IN THE SUPREME COURT OF FLORIDA

GEORGE ALEXANDER HILL, Appellant,	)	
v.	)	Case No. 70,444
STATE OF FLORIDA, Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY

BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

Issue I: The trial court did not abuse its discretion in excluding the multiple hearsay statements proffered by the defense. The defense sought to introduce the following double-hearsay statements:

Testifying Witness	Absent Declarant's Statements
ERNEST DEMONBRUEN	John Stacey told Demonbruen that John Jones admittted (to Stacey) killing 10-12 women in various states.
ERNEST DEMONBRUEN	Charles Hall ("Blue") told Demonbruen that John Jones confessed (to "Blue") to killing Mrs. Lile.

A hearsay statment which includes another hearsay statement is admissible only when both statements conform to the requirements of a hearsay exception. In this case, the defendant failed to allege and demonstrate that each of the hearsay statements came within a hearsay exception.

Issue 11: The trial court did not abuse its discretion in allowing the state to provide the jurors with a transcript of the defendant's statements as an aid-to-understanding the tape recording.

Issue 111: Where the defense counsel did not ask to approach the bench, but, instead, made a speaking objection in open court, the prosecutor cannot be faulted for responding to the objection in like fashion. Furthermore, the prosecutor was

entitled to fairly comment on the evidence before the jury and to argue that the emotions exhibited by this defendant were deliberately feigned by Hill. The jury was properly instructed by the trial court and the reference to Hill's behavior did not deprive Hill of a fair penalty phase proceeding.

Issue IV: This court has previously permitted the "pecuniary gain" factor to stand where the murder was an integral step in obtaining some sought-after specific gain.

Issue V: The unobjected-to comments at trial did not diminish the jury's sense of responsibility in this case.

Issue VI: Under the facts of this case, the trial court did not err in rejecting, as a mitigating factor, that the defendant helped his motehr pay the bills and that, in his mother's opinion, he was the best of her six sons.

Issue VII: In the instant case, the only complaint the defendant had was based on his unsupported speculation that the public defender's office, faced with a heavy case load, would not be able to devote enough time to his case. The inquiry conducted by the trial court in the instant case shows that the appellant was represented by an experienced defense attorney, familiar with capital proceedings, who represented on the record that he had sufficient time to prepare Hill's defense. Hill never expressed any dissatisfaction with his attorney, there was no claim of conflict of interest and the speculative and anticipatory conclusions of Hill regarding the case load of the public defender's office were wholly inadequate to undermine the adequacy of the court's inquiry.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE PROFFERED TESTIMONY OF ERNEST DEMONBRUEN, THEREBY DEPRIVING APPELLANT OF HIS FUNDAMENTAL RIGHT, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, TO PRESENT WITNESSES IN HIS OWN BEHALF TO ESTABLISH A DEFENSE.

The proffered testimony which the defense presented at trial showed that Ernest Demonbruen met a man identified as John Jones and another man known to him as "Blue" [Charles Hall] while he was staying at the construction site. Ernest Demonbruen, John Jones, John Stacey and "Blue" were sleeping at the construction site and one night John Jones was crying in his sleep. Demonbruen awakened Jones and asked him what he was crying about. Jones replied, "Well, a man can cry if he wants to." (R 864) According to Demonbruen, the next day, John Stacey told Demonbruen that "he [Stacey] had heard some stuff that John Jones had told him, that he [Jones] was a pretty bad guy, that he [Jones] had killed ten or twelve women in various states, and "Blue" [Charles Hall] came and told [Demonbruen] that John Jones had came [sic] to him and confessed killed Mrs. Lile." (R 864) Therefore, according to the defense proffer, John Jones allegedly confessed to "Blue" and "Blue" then told Demonbruen about the confession (R 864). Demonbruen did not ask John Jones about the confession (R 864). Demonbruen told Blue that he should go to

the police with the information **(R 865).** The morning that Demonbruen went with "Blue" to the police station was the last time he saw John Jones **(R 866).** Demonbruen stated that he saw John Stacey at a soup kitchen in Immokalee in August of **1986** and he saw "Blue" during the preceding summer in Ft. Lauderdale (R **867).** Demonbruen had not seen John Jones since the day the men were going to go to the police station **(R 868).**

In the instant case, the defendant was trying to establish that John Jones allegedly admitted to Charles Hall ["Blue"] that he committed the murder. The particular witness on the stand, Ernest Demonbruen, never talked to John Jones, so this proffered statement was hearsay on hearsay. The statement from John Jones to Charles Hall ["Blue"] was initial hearsay the statement from John Jones to John Stacey was again initial hearsay and the subsequent statements from "Blue" to Demonbruen and from Stacey to Demonbruen constituted double hearsay.

In this particular case, there is a total absence of anything from Demonbruen to show the trustworthiness of the proffered statements, i.e., the statement from John Jones to Charles Hall who told Demonbruen, and also from John Jones to John Stacey, who then told Demonbruen. The only witness at trial was Demonbruen. Following the proffer, the trial court announced:

> [THE COURT]: Well, I'm going to cut you off, gentlemen. I'm inclined to believe it's hearsay on hearsay, and therefore the rule does not apply.

> I'm also of the opinion it's not trustworthy, so I can go on to exclude these statements from being admitted into evidence.

(R 876)

The principle is well-settled that the trial judge has broad discretion to determine the admissibility of hearsay and trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. Blanco v. State, 452 So.2d 520 (1984), cert. denied, 469 U.S. 1181, 105 S.C. 940, 83 L.Ed.2d 953. The resolution of this issue is governed by section 90.805, Florida Statutes, which is entitled "Hearsay within Hearsay".

As a general rule, a hearsay statement which includes another hearsay statement is admissible only when both statements conform to the requirements of a hearsay exception. Ehrhardt, Florida Evidence section 805.1, 2d Ed, 1984 at 563; Van Zant v. State, 372 So.2d 502 (Fla. 1st **DCA** 1979). In the instant case, the inadmissible hearsay within hearsay was properly excluded as there was no indicia of reliability and the defendant was properly prohibited from bootstrapping the out-of-court statements where the testifying witness had no personal knowledge of the underlying events or transactions but merely related information purportedly supplied by a second person about a third party's "confession". To allow the admission of such incompetent evidence would authorize the admissibility of multiple hearsay statements supported by nothing but gross speculation bearing no indicia of reliability.

Relying on Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the appellant claims that where a third party has made an out-of-court statement admitting his guilt of the crime for which the defendant is on trial, the constitutional right to present one's defense must take precedence over the exclusionary rules of evidence. [Brief of Appellant at 27] Appellant claims that (1) the totality of the circumstances surrounding John Jones' alleged third party confession carried sufficient indicia of reliability to make it admissible as a declaration against interest of an unavailable witness pursuant to section **90.804(2)(c),** Florida Statutes, and (2) assuming arquendo this Court finds there were not sufficient indicia of reliability, appellant contends that section 90.804(2)(c) violates due process and violates the constitutional principles of Chambers regarding the accused's right to present his defense, in that it places a greater impediment on a criminal defendant to introduce exculpatory evidence than it places on a civil litigant to introduce the same evidence.

In Chambers v. Mississippi, after the defendant was arrested for murder, another person [McDonald] made, but subsequently repudiated, a written confession. On three subsequent occasions, each time to a different acquaintance, McDonald orally admitted killing the victim. The United States Supreme Court ruled that the trial court erred in excluding McDonald's hearsay statements, which bore substantial assurances of trustworthiness, including that each was made spontaneously to a close acquaintance, each

was corroborated by other evidence in the case, each was against McDonald's interests, and McDonald was present and available for cross-examination by the state. Each of McDonald's statements were corroborated by some other evidence in the case -- McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of a prior ownership of a .22 caliber revolver and subsequent purchase of a new weapon. The number of independent confessions provided additional corroboration for each. McDonald stood to benefit nothing by disclosing his role in the shooting to any of his three acquaintances and the court concluded that he must have been aware of the possibility the disclosure would lead to criminal prosecution. In concluding that the exclusion of the evidence of McDonald's confessions, coupled with the state's refusal to permit Chambers to cross-examine McDonald, denied Chambers a fair trial, the Supreme Court emphasized that its holding did not signal any diminution and the respect traditionally accorded to the states in establishment and implementation of their own criminal trial rules and procedures. 35 L.Ed.2d at 313. Rather, under the specific facts of <u>Chambers</u>, where the rejected evidence bore persuasive assurances of trustworthiness, its rejection denied the defendant a trial in accordance with due process standards. 410 U.S. at 302, 98 S.Ct. at 1049.

Section 90.804(2)(c), which sets forth the hearsay exception relied upon by appellant, provides:

> (c) Statement Against Interest
> A statement which, at the time of its making, was so far contrary to the declarant for pecuniary or proprietary interests or tended to subject him to liability to render invalid a claim by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances showed the trustworthiness of the statement. A statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant or other person implicating both themselves and the accused, is not within this exception. (emphasis added)

In Maugeri v. State, 460 So.2d 975, 977 (Fla. 3d DCA 1984), cause dismissed, 469 So.2d 749 (Fla. 1985), the Court adopted the test stated in United States v. Riley, 657 F.2d 1377 (8th Cir. 1981), cert. denied, 459 U.S. 1111, 103 S.Ct. 742, 74 L.Ed.2d 962 (1983) for the admission of inculpatory statements against penal interests in criminal cases under the federal equivalent to section 90.804(2)(c), to wit:

> Before an inculpatory statement against penal interest is admissible under Rule 804(b)(3), it must be shown that (1) the declarant is unavailable as a witness, (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true, and (3) corroborating circumstances clearly indicate the trustworthiness of the statement.

Id. at 977, citing United States v. Riley, 657 F.2d at 1383.

In analyzing this claim as it relates to statements against penal interests, the Maugeri court agreed with the analysis set forth in State v. Parris, 98 Wash.2d 140, 654 P.2d 77, 81 (1982):

> It is not correct to say that inculpatory declarations are included within the "firmly rooted exceptions" to the hearsay rule. According to **Ohio** v. **Roberts,** supra, 448 U.S. at 66, 100 S.Ct. at 2539, if hearsay statements fall within a "firmly rooted exception" to the hearsay rule, they are admissible without "particularized guarantees of trustworthiness." Inculpatory statements must be accompanied by such guarantees in order to be admissible. Thus, we can only say that inculpatory statements are a "firmly rooted exception" if we add the proviso that they must be accompanied by corroborating circumstances clearly indicating their trustworthiness, or, in words of the supreme court, "particularized guarantees of trustworthiness". This is a proviso required by substantive law, not one found expressed in the rule, and it places such statements in the second category of the **Roberts** test.

The Florida rule authorizing the admission of a statement against interest parallels the three-pronged test followed by the federal courts. In United States v. Harrell, 788 F.2d 1524 (11th Cir. 1986), the court stated that to be admissible under Rule 804(b)(3), a statement must be against the penal interest of the declarant, corroborating circumstances must exist indicating the trustworthiness of the statement, and the declarant must be unavailable. **Id.** at 1526, citing United States v. Mock, 640 F.2d 629 (5th Cir. 1981); United States v. Robinson, 635 F.2d 363 (5th Cir. 1981). Assuming, arguendo, that the defense proffer would have shown that the original declarant was not available as a

witness, the defendant still needed to satisfy the two additional criteria. The second test is that in order to satisfy the "against penal interest" prong, the statement must *so* far tend to subject the declarant to criminal liability that a reasonable man in his position would not have made the statement unless he believed it to be true. In this case, there is no showing of the circumstances surrounding the disclosure of the statement or whether, by this purported statement, the declarant might well have known at the time he made the alleged statement that he would or would not suffer for it. The last prong of the test, that there were "corroborating circumstances which clearly indicate the trustworthiness of the statement" is wholly absent in this case. In United States v. McDonald, 688 F.2d 224 (4th Cir. 1982), the Court found that the defendant was not denied due process by the trial court's exclusion of the testimony of seven witnesses, all of whom would have testified to various inculpatory comments or statements allegedly made by a woman whom the defendant claimed was involved in the brutal murders of the defendant's wife and two young children. In McDonald, as here, the defendant relied on Chambers, supra, in support of his claim. The declarant in McDonald was unavailable under Federal Rule 804(a)(3) and her statements, if true, clearly would be against her penal interest and although McDonald was able to point to a number of corroborating circumstances, the defendant failed to demonstrate that the declaration were trustworthy. The McDonald court concluded that the declarant's statements were

untrustworthy because of her pattern of admitting and denying complicity, her long-standing involvement with drugs, and her admissions that she was under the virtually continual influence of the drugs when these statements were made. The McDonald court emphasized that the risk of fabrication in this setting is significant and "[t]he requirement of corroboration should be construed in a manner *[so]* as to effectuate its purpose of circumventing fabrication." Id, at 233. Furthermore, the appellant's due process and Chambers challenge to the application of the "corroborating circumstances" prong to a criminal defendant was not raised before the trial court. An appellant may not change the basis for an argument urged before the trial court on appeal. The failure to preserve the issue works a procedural default of it. Glendening v. State, No. 70,346 (Fla. Dec. 1, 1988) [13 F.L.W. 690, 693-94]; Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Stewart v. State, 420 So.2d 862, 865 (Fla. 1982); Steinhorst v. State, 412 So.2d 332, 338 (collecting cases). These cases simply carry out the mandate of Section 90.104(1)(a) Florida Statutes (1987) limiting an appellate court's ability to set aside a judgment for an evidentiary error to only the ground presented to the trial court. In this case, neither the original declarant [Jones] nor the secondary witnesses ["Blue" and Stacey] were purportedly available at trial. The individuals purportedly making the out-of-court statements were migratory laborers who regularly moved from town to town, who slept in whatever quarters they could find, who

sporadically accepted temporary employment, and who rejected all indicia of accountability. The fact that both "Johns" had left the vicinity was entirely consistent with their chosen life-style and did not serve to corroborate the alleged "truthfulness" of the third party confession. See ~~also~~, Ards v. State, 458 So.2d 379 (Fla. 5th DCA 1984) [although unavailable declarant's purported statements were declarations against interest, the trial court did not err in excluding statements where the corroborating circumstances surrounding the statements were ambiguous, unreliable and not trustworthy.]

Even assuming, arguendo, all the other requirements of the "Against Penal Interest" exception were met, it could arguably qualify as an exception to the hearsay rule only if Charles Hall was present in court to testify as to what John Jones had told him, or if John Stacey was present in court to testify as to what Jones allegedly told him; but that was not the situation facing the trial court below. Under the provisions of section 90.805, Florida Statutes, the particular statement was properly excluded as "double hearsay". Therefore, the witness Demonbruen, having never talked to the original declarant, John Jones, simply related hearsay within hearsay. There was absolutely no evidence to support the reliability of the multiple hearsay statements and the statements that Charles Hall and John Stacey gave to the witness, Demonbruen, did not fall within any recognized exception to the hearsay rule.

To the extent the appellant may claim that Stacey's or Blue's secondary statements to either Demonbruen or Office Vargas were somehow admissible under the "state of mind" exception to the hearsay rule, this argument has been waived by the failure to present it to the trial court and the state of mind exception relates solely to a statement showing the declarant's state of mind, not someone else's. The statement is admissible to prove the declarant's state of mind at the time of the statement when that is at issue, or it may be offered to prove that the plan or intention stated by the declarant was subsequently acted upon. Van Zant, 372 So.2d at 504, citing McCormick on Evidence, 2d Ed, sections 294, 295 (1972), Webb v. State, 336 So.2d 416 (Fla. 2d DCA 1976). Section 90.803(3)(a) admits qualifying extrajudicial statements only if the declarant's state of mind or performance of an intended act is at issue in the particular case. Fleming v. State, 457 So.2d 499 (Fla. 2d DCA 1984), rev. den., 467 So.2d 1000 (Fla. 1984). In this case, the actions of the absent transients who spoke with Officer Vargas and Demonbruen were neither at issue nor probative to any material issue raised in the murder prosecution.

Lastly, assuming, arguendo, any error occurred with respect to the trial court's exclusion of the multiple hearsay statements, the error, if any, was clearly harmless under the circumstances of this case. Hill's palm prints were left on the mirror whose broken handle was shoved down the victim's throat, his prints were on every instrument that was used to bludgeon

Marianne Lile, the fibers from his shirt matched the fiber found on her, both a hair from Hill's head and a pubic hair from Hill were recovered from the slaughtered victim, and his shoe print was left on the side of the victim's head showing where she had been kicked by the appellant.

ISSUE II

WHETHER THE TRIAL COURT ERRED, WHEN THE TAPE RECORDING OF APPELLANT'S STATEMENT TO DETECTIVE VARGAS WAS PLAYED TO THE JURY, IN ALLOWING THE STATE TO DISTRIBUTE TO EACH JUROR A POLICE TRANSCRIPT OF THE STATEMENT; THE ERROR WAS COMPOUNDED WHEN, ON THREE SEPARATE OCCASIONS, THE PLAYING OF THE TAPE HAD TO BE INTERRUPTED BECAUSE THE PAGES OF THE TRANSCRIPT WERE OUT OF ORDER.

In Golden v. State, 429 So.2d 45 (Fla. 1st DCA 1983), the defendant testified at trial; and during cross-examination by the state, portions of an enhanced tape recording, already admitted into evidence, were played again while transcript excerpts of the statements, prepared by an FDLE agent, were projected on an overhead screen. On appeal, the defendant argued (1) that any evidentiary use of a transcript of a tape recording violated the "best evidence" rule; (2) that it was hearsay unless authenticated by one who not only listened to the recording but also personally heard the original conversation and (3) that the trial court's particular use of the transcript, permitting its visual display to the jury by means of a projector and screen, improperly displaced or augmented the primary evidentiary material, the tapes. In its decision, the First District Court rejected Golden's interpretations of the cases cited by him, including, inter alia, Grimes v. State, 244 So.2d 130 (Fla. 1971) and Duqqan v. State, 189 So.2d 890 (Fla. 1st DCA 1966) and stated:

> Those decisions do not collectively stand for the proposition that the jury must be left to contend with authentic tape recordings that are difficult to understand without the sense of sight or some other aid to understanding. The decision simply distinguished between primary evidence on the one hand and aids-to-understanding on the other, and insist only that the roles not be reversed, that aids-to-understanding not be treated as evidence independent of or displacing the necessary primary evidence. . . . The cited decision simply require that the proof as a whole, by two or more witnesses if necessary, verify both steps in chain of authenticity: that the tape accurately recorded the conversation, and that the transcript accurately reproduces the tape.

429 So.2d at 50.

In distinguishing Brady v. State, 178 So.2d 121 (Fla. 2d DCA 1965), the court in Golden noted that Brady "aptly illustrates how a tape recording transcript, though susceptible of proper use to assist the jury's understanding of a recording that is the 'best' or primary evidence, can be abused to the point of displacing that primary evidence and masking its remedial faults.'' In Brady, there was no sworn authenticity, there was a wide disparity between what the transcript represented and what the jury could reasonably be expected to hear by playing the recording itself and one particularly damaging conversation was among the passages set out in the transcript but was not audible on the tape. The court in Duqqan v. State, 189 So.2d 890 (Fla. 1st DCA 1966), disapproved the use of transcripts which were not only furnished to the jury but carried into the deliberation room and the trial court treated the transcripts as documentary

evidence equal in competency to the actual recordings. The court in Golden specifically noted that decisions subsequent to Brady confirmed that the availability of the "best" evidence, the actual tape recording, does not preclude proper use of recording transcripts as aids-to-understanding. 429 So.2d at 52, see, e.g. Waddy v. State, 355 So.2d 477 (Fla. 1st DCA 1978). In the instant case, as in Golden, no transcripts, whether in single or multiple copies, were taken into the jury's deliberations room. In Grimes v. State, 244 So.2d 130 (Fla. 1971), this Court set forth the authentication necessary as a predicate for using a transcript of the defendant's recorded statement. The Golden court interpreted this Court's opinion in Grimes "best evidence'' objection and the Grimes discussion as strongly suggesting that the tape recording itself was not introduced into evidence at the trial. The Golden court determined that if it was correct in that interpretation, then this Court's discussion in Grimes was not concerned with verifying a transcript as an aid-to-understanding a recording regularly in evidence, but was concerned instead with the independent competence of a transcript that could not be verified by reference to a recording in evidence. Ultimately, the court in Golden concluded that the testimony of the FDLE agent established that the original tape recordings, available in court though not introduced in evidence, competently recorded the conversations involving Golden; further, that the testimony of the state's expert authenticated the enhanced copies of the recording sufficiently for their receipt

in evidence; and, lastly, that the testimony of the FDLE agent authenticated the transcript sufficiently for their proper use to aid the jury's understanding of the enhanced recording copies as they were played. 429 So.2d at 54. In finding that the trial court did not abuse its discretion in permitting the state to display to the jury, by means of a projector and screen, the incriminating fragments of the transcripts, the court stated:

> In **Brady, Grimes,** and **Waddy** we find precedent for reading to the jury, but not for physically delivering to the jurors for use in their deliberations, variously authenticated transcripts of the defendant's earlier statements. In **Waddy** and by implication in **Brady** we find precedent for characterizing the proper use of such transcripts to aid the understanding of other evidentiary material that is the "best" evidence in the sense of being a step nearer the source, the actual conversation to be evidenced. The only question, then, is whether by engaging the juror's sense of sight, instead of simply reading the transcripts into the record, the trial court improperly permitted the state to violate "the rules against undue repetition and improper emphasis." E.g. **Duggan,** 189 So.2d at 891.
>
> We think the trial court did not err. The judge appears to have held the state's questioning of Golden close to the recordings themselves, requiring that the recordings be played for the jury's listening as the cross-examination progressed, and preventing undue reliance on the visual display alone. Playing and displaying Golden's recorded words to him and to the jury as Golden testified was logistically difficult, to be sure, but the process cannot for that reason alone be condemned. Indeed, since that gave Golden an instant opportunity to refute or explain the apparent incriminating effect of the recordings and the visual display, the process was all the more useful in

> determining the true purport of Golden's conversations . . ."

429 So.2d at 54-55.

According to the appellant, the Golden decision has been criticized by other courts and "most notably by the very judge who presided over the Golden trial itself, Judge Barfield" [429 So.2d at 45, Brief of Appellant at 41]. In support of his claim, the appellant relies on Taylor v. State, 508 So.2d 1265, 1266 (Fla. 1st DCA 1987), in which Judge Barfield noted that, during the Golden trial, the trial judge stopped the use of the overhead projection shortly after its commencement because it was readily apparent that the projection was becoming the focal point of the jury's attention. Judge Barfield concluded that Golden could only be interpreted as holding that a momentary visual display of transcript fragments did not emphasize the evidence otherwise to be understood in the context of the recorded conversation. In Taylor, Judge Smith, concurring in part and dissenting in part, stated that Golden contained ample warnings as to the safeguards and limitations which must be observed in the use of visually displayed evidence and determined that reversal on this issue would not be warrant absent a showing of abuse of discretion and prejudice sufficient to impair the fairness of the trial. Lastly, writing for the dissent in Taylor, Judge Joanos interpreted Golden as approving the visual display as an aid-to-understanding so long as the tape accurately recorded the conversation and the transcript accurately reproduced the tape.

Accordingly, Taylor cannot be fairly read to support the sweeping condemnation of Golden which appellant seeks.

Appellant also claims that Stanley v. State, 451 So.2d 897, 898 (Fla. 4th DCA 1984), is implicitly at odds with Golden. In Stanley, the court found no harmful error in the trial court's allowing the jury to use the state's prepared transcript of the tape recording, which was not admitted into evidence, while listening to the tape. Id. at 898, citing United States v. Onori, 535 F.2d 938 (5th Cir. 1976). In cautioning the trial courts in the future not to allow the use of transcripts, however, the court in Stanley noted that the contents of the tape recordings at issue were in dispute and determined that, in such a case, it should left to the jury to determine what is contained in the tapes without the intervention of a transcriber. The Onori decision, cited in Stanley, concluded that transcripts of recorded conversations, like other evidence, may be admitted for a limited purpose only and discussed the procedures to be complied with concerning the use of a disputed transcript. Here, the defense did not dispute the accuracy of the transcript but, instead, argued at trial that it was not the "best evidence" and claims, on appeal, that it over-emphasized the appellant's statement to Officer Vargas. In support, even now, the worst allegation that the defense can make is that the pages were inadvertently out of sequence; that claimed "inaccuracy", does not vitiate the accuracy of the text itself nor does it indicate that the trial court abused its discretion in allowing the state to utilize the transcripts as an aid-to-understanding.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ARGUE LACK OF REMORSE AS *AN* AGGRAVATING CONSIDERATION IN THE PENALTY PHASE.

The state recognizes that this Court has previously held that lack of remorse is not an aggravating factor in and of itself, McCambell v. State, **421 So.2d 1072** (Fla. **1982);** and though convincing evidence of remorse may properly be considered in mitigation of a sentence, the absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor. Pope v. State, **441 So.2d 1073, 1078** (Fla. **1983);** Patterson v. State, **513 So.2d 1257, 1263** (Fla. **1987);** Robinson v. State, **520 So.2d 1, 6** (Fla. **1988).**

During his argument in support of a finding that the aggravating factor of "cold, calculated, and premeditated" murder be found during the penalty phase of trial, the prosecutor stated that one of the circumstances under this factor which he was arguing was "**a** lack of emotion, or lack of remorse in regard to the death of Mrs. Marianne Lile" (R **1143).** Because it is necessary to examine this comment in context, the state must set forth the arguments which both preceded and followed the challenged remarks, to wit:

> [THE PROSECUTOR]: You'll recall the testimony of Dr. Schmid whenever he testified, he said Mrs. Lile had been gouged four times, excuse me, three times up in the neck area with the end of this broom. Now, that's part of the big black and blue area up here around her neck.

In addition to that, she had been stabbed three times right below the breast, and in the center and on the other breast, two of which was done with such force that it broke the ribs beneath the skin.

In addition to that, she was throttled with the broom. She was actually, while she was on the ground, I submit to you ladies and gentlemen this defendant put that broom across her neck and he exerted, I submit, the availability of all the force that he could muster at that particular point in time in an attempt to throttle and strangle the life from Mrs. Marianne Lile.

That not satisfying the defendant, at some point during the course of his vicious attack upon her, he stuck a mirror, gouged her with the sharp end of that mirror. As Dr. Schmid testified, her mouth was open at the time.

I submit to you she was screaming. He gouged her in the throat and broke the mirror off.

What does he do? He casts that aside. Fortunately, he stepped on it on his way out. He casts that aside.

Well, that wasn't enough for the defendant.

In addition to that, the defendant takes that coffee pot that has coffee in it, he takes that over and he bashes her in the head with it. You'll recall that Dr. Schmid testified that he matched up the rim of that to the side of Mrs. Lile's head, which crushed her jaw.

In addition to that, there's a final insult, I suppose, or maybe as an afterthought on his way out, he takes his foot, and he slams his foot into the top of her head with such force that it leaves a foot impression.

Now, I submit to you, ladies and gentlemen, that the defendant in his

evaluation of this was absolutely correct. This was not a murder. This was a slaughter.

Now, the defendant, in a parade of witnesses during the trial, had people come in and testify as to his reputation in the community for non-violence.

You know, that's sort of someone's opinion about what his reputation is. You know, opinions are sort of like elbows, everybody's got one and most [sic] us have two. However, are the actions of the defendant consistent with an opinion that he's a nonviolent person?

The defendant has demonstrated to you ladies and gentlemen through his actions that he's a violent person. Now I don't care if you parade five hundred witnesses here to tell you that he's not, you know, actions speak louder than words. You can never tell a book by its cover. We know what's inside the book in this particular case.

The defendant through this vicious assault attacked brutally, beyond probably most of your imaginations, cruelly, wickedly slaughtered Mrs. Marianne Lile.

Let me also remind you of what the defendant told the officer, Officer Victor Vargas. You'll recall in that statement, whenever he's speaking about ripping and really getting heavy into it, when he says whenever I fight, I fight to win.

Well, the defendant won in this particular case, if you call taking the life of another individual winning, he succeeded in doing that. He obviously intended to do it.

Now, whenever we talk about this, in weighing these, you have to consider perhaps some of the mitigating circumstances, the acts of the defendant, or the lack of any significant criminal history of the defendant, if they outweigh that one aggravating factor there, the brutality of the attack, is it outweighed simply because the defendant is only twenty-two years of

age? Is it outweighed because the defendant has no significant criminal history?

I submit to you that it does not. This is such a case, circumstances of such a case, that I don't care if you had five hundred mitigating circumstances, the brutality of this, the individual is capable of doing this, does not outweigh by all those other mitigating circumstances, if you find they do exist.

I also anticipate that the judge is going to tell you that the crime for which the defendant is to be sentenced, if it was committed in a cold, calculated and premeditated manner without any pretention or pretense of moral or legal justification, is in fact an aggravating circumstance.

Well, what has the evidence shown to you in that regard? Was it committed in a cold, calculated and premeditated manner? Was it done so without any pretention of a legal or moral justification?

You'll recall what my brother said in his closing arguments about the manner in which the defendant, in recalling the evidence there at the crime scene, whenever you look at the photographs, I'm sure that you can determine that Mrs. Lile was beaten in the area between that little half-door and the wall there going into the private bathroom. That's where all the blood splatters are, up on the side of the wall. The only other place in the building are, you know, straight drops of blood, but you can tell from those straight down drops of blood that he was after her all over that back room back there, and that he has injured her, and that she's trying to get away from him.

Whenever you look at the photographs, Mrs. Lile's feet are in that bathroom. Maybe there's also one where her feet were sticking up on the side of the bathroom wall inside there.

Now, what do we know about what happened? I submit to you, ladies and gentlemen, that

this is what happened in this particular case: Mrs. Like, she's confronted by the defendant up there in the front part of the building, going through that same general area that my brother mentioned in his final arguments. She's pulling those chairs, trying to get away from him, trying to get something between he and Mrs. Lile. He catches her. That's where she loses her glasses. That's where the key is. She falls down. Remember, she's left-handed. That's where she has the keys. Whenever she falls down, that's where she gets the carpet abrasions on her left knee and her left arm. She loses the glasses and she's losing the key. She's trying to get to the back, but where she's trying to get, she's trying to get to a place of safety. She's trying to get into that bathroom so that she can lock the foor [sic].

Now, that's how come her feet end up in that bathroom, but of course we know the defendant caught her before she could get the door closed.

Now, there are the implements that were used to kill Mrs. Lile. She's got her purse back there that she carried back there when she was getting ready to go to lunch. The dustpan is back there along with the broom.

The defendant wants you to believe she had the broom in front. I guess she was up there sweeping the carpet with the broom.

I submit to you that's now how it happened at all. In addition to that, you'll recall Ernest, the last witness that we called, black gentleman who testified that the defendant had told him earlier that day that Mrs. Lile was afraid of being raped, and that if he could have got the chance, he would rape her and beat her.

Now, isn't it something that he would have said that and that's exactly what happened to Mrs. Lile?

Now, there was no evidence that there had been any ejaculation. If the sex act had

been completed in this particular case, it does not mean that Mrs. Lile was not sexually molested. Whenever you look at the evidence in this case, you know, we know, and I'm sure you considered in your verdict, you know that the defendant pulled her pants off after she was in the position on the floor, and he had to have pulled them from the top down to have gotten that leg out the way it was.

Now, Mrs. Lile -- people are taught now in cases if somebody attempts to rape you, don't resist. Well, I suppose there's a lesson to be learned from that, and I'm not advocating one position or the other, don't get me wrong, but that seems to be the current information which I hear, at least.

Be that as it may, I submit that the defendant was attempting to do exactly what he had told Mr. Demonbruen, Ernest Demonbruen that he was going to do if he got the chance, but that Mrs. Lile obviously did not cooperate, and by the time the defendant had rendered her motionless, Mrs. Lile was such a mess that perhaps the defendant changed his mind.

Now, no matter what, and you have to think about this in the context in which these things occur, you'll recall that the defendant, whenever he gave the first statement, which was on November the 20th, which was the day after the murder of Mrs. Lile, the defendant showed no emotion about her death. He denied any knowledge, and as a matter of fact, during the conversation, you'll recall the officer's testimony, that he even laughed at it, at least at one point during that interview.

Whenever the defendant was arrested on December the 13th, you know, he says, "Why are you harassing me? I didn't have nothing to do with it. You got the wrong person --"

[DEFENSE COUNSEL]: I object. That's not going into any of the aggravating factors. That has already been presented to the jury. The jury considered that in their verdict.

> [PROSECUTOR]: One of the circumstances under this particular aggravating factor which I'm arguing is a lack of emotion, or lack of remorse in regard to the death of Mrs. Marianne Lile, and the Florida Supreme Court held that that's a proper consideration, and my argument goes to that particular point.
>
> THE COURT: I'll overrule the objection.
>
> [PROSECUTOR]: It was only after the defendant was confronted with those shoes that he showed any emotion.
>
> Now, that tape has been introduced. You may have listened to it. I know you have listened to it. You heard the defendant crying at various points during that. He was showing emotion.
>
> Now, was that emotion over the fact that he had been caught, or is that emotion over the fact that Mrs. Marianne Lile was dead?
>
> I submit to you, ladies and gentlemen, the only emotion the defendant had is over his predicament. He never demonstrated, except at a time when it was to his advantage, premeditated - no moral or legal justification. . . .

(R 1136-1144)

As evidenced by the above-cited excerpt from the prosecutor's comments, the state's argument was appropriate to refute both the defendant's self-serving laughing denial of involvement which he relied upon prior to being confronted with the incriminating evidence, to show the defendant's emotional behavior was deliberately staged in order to cover up his participation, to support the cold, calculated factor in that Hill discussed raping Mrs. Lile beforehand and that the brutality of the crime outweighed any arguable mitigating factor. <u>Sub</u>

judice, the prosecutor was not prohibited from arguing that the defendant was feigning his emotions in order to benefit himself. The jury was properly instructed by the trial court to consider only the appropriate statutory aggravating factors, the trial court ultimately did not find the "cold, calculated and premeditated" factor to be supported in this case and the fact that the prosecutor responded to defense counsel's objection in open court occurred only because the defense counsel did not ask to approach the bench. The defense, having voiced a speaking objection in the presence of the jury, cannot credibly claim that the prosecutor erred in responding to the court in like fashion. Under the circumstances of this case, error, if any, was clearly harmless. State v. DiGuilio, 491 So.2d 1191 (Fla. 1986).

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED FOR FINANCIAL GAIN.

Appellant has previously conceded that he could not credibly argue against a finding that the murder was committed while engaged in the commission of or in the attempt to commit a sexual battery against the victim (See, Defendant's sentencing memorandum at R 1105).[1] Therefore, as appellant recognizes, under Routley v. State, 440 So.2d 1257, 1264 (Fla. 1983), a separate finding that the crime was also committed for financial gain does **not** constitute an improper doubling of aggravating factors. In Routley, a robbery, kidnapping and murder occurred and this Court found there was no improper doubling of the "for financial gain" and "in the course of robbery" aggravating factors since the defendant also committed a kidnapping. **Id.** at 1264. In the instant case, the murder was committed during the course of a sexual battery or at least an attempted sexual battery, therefore there was no improper doubling of the aggravating factor of "for financial gain". The trial court's written findings in support of his sentence of death conclude:

In the defendant's sentencing memorandum submitted to the trial court, the defense suggested "It is more likely that Mrs. Lile was attack to fulfill a sexual desire and that the money was taken simply because it was there after Mrs. Lile was assaulted and killed." (R 1105)

The court finds that there are sufficient aggravating circumstances to impose the death penalty and there is insufficient mitigating circumstances to support a sentence of life imprisonment. The Court finds that the aggravating circumstances were:

1. George Alexander Hill committed a crime that was especially wicked, evil, atrocious and cruel.

A. Mrs. Lile was a forty-nine year old woman who died from the consequences of suffocation due to a severely traumatic compression of the anterior neck. Additionally, she received a severe kick by a shoe towards the right side of her head. Also, she received at least three blunt injuries to the anterior chest. A hand mirror handle was stuffed down her throat. In other words, Mrs. Lile was bludgeoned, beaten, strangled, and tortured by Mr. Hill. Although not admitting that he committed the murder, Mr. Hill characterized the crime as "slaughter." The testimony of the medical examiner indicated that Mrs. Lile, through the series of acts being perpetrated on her, was aware of impending death.

2. George Alexander Hill committed the murder while engaged in the commission of or attempt to commit the Crime of Sexual Battery or Robbery.

A. Mrs. Lile was found in a bloodstained brassiere which was pulled above her left breast. She wore a bloodstained cotton knit long-sleeved pull over blouse that was torn open in the front and wrapped partially around her left forearm. Her pants and under pants had been pulled down around the right lower leg. One of her shoes was

> on her right foot and the other shoe was off. A sanitary napkin with some bloodstaining was attached to her under pants. Mr. Hill told a witness that he was going to beat and rape Mrs. Lile. This would indicate at the very least that Mr. Hill attempted to rape Mrs. Lile.
>
> B. Mrs. Lile's wallet was removed from the premises and later located at another area. The wallet did not contain her money that she usually carried upon her person. From the facts it is clear that Mr. Hill had perpetrated a Robbery on Mrs. Lile.
>
> 3. George Alexander Hill committed the murder for financial gain. The Court adopts by reference the last paragraph preceeding [sic] for its findings.
>
> The Court finds the following mitigating circumstance:
>
> 1. The Court finds that George Alexander Hill has no significant criminal history.
>
> The Court is of the opinion that beyond and to the exclusion of every reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. The totality of the circumstances dictate the death penalty be imposed. Therefore, it is the sentence of this Court that GEORGE ALEXANDER HILL is to be executed in accordance with the laws of the State of Florida for the First Degree Murder of Marianne M. Lile.

(R 1127-1129)

In Swafford v. State, 13 F.L.W. 595 (Fla. Case No. 68,009, Opinion filed Sept. 29, 1988), this Court reaffirmed the

principle that aggravating circumstances must be proved beyond a reasonable doubt. Id. at 597 citing Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984); Williams v. State, 386 So.2d 538 (Fla. 1980). In Swafford, this Court stated: "Evaluating the evidence and resolving factual conflicts in a particular case, however, are the responsibility of the trial court judge. When a trial court judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent, substantial evidence to support it. See Stano v. State, 460 So.2d 890, 894 (Fla. 1984), cert. denied, 471 U.S. 1111 (1985)." This Court has permitted the "pecuniary gain" factor to stand where the murder is an integral step in obtaining some sought-after specific gain. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987); Simmons v. State, 419 So.2d 316 (Fla. 1983). Here, as in Bryan v. State, 13 F.L.W. 575, Case No. 68,803, Fla. Sept. 22, 1988), the theft of the victim's wallet by Hill satisfied the "pecuniary gain" aggravating factor and does not constitute an improper doubling. [Finding that murder was committed for pecuniary gain supported by conviction for robbery based upon taking of murder victim's wallet and car, even though appellant argued that car was of little value and was soon discarded.]

8

ISSUE V

WHETHER THE JURY'S RECOMMENDATION OF DEATH WAS TAINTED BY THE TRIAL COURT'S STATEMENT DURING VOIR DIRE THAT HE WAS "STUCK WITH THE WHOLE THING" CONCERNING THE DECISION WHETHER TO IMPOSE LIFE OR DEATH.

Hill claims that the trial court's comments denigrated the importance of the jury's role in the capital sentencing proceeding. Examining the now-challenged comments shows that, first-of-all, there was no objection to the statements and, secondly, the trial court's comments were not misleading and did not minimize the role of the jury in this case. The trial court's initial remarks during ~~voir dire~~ were made in response to a prospective juror who stated "I think I could not recommend it [the death penalty]." (R 150) Examining the now-challenged comments in context, the record shows:

> [PROSECUTOR]:. . . . Now, ladies and gentlemen, the defendant has in fact been charged with a capital offense, that being first degree murder.
>
> If you find him guilty of first degree murder, one of the possible penalties is that the death sentence could be imposed.
>
> Is there anyone here who is completely or unalterably opposed to the death penalty?
>
> How about you, Mr. Grant?
>
> MR. GRANT: No.
>
> [PROSECUTOR]: Mrs. Edwards?
>
> MRS. EDWARDS: I am.

8

[PROSECUTOR]: Completely and unalterably opposed?

MRS. EDWARDS: Not completely, not unalterably but mostly.

[PROSECUTOR]: Would your opposition to the death penalty prevent you from returning a verdict of guilty in this case, even if you were convinced as to the defendant's guilt?

MRS. EDWARDS: No, not if I was convinced, but I think I'd have trouble with the death penalty.

[PROSECUTOR]: Okay. As the trial in this particular case, if you find the defendant guilty, there will be a second part. That part is that you listen to the evidence and the judge gives you instructions on aggravating and mitigating circumstances. You would then weigh and evaluate those aggravating and mitigating circumstances according to the law that the judge gives you and make a recommendation to the judge.

After weighing and evaluating those aggravating and mitigating circumstances according to the law that the judge gives you, are there circumstances, or do you believe there are circumstances in which you could follow the law and weigh those aggravating and mitigating circumstances --

MRS. EDWARDS: Yes. I think I understand what you're saying.

[PROSECUTOR]: Okay. Would your opposition to the death penalty in all circumstances prevent you from recommending that the death penalty be imposed, or could you evaluate those aggravating and mitigating circumstances and follow the law as the judge instructs you and make your decision on that, as opposed to your dislike for the death penalty?

MRS. EDWARDS: I don't know. I don't think so.

[PROSECUTOR]: You don't think that you could abide by the instructions that the judge gives you in weighing those factors; is that what you're saying?

MRS. EDWARDS: I think if it resulted in the death penalty, I would not be able to in good conscience.

[PROSECUTOR]: Everyone is entitled to their opinion. Don't let anyone sway you one way or the other; and as my brother said, I'll uphold that right to your opinion to the death.

My question to you, I guess, is are there circumstances, after weighing those aggravating and mitigating factors according to the law as the judge instructs you, in which you could impose the death penalty, or in all circumstances would you be precluded from recommending that?

MRS. EDWARDS: I think I could not recommend it.

[PROSECUTOR]: Okay.

THE COURT: Okay. Let me go one step further. Maybe I can clear something up.

In these types of trials, first of all there is a trial as to the guilt or innocence. If you find the defendant guilty as charged, the next phase of the trial will be a recommendation to the Court of what you think the penalty would be.

The penalty would be either death, or it could be life imprisonment with 25 years to parole, without parole, is what I mean, and you'd have to base that decision on the certain law that I'll give you, or guidelines that are called aggravating and mitigating circumstances.

Then the jury -- it doesn't have to be unanimous this time. A simple majority comes back in and makes these recommendations to me.

Then the ball passes to me, and I'm stuck with the whole thing. I have to decide whether or not to take your recommendation. I mean, the whole thing is up to me and I have certain guidelines to go to to [sic] see -- even though you may recommend death or life, I can do whatever I feel would be appropriate under the law.

I think what we're getting at here is in the second phase of trial, if there's a finding of guilt, the fact that I may sometime down the road have to impose the death penalty, would you automatically vote for life, not knowing that I might have not to agree with you.

Does that make everything more difficult?

MRS. EDWARDS: I don't know if I'd automatically do that.

THE COURT: Could you weigh the guidelines that I'm going to give you and then pass the ball to me, and let me make up my mind what would happen?

MRS. EDWARDS: Yes. I could do that.

THE COURT: Okay. Thank you.

MRS. EDWARDS: Thank you.

(R 148-152)

During the penalty phase, the trial court stated, without objection,:

THE COURT: Ladies and gentlemen of the jury, now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of first degree murder of Marianne Lile.

As you have been told, the final decision as to what punishment should be imposed is a responsibility of the judge.

However, it is your duty to follow that law that will now be given you by the Court

> and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.

(R 1154-1155)

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 may argue 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), vacated on other grounds, __ **U.S.** __, 108 S.Ct. 55, 98 L.Ed.2d 19 (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 427-428)

Though directed to a 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 comments at trial. In fact, defense counsel acquiesced to the scheme as presented to the jury and affirmatively made the same representations to the jury during the defense argument (See, R 1154). Defendant cannot now be heard to challenge the propriety of the proceedings below.

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 trial court'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 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.

The jury was properly and correctly told of their duties and responsibilities in the capital sentencing scheme. The now-challenged 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 (See, R 1154). Therefore, appellant is entitled to neither the reversal of his conviction nor resentencing based on any alleged violation of the principles of Caldwell, supra. The defendant's Caldwell argument is without merit; see Grossman v. State, 525 So.2d 833 (Fla. 1988); Combs v. State, 525 So.2d 853 (Fla. 1988). Moreover, it is not error to instruct the jury correctly as to its role. Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988). In the instant case, as in Mitchell v. State, 527 So.2d 179 (Fla. 1988), this issue is not properly before this Court in light of the absence of any objection at trial; and, even if the issue was properly before this Court, an examination of the context of the entire statement shows that the jury was not misled about its role in the capital sentencing process. Mitchell, 527 So.2d at 181 citing Combs supra; accord, Daugherty v. State, **13** F.L.W. 638 (Fla., Nov. 1, 1988).

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN FAILING TO WEIGH AS A NON-STATUTORY MITIGATING CIRCUMSTANCE THE EVIDENCE THAT APPELLANT WAS A GOOD SON, WHO WORKED TO PROVIDE FOR HIS MOTHER.

The principle is well-settled that it is within the trial court's province to decide whether a mitigating circumstance is proven and the weight to be given it. Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984). The appellant claims that the trial court erred in failing to "find and weigh" as a nonstatutory mitigating circumstance the testimony of the defendant's mother that he was a good son, who worked to provide for his mother. Although the law is clear that the trial court must consider all evidence offered in mitigation, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the record shows that the trial court weighed and rejected this factor as a mitigating circumstance. Here, as in Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983), "the transcript of the court proceedings and the trial court's discussion of the evidence in the sentencing order showed the serious consideration the court gave to the issue. So long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. **Id.** at 1076, citing Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983); Riley v. State, 413 So.2d 1173 (Fla.), cert. denied, ___ U.S. ___, 103

S.Ct. 317, 74 L.Ed.2d 294 (1982); Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982). Under the circumstances of this case, the trial court did not err in rejecting, as a mitigating factor, the fact that the defendant helped his mother pay the bills and that, in his mother's opinion, he was the best of her six sons. The jury unanimously determined that appellant savagely attacked Marianne Lile when he confronted her alone in the office; Hill choked her, thrust a mirror handle down her throat, stripped her naked, kicked her in the head and brutally beat his defenseless victim. As the trial court concluded, ". . . Mrs. Lile was bludgeoned, beaten, strangled, and tortured by Mr. Hill." (R 1127-1128) Although defendant's mother thought of George Hill as a good son, his vicious behavior belied his mother's sympathetic representation of the defendant. In Bryan v. State, 13 F.L.W. 575, Fla. Case No. 68,803, Sept. 22, 1988), this Court opined: "The judge, and the jury, considered the aggravating and mitigating evidence and concluded that the aggravation outweighed the mitigation and there was sufficient aggravation to warrant the death penalty. It is not the function of this Court to substitute its sentencing judgment for that of the trial judge. As a matter of law,

> '[f]inding or not finding that a mitigating circumstance has been established and determining the weight to be given such . . . is within the trial court's discretion and will not be disturbed if supported by competent substantial evidence. Stano v. State, 460 So.2d 890 (Fla. 1984), cert.

> **denied,** 471 **U.S.** 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).' State v. Bolender, 503 So.2d 1247, 1249 (Fla.), cert. denied, 108 S.Ct. 209 (1987). On this record, the judge did not err in imposing the death penalty as the jury recommended.''

Here, as in Bryan, the trial judge did not err in rejecting Hill's claimed mitigating evidence and imposing the death penalty as recommended by the jury.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE INQUIRY WHEN APPELLANT MOVED PRE-TRIAL TO DISCHARGE THE PUBLIC DEFENDER.

Appellant sought to discharge the public defender's office and have a private attorney appointed to represent him. Appellant's claim was based solely on the ground that he believed that the case-load as the public defender's office was excessive.

The victim, Marianne Lile, was murdered on November 19, 1985 (R 380, 409). The pro **se** motion to discharge the public defender was filed on November 13, 1986, and the hearing on appellant's motion was held on December 8, 1986. The state called its first witness at trial on February 5, 1987. (R 1091, SR 1170, R 380)

In Koon v. State, 513 So.2d 1253 (Fla. 1987), this Court recognized that an indigent defendant has an absolute right to counsel, but he does not have a right to have a particular lawyer represent him. Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). Although a defendant has a constitutional right to waive counsel, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), in Koon the defendant expressly declared that he had no desire to represent himself. Here, too, the defendant did not ask to represent himself but rather asked that the public defender's office be discharged and private counsel appointed to represent him because he believed that the public defender's office, due to their case-load, could

not properly devote the amount of time in preparation necessary to properly defend him. (R **1091)** In Scull v. State, ___ So.2d ___ (Fla. **1988)** (Case No. **68,919,** Opinion filed Sept. **8, 1988, 13 F.L.W. 545, 546),** the defendant argued on appeal that the trial judge failed to conduct an adequate inquiry into Scull's motion to discharge his counsel for conflict of interest. Finding that Scull was not given the opportunity by the trial judge to explain why he objected to his trial counsel and that the trial judge failed to inquire into Scull's allegations of conflict of interest, this Court believed that the inquiry made into Scull's request to have a new attorney appointed was legally inadequate. However, towards the end of the trial, Scull stated to the court that he was satisfied with the representation he had received and this Court concluded that Scull's reasons for requesting the removal of his attorney dissipated as the trial progressed and although the trial judge did not adequately determine what those reasons were, the failings of the inquiry were mooted by Scull's expression of satisfaction with trial counsel as his attorney. In the instant case, the only complaint the defendant had was based on his unsupported speculation that the public defender's office, faced with a heavy case load, would not be able to devote enough time to his case. The inquiry conducted by the trial court in the instant case shows that the appellant was represented by an experienced defense attorney, familiar with capital proceedings, who represented on the record that he had sufficient time to prepare Hill's defense. Hill repeatedly

expressed that he was not dissatisfied with trial counsel per but, instead, speculated that the public defender's office was overloaded with cases and wouldn't be able to devote enough time to his particular case. Thus, unlike Scull, the trial court below did specifically inquire of this defendant why he was requesting the appointment of another counsel. The trial court's inquiry demonstrated that the public defender's office, specifically the experienced capital counsel appointed to represent Hill, could adequately prepare for trial and represent this defendant. This case does not present an unequivocal request for self-representation, and the speculative allegations in support of Hill's request for the appointment of new counsel were insufficient to warrant further inquiry buy the Court. Hill never expressed any dissatisfaction with his attorney, there was no claim of conflict of interest and the speculative and anticipatory conclusions of Hill regarding the case load of the public defender's office were wholly inadequate to undermine the adequacy of the court's inquiry. No abuse of discretion has been shown.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the judgment and sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct opy f the foregoing has been furnished by U.S. Mail to Steven L. Bolotin, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830, this 20th day of December, 1988.

K Blanco

OF COUNSEL FOR APPELLEE