subject to recusal.

Even if this Court cannot accept defense counsel's acquiescence in the exclusion of these jurors as evidence that these jurors were properly excluded, deference must be paid to the trial judge's finding that they should have been excluded. This is one of those cases where the trial judge must have been left with the definite impression that these prospective jurors would be unable to faithfully and impartially apply the law upon seeing and hearing the demeanor of the veniremen. See, Witt, at 852-854 and Lambrix v. State, 494 So.2d 1143, 1145 (Fla. 1986).

The question before this Court is not whether you might disagree with the trial court's findings, but whether those findings are fairly supported by the record. Witt, at 858. The State asserts that the jurors' answers to the comprehensive question of the prosecutor, coupled with the absence of objection or rehabilitation by defense counsel, support the trial judge's decision to recuse Dewrell, Richardson, St. Charles and Vilmure for cause.

Appellant's reliance on O'Connell v. State, 480 So.2d 1284 (Fla. 1985) for the proposition that the trial court in this case violated 3.300(b), Fla. R. Crim. P. is misplaced. In O'Connell, the court refused to allow defense counsel to examine jurors that were being excluded, to which defense counsel ardently

objected. In this case, defense counsel never made any effort to examine the prospective jurors so it cannot be said that he was refused an opportunity to participate in the voir dire. The trial judge did not violate the procedural rule and accordingly, the procedure utilized in the voir dire cannot support reversal of appellant's conviction.

Appellant is, therefore, not entitled to the reversal of his conviction on either procedural or constitutional grounds.

ISSUE II (restated)

WHETHER THE PROSECUTOR'S COMMENTS DURING VOIR DIRE IMPERMISSIBLY DIMINISHED THE IMPORTANCE OF THE JURY'S PENALTY RECOMMENDATION.

Mitchell claims that the prosecutor's statement, "the ultimate decision as to whether or not the man lives or dies is made by Judge Coe" was misleading and encouraged the jury to abdicate its own sense of responsibility. Before reaching the merits of this argument it is necessary to consider all of the comments made to the jury with regard to their role in this case.

During voir dire the prosecutor made the statement quoted above (R.884). During penalty phase argument the prosecutor then told the jury:

> "Ladies and gentlemen, you are now facing an extremely solemn and serious decision, namely, whether you should recommend to this Court that the defendant should live or die.
>
> *　　　*　　　*
>
> Judge Coe has instructed you ladies and gentlemen, that during this phase of the proceedings, you are to render an advisory sentence to this Court as to which punishment Judge Coe should impose upon the defendant for the first-degree murder of Walter Shonyo, that punishment being either death in Florida's electric chair or life imprisonment without the possibility of parole for twenty-five years.
>
> *　　　*　　　*
>
> <u>You must understand that Judge Coe will be giving great weight and great consideration to any advisory sentence that you make</u> when Judge Coe makes the ultimate decision as to whether or not Willie Mitchell should live or die." (R.5)

(R.622-623).

The prosecutor went on to explain the system of weighing aggravating and mitigating factors in arriving at their decision (R.623-624). Defense counsel did not object to any of these statements. In fact, he ratified the prosecutor's statements by arguing:

> "I realize that your recommendation is just a recommendation and that Judge Coe is going to do what Judge Coe must do, what he feels he has to do . . ."
>
> (R.631)

The foregoing recitation of the statements in their entirety illustrates why appellant's argument based on Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) must fail. For one thing, the issue was not adequately preserved for appellate review and for another, the statements are not misleading and do not minimize the role of the jury in this case.

Appellant stringently argues that statements made in violation of Caldwell are fundamental error and so the absence of a contemporaneous objection does not preclude review of this issue. However, case law does not support that assertion. As this Court observed in Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987):

> Appellant argues that the lack of objection at trial and argument on appeal does not preclude consideration of the issue now because **Caldwell v. Mississippi** was a fundamental change in the constitutional law of capital sentencing thus creating a new legal right that may form the basis for post-conviction litigation. We find that this contention is without merit. The extreme

importance of the jury's sentencing recommendation under our capital felony sentencing law has long been recognized having emerged from early judicial construction of the statute. **McCaskill v. State,** 344 So.2d 1276 (Fla. 1977); **Chambers v. State,** 339 So.2d 204 (Fla. 1976); **Thompson v. State,** 328 So.2d 1 (Fla. 1976); **Tedder v. State,** 322 So.2d 908 (Fla. 1975); **Taylor v. State,** 294 So.2d 648 (Fla. 1974). That if defense counsel at trial had believed that the prosecutor and judge were denigrating the jury's role to his client's prejudice, he could have objected and received corrective action based on the well known **Tedder** rule. The matter could then have been argued on appeal in the absence of adequate corrective action by the trial court. The lack of objection at trial followed by argument on appeal constitutes a waiver of the objection. The trial court was correct in summarily denying this ground of the motion as procedurally barred.

(505 So.2d at 427-8)

Though directed to procedural bar at the collateral stage, the above-expressed analysis of the importance of contemporaneous objection is equally applicable here. The trial court was never put on notice that the defendant objected to the prosecutor's expression of the law on sentencing. In fact, defense counsel acquiesced to the scheme as presented to the jury by the prosecutor. Defendant cannot now be heard to challenge the propriety of the proceedings below.

As a backup appellant asserts that defense counsel may not have objected to the proceedings because at that time (November, 1986) Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) had yet to make the Caldwell principles applicable to the Florida capital sentencing scheme. It cannot seriously be argued that the tools

to make an objection were not available to Florida attorneys at the time of appellant's trial. Caldwell-type claims have been available in Florida since 1918. See footnote 5 of Caldwell wherein Blackwell v. State, 79 So. 731, 735-736 (Fla. 1918) and Pait v. State, 112 So.2d 380 (Fla. 1959) are cited. The lack of an objection at trial precludes relief on this issue.

If this Court rejects the above contemporaneous objection argument, the lack of an objection is properly considered as evidence that the statements were non-objectionable. That is, that the prosecutor's comments were neither misleading nor did they tend to minimize the role of the jury in capital sentencing.

The comments complained of are an accurate statement of the procedure followed in a death case, as well as the jury's role in a capital sentencing proceeding. See, Section 921.141, Fla. Stat. and Harich v. Wainwright, 813 F.2d 1082, 1101 (11th Cir. 1987). The comments did not diminish the jury's sense of responsibility. Actually, the prosecutor emphasized the significance of that role when he said:

> You must understand that Judge Coe will be giving great weight and great consideration to any advisory sentence that you make . . .
>
> (R.23).

The jury was properly and correctly told of their duties and responsibilities in the capital sentencing scheme. The prosecutor's statements do not suffer the infirmities of Adams, supra and Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987) where the juries were not informed that their recommendation would be

given great weight. Therefore, appellant is entitled to neither the reversal of his conviction nor resentencing based on any alleged violation of the principles of Caldwell, supra.

ISSUE III (restated)

WHETHER THE ADMISSION OF THE BITE MARK EVIDENCE WAS FUNDAMENTAL ERROR REQUIRING REVERSAL OF APPELLANT'S CONVICTION.

The appellant argues that the lower court erred in allowing the State's expert witness on forensic odontology, Dr. Joseph Briggle, to testify since his testimony was inherently unreliable. However, neither the qualification of Briggle as an expert nor the introduction of his testimony were objected to at trial. This issue therefore, cannot support reversal of appellant's conviction.

An appellate court cannot predicate error, set aside or reverse a judgment on the basis of admitted testimony unless a substantial right of the party is affected and a timely objection or motion to strike appears on the record. Further, that objection must state the specific ground for objection if the specific ground is not apparent from the context. See, Rule 90.104(1)(a), Fla. Evid. Code. No objection was made below so this issue, which is not properly before this Court, cannot support reversal of appellant's conviction.

Though appellant attempts to label the admission of Briggle's testimony as fundamental error, this argument is belied by the facts and the record. An error is fundamental only if it goes to the foundation of the case or goes to the merits of the cause of action. This Court has delineated the three types of alleged errors most likely to be reviewed despite lack of preservation in State v. Smith, 240 So.2d 807 (Fla. 1970). The

only one of those even remotely applicable in this case is:

> . . . where the issue reaches down into the very legality of the trial itself to the extent that a verdict could not have been obtained without the assistance of the error alleged . . . Id. at 810.

Even assuming, for the sake of argument, that the admission of Dr. Briggle's testimony was error, it cannot be deemed fundamental since the verdict could have been obtained without that evidence. There is evidence that the victim was killed by over one hundred stab wounds which produced quite a bit of blood (R.57, 58, 122, 131). The defendant's family testified that when he arrived home the evening of the murder his shirt was soaked in blood, and that he did not exhibit any injuries which would account for that amount of blood (R.70-71, 80, 89, 91, 202, 209). The defendant was carrying several items including a watch, some tools and a jacket, identified as the victim's which he admitted stealing from the victim's truck (R.68, 88, 116-119, 145, 183-184, 463-467). Not only did the defendant place himself at the murder scene (victim's truck), a palm print matching his was found inside the truck on the seat cover (R.339-342).

The odontologist utilized by the defense, (whose credentials and testimony went unobjected to at trial and which are vouched for, by the appellant, as above reproach) testified that there were some spacing similarities between the defendant's teeth and the bite mark left on the victim's arm (R.386). Dr. Levine further said that he couldn't say absolutely that the defendant

did not bite the victim, that he couldn't exclude the possibility, but that he couldn't say there was no doubt (R.388, 396). There being sufficient evidence (even without Dr. Levine's testimony) to support the verdict, any error in admitting Dr. Briggle's testimony cannot be said to be fundamental.

This case is a prime example of why courts enforce the contemporaneous objection rule. Appellant asks this Court to consider all the arguments he would have made at trial, had he thought of them. In doing so, he introduces evidence in the form of odontological treatises and texts which were not before the trial judge. The appellant further asks this Court to speculate that the trial judge would have erred had he been given the benefit of this information.

Not only can this Court not be expected to rule on the basis of evidence not presented to the lower court and not tested by cross-examination, but this Court should not be asked to reverse itself on the admissibility of bite mark evidence on the untested testimony of an appellate attorney. Even so, the appellant's arguments attacking the reliability of bite mark evidence and forensic odontology as a science have previously been rejected by this Court, and others.

In Bundy v. State, 455 So.2d 330 (Fla. 1984), this Court upheld the trial court's finding that the science of odontology is generally recognized by scientists in the relevant fields which is therefore an acceptable foundation for the admissibility of expert opinion on the subject. There, as here, the appellant

argued that the comparison techniques were not shown to be reliable and that the State's expert gave an improper opinion on the issue. These arguments were rejected by this Court because the nature of the evidence did not involve total reliance on scientific interpretation to establish a question of fact. Rather, with bite mark evidence, the jury was able to see the comparison for itself by looking directly at the physical evidence in the form of models and photographs. Bundy, at 348, 349. The admission of the bite mark evidence in this case is no less reliable, and absent any contemporaneous objections cannot support reversal. See also, Bradford v. State, 460 So.2d 926 (Fla. 2d DCA 1984) and Handley v. State, (Ala. Ct.Crim.App., No. 6 Div. 360, Decided June 30, 1987), synopsis at 41 Cr.L. 2302.[1] The question in those cases, as in this one, became no more than the weight the bite mark evidence was to be afforded, which is a question for the jury, not the appellate court.

The evidence in cases cited by appellant, Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977) and State v. Peek, an unpublished opinion of the Circuit Court of the Tenth Judicial Circuit of Florida, are not of the same caliber as bite mark evidence in that the juries were not able to see the physical evidence and had to rely on uncontestable scientific analysis. In this case, not only could the jury compare the photo of the

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1/ Opinion attached as appendix 1. See specifically the discussion of the admissibility of bite mark evidence at III, pp. 14 - 20.

bite mark to the defendant's impression, they heard Dr. Briggle's methodology and finding challenged by cross-examination and then impeached by another expert with a different opinion.

Appellant's argument on the admissibility of the bite mark evidence in this case is no more than a thinly disguised weight and sufficiency argument which was not considered by the trial court. Not only can the lack of an objection be considered a bar to this argument on appeal, the lack of objection can be considered as a concession on the part of defense counsel that there were no grounds on which to object. Dr. Briggle was adequately qualified to testify in the area of forensic odontology and the admissibility of the science of forensic odontology in Florida laws is well established. Therefore, the lower court did not err in admitting Dr. Briggle's testimony and appellant is not entitled to reversal of his conviction for the admission of this evidence.

ISSUE IV (restated)

WHETHER THE PROSECUTOR'S REMARKS AT CLOSING ARGUMENT WERE IMPROPER AND, IF SO, WHETHER THEY DENIED APPELLANT'S RIGHT TO A FAIR TRIAL.

Appellant contends that the prosecutor's remarks during closing argument regarding the victim's alleged homosexuality were improper and of such magnitude as to constitute fundamental error. This argument must fail because the issue is waived by the absence of an objection to the alleged comments and that lack of objection cannot be overcome since any error was not fundamental. Additionally, the State would argue that the comments were not improper but were remarks invited by the defense. Should this Court find the comments improper, any error in their presence did not affect the verdict, and harmless error cannot support reversal.

Florida courts have continuously held issues which have not been presented to the trial court cannot be raised for the first time on appeal. See, i.e., State v. Jones, 204 So.2d 515 (Fla. 1967); Castor v. State, 365 So.2d 701 (Fla. 1978) and Steinhorst v. State, supra. The principles underlying the contemporaneous objection requirement are equally applicable in death penalty cases and have barred appellate review of such issues. See, Lucas v. State, 376 So.2d 1149 (Fla. 1979) and Steinhorst, supra.

Ordinarily, the appellant's failures to object and to raise prosecutorial misconduct as grounds for seeking a new trial may be viewed as a waiver of the objection. Clark v. State, 363 So.2d 331, 335 (Fla. 1978). But, courts will consider the issue

excepted from the contemporaneous objection/motion for mistrial rule when the proseuctor's argument, taken as a whole, is of such character that its sinister influence could not be overcome by rebuke or retraction. Ryan v. State, 457 So.2d 1084, 1091 (Fla. 4th DCA 1984), see also, Tuff v. State, on rehearing, So.2d ___ (Fla. 4th DCA July 29, 1987) [12 F.L.W. 1845].

The alleged error in this case could have been easily cured by either rebuke or retraction and, therefore, is not fundamental error. The prosecutor merely mentioned that the victim would have been offended by the allegations that he was killed while engaged in a homosexual act. Any error present in this comment could easily have been cured as it did not go to the heart of the case. Whether or not the jury thought the victim was homosexual had no bearing on the determination of appellant's guilt. That is, the victim's sexual proclivity had no bearing on whether or not Willie Mitchell killed him.

The prosecutor's comments did not erroneously restate the law or derogate a legal defense asserted by the defendant as did those in Rosso v. State, ___ So.2d ___ (Fla. 3d DCA 1987) [12 F.L.W. 1024] and Tuff v. State, ___ So.2d ___ (Fla. 4th DCA 1987) [12 F.L.W. 1335] and [12 F.L.W. 1845] where the courts found the comments constituted fundamental error. Mitchell's defense, that he didn't murder the victim, did not depend on establishing Shonyo was a homosexual. Likewise, appellant's defense that someone else killed Shonyo in a homosexual rage, is not dependant on a finding by the jury that the victim was homosexual. Had the

jury believed the prosecutor and found Shonyo was not homosexual, they were in no way constrained to find Shonyo was not murdered by Willie Mitchell.

Neither is this a case where a combination of prosecutorial comments, though unobjected to, constitute fundamental error like Tuff, supra; Rosso, supra; Jones v. State, 449 So.2d 313 (Fla. 5th DCA 1984); Ryan, supra; and Bertolotti v. State, 476 So.2d 130 (Fla. 1985). In those cases the prosecutor made several improper comments, whereas, in this case only one comment is challenged as improper.

The State would urge in the alternative that the complained-of comments were not even improper, but were legitimate comments on the evidence which were induced by the argument advanced by the appellant's attorney in opening statement. Though no opening statements were transcribed, it is clear that the defense sought to establish Shonyo had been killed by someone in a homosexual rage and that since Mitchell was not a homosexual the murder could not have been committed by him. No evidence was presented at trial to support the argument that Shonyo was homosexual. The prosecutor's comment was therefore a valid comment on the evidence, and was properly made in anticipation of the defense's reiteration of their unsupported theory. This comment was a proper exercise of closing argument - to review the evidence and to explicate the reasonable inferences possible therefrom. See, Bertolotti, supra.

Even if this Court finds the comment was improper, the

impropriety of proseuctorial comments is subject to an harmless error analysis. See, Hill v. State, 477 So.2d 553, 556-557 (Fla. 1985) and State v. Murray, 443 So.2d 955 (Fla. 1984). Many of the reasons this error (assuming the comment was improper) cannot be considered fundamental are applicable to establishing the error as harmless. Of primary importance is the fact that even if the jury was swayed by the comment to find Shonyo was not homosexual, they were in no way constrained to render a guilty verdict. The evidence supports a finding that Mitchell is guilty, regardless of Shonyo's sexual habits. There is uncontroverted evidence that Mitchell was in Shonyo's truck; that he stole the victim's tools, watch, jacket and radio; that he left his palm print in blood in the seat of the murder scene; and that he was seen covered in an amount of blood consistent with having stabbed someone to death and inconsistent with the barroom brawl explanation he gave the night of the murder. There is evidence from which the jury could find that the bite mark left on Walter Shonyo's body was put there by Willie Mitchell and that a knife consistent with Shonyo's injuries was found a few feet from where Mitchell slept. Had the jury been improperly led to believe Shonyo would have been embarrassed by the intimation that he was homosexual, that improper consideration did not require them to convict Mitchell.

Additionally, it should be noted that the defense theory that Shonyo was killed by someone in a homosexual rage, even if believed does not automatically exonerate Mitchell. It is

inferrable from the evidence that despite his denial of homosexuality, it was Mitchell who became enraged with Shonyo for some reason or another and stabbed him one hundred ten times, bit him, and robbed him of his belongings. The reliance appellant places on this defense is somewhat exaggerated. If the jury chose not to believe it, the loss in the viability of that theory is harmless.

Further, only attenuated reasoning can support the conclusion that worrying whether Shonyo would be embarrassed or angered by allegations of homosexuality led the jury to believe the State witnesses and disbelieve the defense witnesses. Since there has been no showing that the prosecutor's comment undermines confidence in the outcome of the proceeding, see Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985), appellant is not entitled to the relief requested.

ISSUE V (restated)

WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE ONE OF THE JURORS SAID SHE BELIEVED THE APPELLANT WAS NOT GUILTY OF MURDER.

Appellant asserts that because one juror voluntarily made the statement that she didn't believe Mitchell was guilty of murder and only voted that way because of pressure by other jurors he is entitled to a new trial. The law on the issue of the finality of jury verdicts holds exactly the opposite, establishing conclusively that appellant is entitled to no such relief.

> It is a long established and generally accepted doctrine that testimony or affidavits of jurors impeaching a verdict rendered by them will not be received and considered where the facts shown therein are such as inhere in the verdict. Russ v. State, 95 So.2d 594 (Fla. 1957) citing Langford v. King Lumber & Mfg. Co., 167 So. 817 (Fla. 1936); City of Miami v. Bopp, 158 So.2d 89 (Fla. 1934); Linsley v. State, 101 So. 273 (Fla. 1924).

See also Songer v. State, 463 So.2d 229 (Fla. 1985) for the applicability of this principle to capital cases.

The classic definition of "facts such as inhere in the verdict" is contained in Russ, supra, citing Wright v. Illinois - Miss. Telegraph Co., 20 Iowa 915 (1866).

> . . . such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment or other matter

resting alone in the juror's breast". Russ, at 600. (e.s.)

All of the statements made by juror Woodward, despite appellant's efforts to characterize them otherwise, are precisely those which cannot support overturning a verdict. For instance, Juror Woodward says she did not assent to the verdict (R.832); that she misunderstood the instructions (R.848, 851, 861); that she was unduly influenced by other jurors (R.835, 836, 841, 845, 854); and that she was mistaken in assenting to the verdict (R.848). All of those matters inhere in the verdict, they arose during the deliberation process. A verdict will not be overturned where one juror alleges that her will was overborne by another or that the verdict was based on a mistaken presumption. State v. Blasi, 411 So.2d 1320 (Fla. 2d DCA 1981).

The juror's actions in this case are similar to those of the juror in United States v. Ayarza-Garcia, et al, __ F.2d __, (11th Cir. Case No. 86-5277, June 22, 1987) [1 FLW Fed. C806]. In Ayarza-Garcia, the juror wrote a book indicating one of the jurors assented to the jury under duress. The Eleventh Circuit characterized the appellant's efforts to gain a new trial as nothing more than impermissible inquiries seeking to probe the mental processes of jurors. Id. at 809. The cases cited therein reiterate the long held precept that verdicts will not be upset on the basis of juror's post-trial reports of jury deliberations unless extraneous influence is shown. Evidence of discussions among jurors, intimidation of one juror by another, and other

intra-jury influences on the verdict are not competent to impeach the verdict. Llewellyn v. Stynchcombe, 609 F.2d 194, 196 (5th Cir. 1980).

Juror Woodward's affidavit merely describes the jury's internal deliberations and the mental process by which its various members reached the verdict. It raises no inference that the verdict was the result of improper consideration of extraneous information or duress from extrinsic sources.

Additionally, it should be noted that at least six times the prospective jurors vowed they could be the lone hold-out against an otherwise unanimous jury (R.957, 977, 985, 993, 995, 1008). Juror Woodward herself specifically stated she could do a minority hold out if she had reasonable doubts as to the defendant's guilt (R.1012). Her desire to change her mind after the verdict is determined and after she has affirmed her decision with the jury poll (R.603) cannot be countenanced as a reason to overturn appellant's conviction and grant him a new trial.

ISSUE VI (restated)

WHETHER THE COURT ERRED IN INSTRUCTING AND FINDING THE EXISTENCE OF THE AGGRAVATING FACTOR THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED.

Appellant asserts that the facts of this case do not support a finding that this murder was committed in a cold, calculated and premeditated manner. Appellee recognizes the authorties cited by appellant hold that a murder during a robbery, without more, will not support a finding of cold, calculated and premeditated, but counters with the assertion that there is more to this case than a robbery gone awry.

The defendant, by his own admission, was out looking to rob someone. He chose a victim who was alone in an isolated area. The victim was vulnerable due to the isolation and his age. The defendant chose a victim convenient to his home which would facilitate the commission of the crime. It is not known whether the robbery occurred before or after the murder, but the defendant systematically removed the victim's property from him; he did not leave behind items which could not be sold. The defendant stabbed the victim one hundred ten times. Some amount of time must elapse between that number of stabs - time in which the defendant could either decide to stop stabbing or decide to stab until death ensued. Sufficient time also passed during which the defendant could plot his actions as to ascertaining death, disposing of the body and returning home. The appellant admitted to his cousin that if the victim of their "fight" wasn't

dead, he'd wish he was. These facts, taken in their totality, substantiate the finding that this murder was committed in a cold, calculated and premeditated manner. Defense never asserted any pretense of moral or legal justification as there is none. Therefore, the judge did not err in so finding, or in allowing the jury to consider the applicability of that aggravating circumstance.

The jury was adequately instructed that they were to evaluate the evidence to decide the existence of any aggravating and mitigating factors themselves (R.622-623). They were further admonished that the state contended four aggravating circumstances existed and that:

> You can reject that or accept it as you see fit. Maybe four don't. The State's contention is that the evidence has shown without any doubt that four out of the nine aggravating circumstances apply.

(R.624)

In fact, the jury was invited to consider cold, calculated and premeditated and heinous, atrocious and cruel as only one aggravating circumstance (R.627). Contrary to appellant's assertion, they were in no way misled by the intimation that the existence of the aggravating circumstances had been predetermined and that they were constrained to agree with the state and judge's findings. While there is authority for the giving of only those instructions supported by the evidence, see Byrd v. State, 481 So.2d 468 (Fla. 1985), there is no authority for appellant's argument that the defendant was harmed because the

jury knew other aggravating circumstances had been rejected as not applicable.

As stated previously, the judge did not err in finding the existence of this aggravating circumstance. The findings of the trial judge on aggravating and mitigating circumstances are factual findings which should not be disturbed unless there is a lack of competent evidence to support such finding. Sireci v. State, 399 So.2d 964 (Fla. 1981) and Lucas v. State, supra. See, Mason v. State, 438 So.2d 374 (Fla. 1983); Squires v. State, 450 So.2d 208 (Fla. 1984); O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); Hill v. State, 422 So.2d 816 (Fla. 1982) and Jent v. State, 408 So.2d 1024 (Fla. 1981) where this Court has upheld findings of cold, calculated and premeditated circumstances. As in these cases, the finding should be supported in this case.

Should this Court find that cold, calculated and premeditated circumstances did not exist, appellant is not entitled to resentencing. It is well-established that death is the appropriate sentence where there are one or more aggravating circumstances and no mitigating circumstances. See, i.e., Blanco v. State, 452 So.2d 520 (Fla. 1984); Sireci, supra; Alford v. State, 307 So.2d 433 (Fla. 1975). Even in a case where one aggravating circumstance found by the trial judge to exist is found not to exist by this Court, death is still the appropriate sentence. See, i.e., Armstrong v. State, 429 So.2d 287 (Fla. 1983) and Antone v. State, 382 So.2d 1205 (Fla. 1980). See also, Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77

L.Ed.2d 1134, reh'g denied, 463 U.S. 874, 104 S.Ct. 209, 78 L.Ed.2d 185 (1983).

Appellant argues that in Nibert v. State, __ So.2d __ (Fla., May 7, 1987) [12 F.L.W. 225] this Court impliedly recedes from the "Elledge rule", and urges a beyond a reasonable doubt standard for proving the court did not rely on an impermissible aggravating circumstance in affirming a death penalty. However, this is not the standard applied by this Court as late as July 9, 1987. In Rogers v. State, __ So.2d __ (Fla. July 9, 1987) [12 F.L.W. 368] the standard for reversal of a conviction where some aggravating circumstances were found not to exist and some mitigating circumstances were found to have required consideration is stated as follows:

> Reversal of Roger's conviction is permitted only if this Court can say that the errors in weighing aggravating and mitigating factors, if corrected, reasonably could have resulted in a lesser sentence. If there is no likelihood of a different sentence, the error must be deemed harmless. See **State v. DiGuilio**, 491 So.2d 1129, 1138 (Fla. 1986).

Rogers, supra at 372.

In this case we have a man who has previously been convicted of a violent felony murder during yet another robbery. We have a defendant who stabbed one hundred ten times and bit his victim in order to affect the murder. There is no assertion that any mitigating circumstances should have been considered. Therefore, there is no reasonable likelihood that had the trial court not considered the murder cold, calculated and premeditated that they would have found the non-existent mitigating circumstances

outweighed the three remaining aggravating circumstances. Accordingly, appellant is not entitled to the reversal of his sentence or resentencing.

ISSUE VII (restated)

WHETHER THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCES THAT THE MURDER WAS COMMITTED DURING THE COMMISSION OF A ROBBERY APPLICABLE TO THIS CASE.

Appellant challenges the utilization of the aggravating factor that the murder was committed during the commission of a robbery when that robbery is the underlying felony of the felony murder of which he was convicted. It should be noted that the applicability of this factor was not challenged at trial by any sort of objection. Besides that, this argument has expressly been rejected by both this Court and our Federal Circuit Court.

This Court rejected the argument that allowing aggravation on this factor automatically created a presumption that death is the appropriate penalty for those convicted of felony murder, but not for those convicted of premeditated murder, in Menendez v. State, 419 So.2d 312 (Fla. 1982). The reasonableness of taking into account as an aggravating circumstance the fact that the murder was committed during the commission of another serious felony was affirmed in White v. State, 403 So.2d 331, 336 (Fla. 1981), citing State v. Dixon, 283 So.2d 1 (Fla. 1973).

In Brown v. State, 473 So.2d 1260 (Fla. 1985), this Court got even more specific as to this argument when it said:

> [17] Appellant also argues that relying upon the murder being committed in the course of a burglary as an aggravating circumstance was improper because the burglary also supplies an essential element of the murder conviction under the felony murder doctrine. Even if the premise of this argument--that the

> murder conviction rests upon the felony-murder doctrine--were correct, the argument would be without merit. Application of the commission-during-felony aggravating circumstance is permissible even though the murder conviction itself rests on the felony-murder doctrine and both are based on the same felony. **White v. State**, 403 So.2d at 335-36.
>
> Brown, at 1267.

Likewise, the Eleventh Circuit has rejected appellant's argument. See Porter v. Wainwright, 805 F.2d 930, 943 (11th Cir. 1986) fn. 15 citing Henry v. Wainwright, 721 F.2d 990, 996 (11th Cir. 1983), cert. denied, 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984); Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), cert. denied 464 U.S. 1063, 104 S.Ct. 745, 79 L.Ed.2d 203.

This Circuit has consistently refused to adopt the holding of the Eighth Circuit in Collins v. Lockhart, 754 F.2d 258, cert denied, 88 L.Ed.2d 475 (1985), with reason. That Court's reasoning misapprehends Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) and ignores Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

The vice condemned in Godfrey, supra was that there was but one statutory aggravating factor and that factor was interpreted by the State Supreme Court to render indistinguishable those eligible for the death penalty and all others guilty of murder. Florida does not assert that it may impose a death penalty merely on one who commits a premeditated murder; and, Florida law requires the presence of at least one of several enumerated statutory aggravating factors (§921.141(a)-(i), Fla. Stat.) and

findings by the trial judge that the aggravating factors outweigh what may have been found as mitigating.

Enmund, supra is grounded on the premise that while states may declare it is first degree murder to participate in a felony murder, it is not constitutionally permissible to impose a sentence of death for such crime unless the defendant also killed, intended to kill or contemplated the use of lethal force. This requirement serves to insure that not everyone guilty of participating in a felony murder is eligible for the death penalty; the requirement of intent to kill permissibly circumscribes the class of persons eligible for death.

Collins' prohibition of the consideration of robbery as an aggravating factor as impermissible not only misconstrues Godfrey, supra and ignores Enmund, supra but it conflicts with Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Proffitt upheld the Florida statute and was a case wherein one of the aggravating factors found was the homicide was committed in the course of a felony (burglary).

Additionally, it would be irrational to consider the imposition of the death penalty for a defendant without considering the circumstances of the offense.

Even if this Court finds this aggravating circumstance was improperly considered, the error is harmless in that three other aggravating and no mitigating circumstances were found. See Armstrong, supra; Rogers, supra, and Barclay, supra.

ISSUE VIII (restated)

WHETHER THE TRIAL COURT ERRED IN FINDING THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Appellant contends that the evidence does not support the finding that the murder of Walter Shonyo was especially heinous, atrocious or cruel. This assertion is belied by the facts.

Shonyo was alone in an isolated area when he was approached and killed, which in itself is terrifying. He was not a young man, between fifty and sixty years old. His attacker was young and much larger than he. Shonyo was forced from a sitting position in the drivers' seat of his truck to the passenger side, apparently to the floor, where he was stabbed one hundred ten times in the side, back and face.

Some of the stab wounds were on his arm; defensive wounds (R.204). The stabs were inflicted with a great deal of force, enough to cause bruising and fracturing of his ribs (R.206, 233). There is no doubt that there was pain associated with his wounds (R.209). Mr. Shonyo also suffered the pain of a human bite (R.204).

While the doctor who performed the autopsy felt he was alive for all one hundred ten stabs, it is clear that he was alive for some of them. Even if Dr. Baden is believed and Shonyo died soon after the stabbings began, even milli-seconds between stabs is a long time to contemplate death. Any stab after the first is even that more painful and frightening to a scared, beleagured victim.

In Hansborough v. State, ___ So.2d ___ (Fla. June 18, 1987)

[12 F.L.W. 305], this court upheld a finding of heinous, atrocious and cruel in a sitaution quite like this one. One of the reasons the court upheld the finding was because the fact that some of the victim's 30-some stab wounds were defensive. This, the court reasoned, showed she was aware of what was happening to her. Some of Mr. Shonyo's wounds were defensive. Another of the reasons utilized to uphold this as an aggravating circumstance was the fact that the testimony indicated the victim did not die, or even necessarily lose consciousness instantly; neither did Mr. Shonyo. See also, Roberts v. State, ___ So.2d (Fla. July 2, 1987) [12 F.L.W. 325] which cites Heiney v. State, 447 So.2d 210 (Fla. 1984) cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984).

This Court has found stabbing deaths in far less egregious circumstances heinous, atrocious and cruel. See, Nibert v. State, supra, where seventeen stab wounds was found heinous, atrocious and cruel.

The fact that the victim lingered for several minutes, conscious of impending death, are factors the court should consider in determining heinous, atrocious or cruel. See, Funchess v. State, 341 So.2d 762 (Fla. 1976); Knight v. State, 338 So.2d 201 (Fla. 1976); Washington v. State, 362 So.2d 658 (Fla. 1978) and Phillips v. State, 476 So.2d 194 (Fla. 1985). There is every indication that Walter Shonyo lingered long enough to be conscious of impending death.

For these reasons, the lower court did not err in finding

the heinous, atrocious and cruel nature of this murder constituted an aggravating circumstance. Should this Court, however, find this circumstance inapplicable, death is still the appropriate sentence. There were no mitigating circumstances found; there are at least three valid aggravating circumstances. Under these circumstances, a sentence of death is proper. Armstrong v. State, supra and Antone v. State, supra.

ISSUE IX (restated)

WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT IMPOSITION OF THE DEATH PENALTY.

Appellant, relying on his argument that the testimony of the state's odontologist is unreliable, asserts that the evidence in this case is insufficient to support imposition of the death penalty. While the evidence of the bite mark experts did conflict, and the story told by the state witnesses conflicted with the story urged by the defendant, it is not the province of this Court to reweigh conflicting testimony. Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Rather, it is within the province of the jury to determine the credibility of witnesses and to resolve factual conflicts. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). Obviously, the jury resolved any conflicting evidence in this case against the defendant and in favor of the state.

Where, as here, the jury's verdict is supported by competent, substantial evidence, the jury's finding will not be disturbed on appeal. See Melendez v. State, 498 So.2d 1258 (Fla. 1986). Unlike the evidence in Melendez, which Justice Barkett found not to rise to the level of certainty necessary to support imposition of death, the evidence in this case does not rest solely on the uncorroborated testimony of a convicted felon. Neither, as urged by appellant, does the case rest solely on the "unreliable" testimony of the state's bite mark expert.

The conflict in the bite mark evidence is exactly the sort of evidence a jury is charged with resolving. In this case, the state's odontologist explained to the jury how he went about matching bite marks to people's teeth. He physically showed the jury how he compared the picture of the bite mark to plaster casts of the defendant's teeth. They were able to see for themselves and decide whether they thought the defendant had indeed bitten the victim. The defense odontologist did not believe the defendant had left the bite mark, but couldn't positively rule out the defendant. The jury had before them the testimony, the impeachment, and the physical evidence from which they made their decision. This Court cannot reweigh this evidence since it does not have the advantage of the physical evidence.

Besides the fact that this Court does not have benefit of the same evidence, it is unknown whether the jury actually found the defendant inflicted the bite mark. The verdict does not rely solely on the bite mark evidence. Thus, without knowing whether the bite mark was the coup de grace convincing the jury to vote to impose the death penalty, it would be error to reverse their decision.

Aside from the bite mark evidence, other evidence exists which is sufficient to support both the verdict and the sentence. In the early morning hours of May 1, 1986, Willie Mitchell returned home with his shirt soaked in blood (R.70, 80, 89, 93). He explained that he'd been in a fight in a bar, but

his injuries were inconsistent with the amount of blood on his clothes (R.71, 89, 149, 459). Mitchell was carrying a box containing, among other items: tools, jumper cables, books, a radio, and a jacket. Appellant was wearing a watch (R.68, 88, 183-184). All of these items were identified as belonging to the victim, Walter Shonyo (R.114-119).

When Mitchell arrived at his cousin's apartment he acted nervous, scared; he turned out the lights and peeped out the windows (R.72, 89). He slept in the apartment that night and a small knife with blood on it was later found by some of the other residents (R.91, 455). Appellant admitted he carried a small knife (R.475). Neither appellant's clothes nor the knife were recovered (R.94).

Mitchell testified himself that he had stolen the box of tools and other things out of the victim's truck which he had happened across while out shopping for crack cocaine. He testified that he had found the watch on the ground near the truck and had picked it up (R.463, 466, 478-480). Mitchell said the truck was unoccupied but that he had leaned way inside through the drivers door, retrieved the victim's jacket from the floorboard and "went through the truck pretty good". He did not mention seeing any blood in the truck (R.466. 478-480). Two palm prints in blood, which matched Mitchell's, were found on the seat covers in the truck (R.339-342).

Walter Shonyo's body was found in a parking lot (R.41-44, 49-51, 53-56) located somewhere between his place of employment,

where he'd been seen as late as 12:30 a.m. May 1, 1985 (R.34), and where his truck was recovered, which was in the neighborhood close to Willie Mitchell's residence (R.130, 176-178). The truck contained a great deal of blood on the windshield and floorboard (R.131, 176-178, 250). The blood on the jacket, which belonged to Shonyo but was recovered from the defendant, was of the same type and genetic markers as the victim's (R.352), as was the blood on the seat cover (R.354). Shonyo's blood type and genetic markers were rare, and would be consistent with only 200 people in Tampa (R.353-354).

The victim died after having been stabbed 110 times in the left side, back and face (R.202-203). A great degree of splattered blood would be associated with such wounds (R.209), and Shonyo's body and shirt were covered with blood (R.58, 60, 122).

The evidence in this case was obviously sufficient to convince the jury not only of Mitchell's guilt, but that he deserved to be sentenced to death. The evidence being sufficient, this Court should affirm both the conviction and the penalty.

CONCLUSION

Based upon the foregoing reasons, argument and citations of authority, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Steven L. Bolotin, Assistant Public Defender, Hall of Justice Building, Post Office Box 1640, Bartow, Florida 33830, this 24th day of August, 1987.

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