IN THE SUPREME COURT OF FLORIDA

HAROLD G. LUCAS,

Appellant,

v. Case No. 70,653

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The record on this appeal, which consists of 5 volumes, will be referred to by the symbol "R" followed by the appropriate page number. Any references that may be made to the previous appellate record, that is that record involving the appeal of the guilt phase of the trial will be referred to by the symbol "PR".

SUMMARY OF THE ARGUMENT

ISSUE I: (1) The lower court did not abuse its discretion in allowing the prosecutor to question the prospective jurors as to their feelings concerning whether an intoxicated person should be held accountable because the degree of accountability is always a matter for sentencing, because the jury was not misled and because they were properly instructed.

(2) The prosecutor did not err in urging the jury to reject no significant criminal history as a mitigating factor because it was a proper argument. Moreover, no objections were interposed.

ISSUE 11: The trial court did not err in taking judicial notice of the contemporaneous convictions because appellant was amply noticed, because it concerned a predicate about which there could be no dispute and because the jury was instructed that they had to find this aggravating factor (previous crimes of violence) beyond a reasonable doubt.

ISSUE 111: Appellant failed to object to the testimony concerning pain and anguish endured by the victims of the contemporaneous crimes. Moreover, the details of a prior violent felony are admissible.

ISSUE IV: It was appellant who opened the door to hearsay testimony by insisting that hearsay evidence of threats was admissible to show state of mind. Moreover, no error has been demonstrated due to the court's disallowance of hearsay statements concerning the type of drug appellant was allegedly using, as the testimony was never proffered.

ISSUE V: There was no "Williams Rule" violation through the introduction of evidence concerning the burglary because (1) Fla. Stat. 90.404(2) is inapplicable to the penalty phase, (2) section 90.404(2)(a) is applicable only to similar fact evidence and burglary was not a similar fact crime and (3) all the elements of a collateral crime were not present.

ISSUE VI: The trial judge did not abuse his discretion in allowing the jurors to take notes as this is allowed in Florida.

ISSUE VII: There is no constitutional prohibition against allowing a prosecutor to peremptorily excuse jurors opposed to the death penalty.

ISSUE VIII: The lower court's order is more than sufficiently clear to support the conclusion that the trial judge engaged in a reasoned weighing of factors.

ISSUE IX: The evidence supports the judge's finding that the homicide was especially heinous, atrocious or cruel because the victim was put in imminent fear of an impending execution. There was also evidence to support the judge's finding with respect to the cold, calculated factor because the evidence disclosed that appellant planned the murder, that he stalked his victim and lay in wait.

In considering contemporaneous convictions as negating no significant history, the lower court followed existing law. Regardless, Scull, *infru*, is distinguishable.

The lower court considered all non-statutory mitigating factors urged upon it.

ISSUE X: The punishment in the instant case was not disproportionate to the crime.

ISSUE XI: The victim's use or non-use of drugs was totally irrelevant to the sentencing issues.

ARGUMENT

ISSUE I

THE JURY'S SENTENCING RECOMMENDATION HEREIN WAS TAINTED BY THE PROSECUTOR'S IMPROPER VOIR DIRE AND CLOSING ARGUMENT, WHICH MISLED THE JURY IN ITS CONSIDERATION OF MITIGATING EVIDENCE.

Under one issue appellant raises three alleged acts of judicial error, one that allegedly occurred during voir dire of the jury and two that allegedly occurred during closing argument. This Court has held that where two or more alleged errors are grouped in one assignment, if any one of such alleged errors fails, the entire assignment fails. Cobb v. State, 126 So. 281 (Fla. 1930), Williams v. State, 50 So. 749, 58 Fla. 138 (Fla. 1909), Smithie v. State, 101 So. 276, 88 Fla. 70 (Fla. 1924). Manifestly, where errors are grouped under one assignment or issue an appellant is relying on the cumulative effect of the errors. Consequently if one or more of the alleged errors fail, either because the appellant is incorrect with respect to the position he takes or because it was not preserved for appellate purposes, then the issue looses its cumulative effect. Once it looses its cumulative effect the remaining errors must be considered harmless.

We shall now demonstrate why no error was committed with respect to any of the statements made by the assistant state attorney.

Voir dire questions concerning accountability of intoxicated person.

Appellant argues that it was improper for the court to allow the prosecutor to ask the prospective jurors questions as to whether they believed someone who was intoxicated from alcohol or on drugs should be held accountable for what he did. **(R-119-121).** He argues that at the penalty phase of the trial accountability is not the issue, that the only issue is whether the defendant should be sentenced to life or death for the crime which the jury has already held him accountable.

We do not concede that accountability is not an issue at the penalty phase of a capital proceeding. The question to be determined is the extent of accountability, that is, the extent to which the convicted defendant should be punished for his crime. A convicted defendant who does not "pay his debt to society" cannot be deemed to have been held accountable. If the amount owed is his life, then anything less fails to hold him accountable. When a prosecutor is conducting a voir dire he is entitled to know the jurors' thoughts on accountability. Those thoughts give him insight as to whether to exercise his peremptory challenges with respect to any juror.

When appellant's counsel objected to the prosecutor's voir dire questions, the assistant state attorney clearly argued that he was not telling the jury what the law was with respect to mitigating factors, or setting out a standard for the jury, he was merely trying to determine the jurors' thoughts on intoxication, drugs and accountability. **(R-120).**

Nor was the jury misled into believing that appellant's alcohol and drug use could not be considered in mitigation. Appellant's counsel argued extensively to the jury that appellant's judgment was curtailed through his alcohol and drug use. (R-788-792). The standard of review with respect to voir dire is one of abuse of discretion. Zamora v. State, 361 So.2d 776 (Fla. 3 DCA 1978). Even where a prosecutor gives an erroneous explanation to the jury with respect to some aspect of their functions it does not constitute reversible error where the court correctly instructs the jury. Magill v. State, 386 So.2d 1188 (Fla. 1980).

That in closing argument the prosecutor improperly urged the jury to reject as a mitigating circumstance the no significant criminal history factor because of the contemporaneous convictions.

Appellant concedes that at the time the comment was made it was proper to consider contemporaneous convictions as negating the not significant criminal history factor. He says, nevertheless, that since then this court has changed its mind and it is no longer proper to consider contemporaneous convictions, Scull v. State, 533 So.2d 1137 (Fla. 1988), the prosecutor's argument, quite proper at the time, is no longer proper and reversal is required.

Unfortunately, appellant did not object below. (R-744). In order for an argument to be cognizable on appeal it must be the specific contention asserted as legal ground for the objection, exception or motion in the court below. Steinhorst v. State, 412

So.2d 332 (Fla. 1982). It has been a rule of long standing that an appellate court should confine itself to those questions, and only those questions that were before the trial court. Silver v. State, 188 So.2d 300 (Fla. 1966), Haverty v. State, 258 So.2d 18 (Fla. 2 DCA 1972). The reason for the rule is well established: "The judge must be allowed to make his error.'' Mancini v. State, 273 So.2d 371 (Fla. 1973). This applies to arguments of the prosecutor. In the absence of a timely objection interposed at trial a defendant may not raise objections to the remarks of a prosecutor for the first time on appeal. Kruglak v. State, 300 So.2d 315 (Fla. 3 DCA 1974), Thomas v. State, 326 So.2d 413 (Fla. 1976), Darden v. State, 329 So.2d 287 (Fla. 1976).

The defense had called a psychiatrist, a Dr. Sprehe, to testify in mitigation. During arguments to the jury the assistant state attorney first pointed out that Dr. Sprehe's opinion was rendered after speaking to appellant one hour, ten and one half years after the crime, (R-745), on the basis of one sided information. (R-751). Then he argued:

> It is interesting to note, though, that Dr. Sprehe did say even when this crime was occurring, Gene Lucas still knew the difference between right and wrong. Do you remember hearing that? Even when he was murdering Jill Piper.
>
> (R-752)

This was proper comment because when Dr. Sprehe was testifying on direct for the defense he stated that appellant ". . . probably knew the difference between right and wrong. . ." (R-620). Moreover, on cross examination Dr. Sprehe admitted that appellant

was not suffering from any serious mental illness, that he had an antisocial personality, (R-631), and again reiterated that appellant knew right from wrong on the night of the murder in spite of all the drugs and alcohol appellant claims he was using. (R-632). Significantly appellant never objected to these questions or sought to strike any of the answers. A prosecutorial comment cannot be considered improper if predicated on the evidence at trial. Spencer v. State, 133 So.2d 729 (Fla. 1961), Craig v. State, 510 So.2d 857 (Fla. 1987). Even though remarks are actually inaccurate or overreaching, statements as to the testimony and meaning of the testimony, where there is nothing in the record to indicate that the statements complained of were willfully inaccurate, do not require a reversal. Myers v. State, 256 So.2d 400 (Fla. 3 DCA 1972).

When appellant objected to the prosecutor's comments, the prosecutor correctly explained to the court that one of the statutory mitigating circumstances which appellant was relying on was that appellant's capacity to appreciate the criminality of his conduct was impaired. See Fla. Stat. 921.141(6)(f). If a criminal defendant knows that society frowns on murder, then that fact places into question any allegation that he could not appreciate the criminality of his conduct. It is true that subsection (6)(f) disjunctively also provides for the defendant's impaired inability to conform his conduct to the requirements of the law as a mitigating factor. While the prosecutor's argument may not have addressed that particular clause he was entitled to

make what ever argument the record supported as to the first part of subsection (6)(f).

ISSUE II

THE COURT BELOW ERRED IN TAKING JUDICIAL NOTICE OF THE FACT THAT APPELLANT WAS FOUND GUILTY ON JANUARY 14, 1977 OF THE ATTEMPTED MURDERS OF TERRI L. RICE AND RICHARD BYRD, JR., AND IN SO INFORMING THE JURY.

On March 25, 1987 the state filed a request to take judicial notice of the fact that appellant had, on January 14, 1977 been found guilty of attempted first degree murder of Terri L. Rice and of Richard Byrd, Jr. (R-847). On March 26, 1987 appellant filed a motion to strike the request predicated on the ground that attempted first degree murder is a nonstatutory aggravating factor. (R-848). He did not complain about inadequate notice in his motion to strike. At the trial, which began on March 20, 1987, appellant did, orally, add the argument that the request was not timely filed. (R-13). He now argues, in this appeal, that the court erred in taking judicial notice because (1) the request was not timely filed, (2) it relieved the state of proving, beyond a reasonable doubt, the aggravating circumstance which the two convictions supported, and (3) because it provided the prosecutor with a "sword and a shield" in that it not only allowed him to argue that the state had proven the aggravating circumstances of previous conviction of a crime of violence, but that these two convictions negated any contention that appellant had no significant history of prior criminal activity.

(1) That the request was not timely filed.

The Florida Evidence Code 90.202(6) provides that a court *may* take judicial notice of the records of any court of this state. **Section 90.203** provides that a court shall take judicial notice of any matter covered in **90.202** when one of the parties files a request that the court do *so* in a timely manner. The amount of time is not specified in the code. All that is required is that the requesting party make his written request in sufficient time to enable the adverse party to meet the request. Appellant claims a five day notice was not sufficient. He fails to explain why. The request involved the court records of the same case which was before the court. It was not a situation where the records pertained to another case or from another county or state. Appellant he has failed to explain exactly what he could not meet within the five days notice. Certainly it was not the fact of the judgments because they were right there in the court file. Certainly it was not the fact that he was not the Lucas that had been convicted in 1987 because he could have easily taken the stand and testified that he was not the same Lucas referred to in the judgments.

The contention that the notice was not timely is simply without merit.

Milton v. State 429 So.2d 804 (Fla. 4 DCA 1983), cited by appellant does not aid him because in Milton the Court was asked to take judicial notice of facts contained in another file and the request was made in the midst of the trial, without

sufficient timely notice to allow the defendant to meet the request. What is sufficient time depends on the facts of any given case. Under the circumstances of this case five days notice was more than adequate.

(2) That it relieved the state of having to prove the aggravating circumstance beyond a reasonable doubt.

As already indicated above, once the state filed a timely request with respect to it own records and provided the court with sufficient information to enable it to take judicial notice the court was required by the code to take judicial notice. See *90.203.* Once the court is requested to take judicial notice of its own records there are only two grounds upon which the request may be denied absent failure to meet the request; viz: that the request was not timely or that the court was not provided with sufficient notice. The fact that the requesting party is relieved from proving a matter is not a ground which justifies denying the request.

Nevertheless, appellant confuses his concepts. The purpose of judicial notice is to relieve a party from proving a fact which is not subject to reasonable dispute and about which an argument about their existence would be moot and a sham. Ehrhardt, Florida Evidence, Second Edition Section 201.1. That appellant was adjudicated guilty of the attempted murders of Byrd and Rice is not subject to any dispute. This very court recognized those two convictions in appellant's first of many appeals to this court. Lucas v. State, 376 So.2d 1149 (Fla.

1979) at 1152. The fact that the convictions were judicially noticed, however, did not relieve the state of proving the two aggravating circumstances which they supported beyond a reasonable doubt. It only relieved the state of establishing an extensive and unnecessary predicate for a fact that was moot. While it eased the proof required, it did not relieve the jury of finding the existence of this aggravating factor beyond a reasonable doubt. The jury was so instructed. (R-797).

(3) That it allowed the prosecutor to arque that the two convictions negated the "no significant previous criminal history."

This argument does not even deserve an answer because it goes to what may be considered instead of how it may be considered. Whether the two previous convictions could be considered in determining whether appellant had no significant history of prior criminal activity is an issue of itself which appellant has raised in issue I of his brief. Once it is determined that they can be considered, the question as to how evidence of that fact is admitted is another matter -- one already covered above.

ISSUE III

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE AT APPELLANT'S PENALTY TRIAL EVIDENCE OF THE MENTAL ANGUISH AND PHYSICAL PAIN ENDURED BY TERRI RICE AND RICHARD BYRD, JR.

Appellant complains that the state should not have been allowed to introduce evidence of the anguish and physical pain endured by the two victims of the attempted murders which occurred during the same transaction or episode as the murder which is the subject of this appeal.

In some eight pages of his brief, (appellant'sbr. p 40-47) appellant summarizes the testimony wherein such evidence was introduced and supports this through a plethora of record cites. Significantly, however, with but one exception, when one examines these record cites, one fails to find any objection predicated on the contention that the testimony was inadmissible on the grounds he now raises on this appeal. (R-271, 274, 275, 294, 296, 297, 298, 300, 301, 322, 323, 324, 415, 419, 420, 423, 424, 425, 426). It was only at this point, R-426, that appellant made any objection on the grounds that he now raises. At this time Terri Rice had already testified to the details of the assault, the fear and the anguish and Deputy Humble had already testified with respect to what he found when he arrived at the scene. (R-294-324). In fact Byrd had already testified to much of the details before any objection was interposed on the grounds that it was improper to introduce evidence of the anguish and pain suffered by the other two victims of this criminal episode.

We do not feel it necessary to reassert the need for an objection to preserve an issue on appeal. The cases have already been cited under issue I above. Consequently, appellant cannot be seen to complain about any of the details furnished prior to

his objection. When he did object the assistant state attorney informed the court that he recognized that in Lucas I, Lucas v. State, 376 So.2d 1149 (Fla. 1979), this Court had held that in determining whether the capital felony was committed in a heinous or atrocious manner, the heinousness or atrociousness of the collateral crimes could not be considered. (The logic of that ruling escapes the undersigned, but, nevertheless, it is the ruling of this Court.) He informed the court that this testimony was admissible because the two collateral offenses were prior violent felonies and the details of those crimes were admissible as per prior decisions of this court. The lower court overruled the objection. (R-428). Nevertheless, the testimony thereafter did not focus on ". . . Mr. Byrd and what happened to him," (R-426), but on what he observed between Rice and appellant, that is, that they were fighting. (R-428). Concededly, further on in the testimony Byrd proceeded to testify concerning the fear, anguish and pain to him and to Terri Rice, but no further objections were interposed. (R-431-436).

We recognize, of course, that appellant will take the position that his one objection was sufficient and he should not have been required to object further. But the contention that he should not be required to make further objections does not remedy the fact that prior to this he had allowed this type of testimony without objection. Consequently, to the extent that it was error to have overruled the objection, it was harmless error considering what appellant had already allowed.

Furthermore, the assistant state attorney was correct when he stated that this court has held that in proving a prior crime of violence the details of that crime are admissible since "[p]ropensity to commit violent crimes surely must be a valid consideration for the judge and jury." Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977). Justus v. State, 438 So.2d 358 (Fla. 1983). While evidence may be inadmissible for one purpose it may be admissible for another and, in such a case may be admitted for the purpose which it is admissible. Parkin v. State, 238 So.2d 817 (Fla. 1970).

While recognizing that this court held that the details of a prior violent crime are admissible, appellant argues that they should not be in the instant case, because they occurred within the same episode as the capital offense and contemporaneous offenses do not establish propensity. We beg to disagree. The details of the other attempts whereby appellant was proven not to have been satisfied with killing Jill Piper, but had to kill her helpless companions, evincing a "thrilled look," (R-431), as he attempted to kill them, clearly was evidence tending to establish propensity. Appellant may well explain his actions away as being the product of an enraged, intoxicated or drugged mind, but the fact is, evidence concerning the details of these crimes tended to establish that the killing of Jill Piper was not an isolated

instance of murder but that appellant has the propensity to murder and may even thrill in its commission. That is the meaning of relevant evidence. Fla. **Evidence Code 90.401 (1987).**

ISSUE IV

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE DAMAGING HEARSAY TESTIMONY AGAINST APPELLANT WHILE DENYING APPELLANT THE OPPORTUNITY TO PRESENT HEARSAY TESTIMONY THAT WAS CRITICAL TO HIS DEFENSE.

The undersigned never ceases to be amazed at how in capital cases only the facts beneficial to the appellant are related in the defendant's brief. In the instant issue appellant first complains that the state was allowed over objections to introduce hearsay statements about what the victim told Franklin "Flip" Dorothy concerning threats made by appellant to her. He calls this Court's attention to R-389-390.

What appellant conveniently omits to point out is that he was the first that sought to bring out hearsay conversations between the victim and Dorothy.

The state called Dorothy as its witness. (R-376). On direct examination the state elicited from Dorothy a statement made by appellant to Dorothy that he, appellant, was going to ". . . put her . . . (the victim). . . in a hole . . ." and ". . . cut her guts out." (R-381). During this direct examination the state never sought to elicit any hearsay statements from Dorothy. On cross-examination, however, counsel for appellant sought to

elicit conversations that Dorothy had had with the victim. **(R-381)**. It was the state who objected to these conversations on the grounds of hearsay. **(R-381-382)**. The lower court, at first sustained the objection, **(R-382)**, but when the defense requested to make a proffer, **(R-382)**, and did, **(R-382-385)**, the court receded from its earlier ruling. **(R-386)**. During the proffer, appellant sought to establish that the victim had threatened that if appellant ". . .came over and started messing with her, she was going to blow his shit away, or blow the shit away." **(R-384)**. In arguing that this evidence should be admitted counsel for appellant argued that in the penalty phase the rules of evidence are relaxed, **(R-385)**, and that ". . . threats made prior to the incident are relevant." **(R-386)**. The court then receded and allowed the evidence on the proposition that the actions or expressions by the parties are relevant to show state of mind. **(R-386)**. In other words it was appellant's counsel who wanted hearsay evidence introduced for the purpose of reflecting the state of mind of the parties.

The evidence was allowed and presented. Now the door was opened. On redirect the state then proceeded to ask Dorothy about statements made by the victim to him concerning threats made by appellant to the victim. Counsel for appellant weakly objected on the grounds of hearsay. Naturally, the lower court overruled the objection. **(R-389)**. Appellant's trial counsel had opened the door. McCrae v. State, **395** So.2d **1145** (Fla. **1980)**, Ashcraft v. State, **465** So.2d **1374** (Fla. **2** DCA **1985)**, United

States v. Kaye, 779 F.2d 1461 (Fla. 10th Cir. 1985), United States v. Robinson, 485 U.S. ___, 99 L.Ed.2d 23, 108 S.Ct. (1988). A party may not invite error and then he heard to complain of that error on appeal. Pope v. State, 441 So.2d 1073 (Fla. 1983). It was appellant's trial counsel who first argued to the court that at the penalty phase the rules of evidence are relaxed. (R-385). It was appellant's trial counsel who first sought to bring out hearsay statements through witness Dorothy.

Threats allegedly made by the victim can not be logically relevant unless it is established that defendant was aware of these threats. Compare: Campos v. State, 366 So.2d 782 (Fla. 3 DCA 1978). Nevertheless appellant was allowed to introduce such evidence. When the state turned the tables he complains. Moreover, if any such evidence was admissible it was the threats made by appellant concerning his victim because they were relevant to establishing intent, motive and to establishing the declarant's state of mind inasmuch as it was appellant's state of mind that was an issue. Moreover, they are admissible as an exception to the hearsay rule. **Florida Evidence Code 90.803(3)(a).**

Appellant suggests that the lower court was not playing fair because, while denying him his hearsay objection with respect to the above discussed threats, the lower court refused to allow him to introduce hearsay evidence with respect to the drug he was allegedly using that day. In the first place, as stated above, it was appellant, not the state, who first sought to introduce

hearsay evidence of threats. In the second place the evidence respecting the drugs was clearly hearsay. In the third, appellant never proffered the answer as to the type of drug.

Appellant called Georgina Martin, a convicted felon, (R-512-513), as a witness, (R-505), to testify that on August 13, 1976 appellant bought some ". . . PCP, angel dust, THC, whatever it was called" from a friend of hers from Miami, (R-507), and that appellant was ". . . totally out of it" (R-508). On cross-examination the state brought out the fact that she really did not know what the drug was. (R-518). On re-direct appellant's counsel asked her whether ". . . the girl who sold this to Gene and Dean indicate to you that it was called angel dust or PCP ." (emphasis supplied). The state objected on the grounds of hearsay and the court sustained the objection. (R-518). The witness never answered the question and we do not know what the answer would be as the defense never proffered the answer. Where a defendant makes no proffer of a witness's disallowed testimony a court of appeals can not speculate what the testimony would have been in determining whether it was error not to allow it. Mitchell v. State, 321 So.2d 108 (Fla. 1 DCA 1975), Gaines v. State, 244 So.2d 478 (Fla. 4 DCA 1970). Based on the question that was asked we do not know if the girl from Miami actually told the witness the name of the drug or simply "indicated" in some way the name of the drug, if at all. Consequently, since this court would not know the what the answer would have been it is impossible for error to be determined, even

assuming that the trial court should have allowed this hearsay evidence.

ISSUE V

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE PREJUDICIAL EVIDENCE OF A COLLATERAL CRIME (BURGLARY) WHEN THE STATE HAD FAILED TO GIVE APPELLANT THE STATUTORILY REQUIRED NOTICE THAT IT INTENDED TO INTRODUCE THIS EVIDENCE.

This issue assumes that Fla. **Stat. 90.404(2)(b)1 (1987)** is applicable to the penalty phase of a capital trial. We do not *so* assume and reject the contention that it is. We recognize that the **section 90.404** (2) **of the Evidence Code** does not distinguish between the guilt phase and the penalty phase of a trial. But, the object of that section is to protect a defendant from being convicted through inadmissible evidence of bad character or propensity. It is an attempt to assure that the state is allowed to introduce all relevant evidence, even if it be of another similar fact crime, while at the same time disallowing evidence of such crime where its only purpose is to prove bad character or propensity. The guilt phase is concerned with the whether the state proved that the defendant committed the crime in question, not whether he committed another crime. If a collateral offenses is introduced, and that collateral offense has no relevancy to any issue at the trial, there is danger that the jury may be influenced by the collateral offense to convict a person they would have otherwise acquitted. In such a case the defendant

stands in danger of being convicted because of his character or propensity and not because he in fact committed the charged offense. In order to obviate this possibility the code provides for a 10 day notice on the part of the state so that the defense can adequately be prepared to meet any allegation of relevancy with respect to the collateral offense.

At the penalty phase, however, the defendant has already been convicted. The defendant's character and propensity is an issue, in fact, the issue, which must be resolved. In the guilt phase, a defendant's character or propensity is not relevant; whereas, in the penalty phase it most assuredly is. Consequently, at the penalty phase **section 90.404(2)(a)** has little, if any, application, because the collateral offense is relevant for the very purpose for which it is irrelevant during the guilt phase. Moreover, **section 90.404(2)(b)1** serves no purpose with respect to providing the defendant with the opportunity contest the relevancy of the offense because the 10 day notice is designed to provide the defense with an opportunity to show that the crime is not relevant to any issue other than bad character or propensity. Since character and propensity are relevant, notice is not required. If notice of the aggravating circumstances which the state intends to rely on is not required, Menendez v. State, 368 So.2d 1278 (Fla. 1979), Sireci v. State, 399 So.2d 964 (Fla. 1981), which include factors involving other crimes, we fail to see why notice of a collateral crime is required at the sentencing phase.

Even assuming that notice of the specific offense is required, even for the penalty phase of the trial, section **90.404** (2)(a) is applicable only to similar fact evidence. Appellant was charge and convicted of first degree murder. The collateral offense in the instant case was, appellant claims, a burglary. Accepting this for the moment such an offense does not require presentation of similar facts to the murder. Compare: Bryan v. State, **533** So.2d **744** (Fla. **1988),** Gorham v. State, **454** So.2d **556** (Fla. **1984).**

Finally, even accepting that section **90.404** is applicable to the penalty phase setting, the circumstances did not call for a mistrial. A mistrial should not be granted in the midst of a criminal trial unless there is absolute necessity to stop the trial and discharge the jury. Kelly v. State, 202 So.2d **901** (Fla. 2 DCA **1967),** Warren v. State, 221 So.2d **423** (Fla. 2 DCA **1969),** Wilson v. State, **436** So.2d **908** (Fla. **1983).** There was no necessity for a mistrial, in the instant situation. The state had notified the defense of the fact that it was going to introduce evidence of appellant's prior arrest for a trespass of the Piper residence. When the victim's mother testified that a few days before her daughter was killed she found that appellant had ". . . broken in some way or another'' the defense objected and asked for a mistrial on the grounds that she was testifying to a burglary and the defense had not received notice of the burglary. **(R-481).** After arguments heard, the court correctly concluded that "[t]he breaking of the close without criminal

intent is trespass, it's not a burglary." (R-488-489). There is no "Williams Rule" violation where all the elements of the collateral crime are not present. Malloy v. State, 382 So.2d 1190 (Fla. 1979).

ISSUE VI

THE COURT BELOW ERRED IN PERMITTING THE JURORS TO TAKE NOTES DURING APPELLANT'S PENALTY TRIAL, AND TO USE THEIR NOTES DURING DELIBERATIONS, WITHOUT INSTRUCTING THE JURY ON THE PROPER WAY TO USE NOTES.

Appellant recognizes that whether to allow jurors to take notes is generally within the trail court's discretion. Kelley v. State, 486 So.2d 578 (Fla. 1986), Myers v. State, 499 So.2d 895 (Fla. 1 DCA 1986).

He argues, nevertheless, that the court abused its discretion in failing to instruct them on the proper use of note taking. He fails to point out that although he did object to allowing the jurors to take notes he never suggested any instructions that should be given to them as to the proper method of note taking. (R-230). As in Kelley, other than the objection ". . . no additional or different instructions on the matter were proposed by the defense below." Kelley at 583.

Appellant places primary reliance on United States v. MaClean, 578 F.2d 64 (3rd Cir. 1978). Aside from the fact that it is a federal case and the issue is not one of constitutional dimensions, the case was affirmed on the general principle that

note-taking is primarily a matter for judicial discretion of the trial judge. The court suggested instructions on the role of note-taking, but never said that if the instructions were not given it would require reversal. Similarly with United States v. Rhodes, 631 F.2d 43 (5th Cir. 1980).

ISSUE VII

THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO SYSTEMATICALLY EXCLUDE ALL POTENTIAL JURORS WHO EXPRESSED RESERVATIONS ABOUT THE DEATH PENALTY PRODUCED A JURY THAT WAS UNCOMMONLY WILLING TO CONDEMN APPELLANT TO DIE AND THEREBY VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO BE TRIED BY AN IMPARTIAL JURY.

Appellant next contends that reversible error inheres in the prosecutor's use of peremptory challenges to exclude systematically jurors Horncastle, Johnson, Gillette - jurors who expressed reservations about the death penalty; Lucas contends that a jury was produced uncommonly willing to condemn appellant to die and violating the Sixth and Fourteenth Amendment right to be tried by an impartial jury.

The record shows that Ms. Horncastle was opposed to the death penalty "except if there's an extremely exceptional circumstance" (R 86).[1] Ms. Horncastle also believed a person

[1] It is important to note that guilt had already been previously determined. The instant proceeding was solely to decide whether the sentence should be death or life imprisonment.

matter. It is central to *Batson* that a "person's race simply 'is unrelated to his fitness as a juror.'''*Id.*, at 87, 90 L.Ed.2d 69, 106 S.Ct. 1712 (citation omitted).

There is no basis for declaring that a juror's attitudes towards the death penalty are similarly irrelevant to the outcome of a capital sentencing proceeding. Indeed, *Witherspoon u. Illinois*, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770, 56 Ohio Ops 2d 368 (1968), upon which Justice Brennan's dissent so heavily relies, itself recognizes the relevance of this attitudinal factor. Categorical exclusion of jurors with moral qualms over capital punishment is forbidden precisely because such a practice would produce "a jury uncommonly willing to condemn a man to die.''*Id.*, at 521, 20 L.Ed.2d 776, 88 S.Ct. 1770, 56 Ohio Ops 2d 368.

Moreover, Justice Brennan's dissent ignores a fundamental distinction between peremptory challenges of jurors and challenges for cause. Challenges for cause permit the categorical and unlimited exclusion of jurors exhibiting an inability to serve fairly and impartially in the case to be tried, as noted in *Wainwright v. Witt*, 469 U.S. 412, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985). In *Witherspoon*, the Court held that the Constitution does not tolerate such a categorical exclusion of jurors who merely express moral scruples about or general objections to capital punishment unless it would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright u. Witt, supra,* at 424, 83 L.Ed.2d 841, 105 S.Ct. 844 (citation omitted).

Peremptory challenges are limited in number. Each party, the prosecutor, and the defense counsel, must balance a host of considerations in deciding which jurors should be peremptorily excused. Permitting prosecutors to take into account the concerns expressed about capital punishment by prospective jurors, or any other factor, in exercising peremptory challenges simply does

> not implicate the concerns expressed in Witherspoon.
>
> We ought not delude ourselves that the deep faith that race should never be relevant has completely triumphed over the painful social reality that, sometimes, it may be. That the Court will not tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact. In my view, that special rule is a product of the unique history of racial discrimination in this country; it should not be divorced from that context. Outside the uniquely sensitive area of race the ordinary rule that a prosecutor may strike a juror without giving any reason applies. Because a juror's attitudes towards the death penalty may be relevant to how the juror judges, while, as a matter of law, his race is not, this case is not like *Batson*.

(93 L.Ed.2d at **374-375).**

The district court in Brown disagreed with Justice O'Connor. We disagree with the district court and agree with Justice *O*'Connor.

The state respectfully submits that five Justices of the United States Supreme Court have indicated that such a claim would be rejected. In Gray v. Mississippi, **481** U.S. **648, 95** L.Ed.2d 622 **(1987),** dissenting Justice Scalia (joined by the Chief Justice, Justice White, and Justice O'Connor) declared:

> Finally, I cannot omit commenting upon the plurality's *dictum* implying that it is unconstitutional for prosecutors to use peremptory challenges consistently to exclude potential jurors who express reservations about capital punishment. *Ante*, at ____, **95** L.Ed.2d **639.** I disagree. Prosecutors can use peremptory challenges for many reasons, some of which might well be constitutionally

> insufficient to support a legislative exclusion. For example, I assume that a State could not legislate that those who are more sympathetic toward defendants than is the average person may not serve as jurors. But that surely does not mean that prosecutors violate the Constitution by using peremptory challenges to exclude such people. Since defendants presumably use their peremptory challenges in the opposite fashion, the State's action simply does not result in juries "deliberately tipped toward" conviction. The same reasoning applies to the exercise of peremptory challenges to remove potential jurors on the basis of the perceived likelihood that they would vote to impose a death sentence. In this case, for example, it appears that the defendant used peremptory challenges to exclude at least two potential jurors whose remarks suggested that they were relatively likely to vote to impose a death sentence. See Tr 522 and **579** (Mr. Cavode), **573-577** and **579** (Mr. Hester).
>
> **(95** L.Ed.2d at **646-647).**

Justice Powell, who concurred in the result reached by the majority, opined:

> There can be no dispute that a prosecutor has the right, indeed the duty, to use all legal and ethical means to obtain a conviction, including the right to remove peremptorily jurors whom he believes may not be willing to impose lawful punishment. Of course, defense counsel has the same right and duty to remove jurors he believes may be prosecution-oriented. This Court's precedents do not suggest that the *Witherspoon* line of cases restricts the traditional rights of prosecutors and defense counsel to exercise their peremptory challenges in this manner. I therefore cannot agree that the prejudice created by Mrs. Bounds' removal was exacerbated by the proper exclusion of other jurors who may have shared her views.
>
> The plurality acknowledges that judges normally may not inquire into the prosecutor's use of these challenges. ***Ante,***

> at ___, n 18, 95 L.Ed.2d __. This Court has recognized one exception to that rule, when the defendant has established a prima facie case of racial bias in the selection of a particular venire. *See Batson v. Kentucky*, 476 U.S. ___, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986). Our decision in *Batson*, however, was justified by the compelling need to remove all vestiges of invidious racial discrimination in the selection of jurors, a concern that obviously is not implicated on these facts. Nothing *Batson* suggests that courts may examine the prosecutor's motives whenever he has excluded peremptorily those whom the court may not remove for cause. *See Brown v. North Carolina*, 479 U.S. __, 93 L.Ed.2d 373, 107 S.Ct. 423 (1986) (O'Connor, J., concurring in the denial of certiorari). Because the improper exclusion of even a single juror is sufficient to require resentencing in a capital case, and because the prosecutor is free to exclude panel members who express doubt as to whether they could vote to impose capital punishment. I would attach no significance to the peremptory exclusion of the other jurors.
>
> (95 L.Ed.2d at 641-642).

Thus, a majority of the Court already is on record expressing the view that the Constitution does not prohibit the prosecutorial use of peremptory challenges to exclude jurors with reservations about the death penalty.

In Lockhart v. McCree, 476 U.S. 162, 90 L.Ed.2d 137 (1986), the court stated:

> [lc, 3] The Eighth Circuit ruled that "death qualification" violated McCree's right under the Sixth Amendment, as applied to the states via incorporation through the Fourteenth Amendment, see *Duncan v. Louisiana*, 391 U.S. 145, 148-158, 20 L.Ed.2d 491, 88 S.Ct. 1444, 45 Ohio Ops 2d 198 (1968), to a jury selected from a representative cross section of the community. But we do not believe that the fair-cross-section

requirement can, or should, be applied as broadly as that court attempted to apply it. We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. ***See Duren v. Missouri,*** 439 U.S. 357, 363-364, 58 **L.Ed.2d** 579, 99 S.Ct. 664 (1979); ***Taylor v. Louisiana,*** 419 U.S. 522, 538, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975) ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population"); ***cf. Batson v. Kentucky, ante,*** at 84-85 n 4, 90 L.Ed.2d 69, 106 S.Ct. 1712 (expressly declining to address "fair-cross-section" challenge to discriminatory use of peremptory challenges). The limited

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scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury, ***see ante*** , at 85-86, n 6, 90 L.Ed.2d 69, 106 S.Ct. 1712, a basic truth that the Court of Appeals itself acknowledged for many years prior to its decision in the instant case. ***See United States v. Childress,*** 715 F.2d 1313 (CA8 1983)(en banc), ***cert. denied,*** 464 U.S. 1063, 79 L.Ed.2d 202, 104 S.Ct. 744 (1984); ***Pope v. United States,*** 372 F.2d 710, 725 (CA8 1967) (Blackmun, J.) ("The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn"), vacated on other grounds, 392 U.S. 651, 20 L.Ed.2d 1317, 88 S.Ct. 145 (1968). We remain convinced that an extension of the fair-cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension.

(90 L.Ed.2d at 147-148).

* * *

[5] The group of "**Witherspoon-excludables**" involved in the case at bar differs significantly from the groups we have previously recognized as "distinctive." "Death qualification," unlike the wholesale exclusion of blacks, women, or Mexican-Americans from jury service, is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of

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a capital trial. There is very little danger, therefore, and McCree does not even argue, that "death qualification" was instituted as a means for the State to arbitrarily skew the composition of capital-case juries.

(90 L.Ed.2d at 149).

* * *

[le] In sum, "**Witherspoon-excludables**" or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a

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particular case, may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement. ***See*** *Lockett v.* ***Ohio,*** 438 U.S. 586, 597, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops 3d 26 (1978) ("Nothing in ***Taylor,*** however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge"). It is for this reason that we conclude that "*Witherspoon*-excludables" do not constitute a "distinctive group" for fair-cross-section purposes, and hold that "death qualification" does not violate the fair-cross-section requirement.

(90 L.Ed.2d at 150).

* * *

The view of jury impartiality urged upon us by McCree is both illogical and hopelessly impractical. McCree characterizes the jury that convicted him as "slanted" by the process of "death qualification." But McCree admits that exactly the same 12 individuals could have ended up on his jury through the "luck of the draw," without in any way violating the constitutional guarantee of impartiality. Even accepting McCree's position that we should focus on the jury rather than the individual jurors, it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a state-ordained process, yet impartial when exactly the same jury results from mere chance. On a more practical level, if it were true that the Constitution required a certain mix of individual viewpoints on the jury, then trial judges would be required to undertake the Sisyphean task of "balancing" juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on. Adopting McCree's concept of jury impartiality would ~~also~~ likely require the elimination of peremptory challenges, which are commonly used by both

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the State and the defendant to attempt to produce a jury favorable ~~to the~~ challenger.

(90 L.Ed.2d at 151).

ISSUE VIII

THE SENTENCING ORDER ENTERED BY THE COURT BELOW IS NOT SUFFICIENTLY CLEAR TO ESTABLISH THAT THE COURT ENGAGED IN A REASONED WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES, AND SO WILL NOT SUPPORT THE SENTENCE OF DEATH IMPOSED UPON APPELLANT.

Appellant next contends that the trial court's sentencing order is not sufficiently clear to establish that the court engaged in a reasoned weighing of aggravating and mitigating circumstances. Appellee disagrees.

Appellant argues that on the first page of the sentencing order the trial judge stated that he had considered the following mitigating circumstances urged by appellant:

> . "(1) that the Defendant had no significant history of prior criminal activity, (2) the Defendant was under the influence of extreme mental or emotional disturbance, **(3)** there was substantial impairment of the Defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law and **(4)** the age of the Defendant at the time of the crime.
>
> **(R 889)**

He complains that the court then specifically rejected only one of the four mitigating factors - his age (R **891).** Such a literal parsing of the trial judge's sentences is not required either by the Constitution or the case law. Cf. Wainwright v. Witt, **469 U.S. 412, 434, 83** L.Ed.2d **841, 858 (1985)** (an opinion is, after all, an opinion and not an intricate desire in a will). The fact is the very next sentence in the trial judge's order explains clearly why the first proffered mitigating factor was deemed meritless:

> ''TheCourt finds that the Defendant as of the date of sentencing has previously been convicted of two felonies involving the use or threat of violence as evidenced by his conviction for the attempted murders of Terri Rice and Ricky Byrd."
>
> **(R 890)**

This is a legitimate finding to support a finding of aggravating factor, F.S. **921.141(5)(b),** and also rebuts mitigating factor **(6)(a).**

This Court previously has stated:

> "Prior to sentencing in this case, appellant was convicted of the attempted murders of Ricky Byrd and Terri Rice. It is true that the two felony convictions were entered contemporaneously with the conviction of murder in the first degree, but both were entered 'previous' to sentencing and were therefore appropriate considered by the trial judge as an aggravating circumstance."

Lucas v. State, 376 So.2d 1149 at 1152-1153 (Fla. 1988).

Appellant argues that the law has changed in this regard, citing Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988). Appellee responds that the earlier ruling in Lucas constitutes the law of the case. Moreover, Scull is distinguishable as it dealt with the state's attempt on cross-appeal to overturn the trial court's finding of the existence of a mitigating factor whereas the instant case presents the trial court's rejection of a proffered mitigating factor.

Appellant complains that the trial court's conclusion regarding the applicability of F.S. **921.141(6)(b)** and **(f)** is unclear. We disagree. The Court declared:

> "The Court finds there is no credible evidence that the Defendant suffers from any psychosis and further that he is free from serious mental illness or anti-social personality disorder. Testimony was presented that the Defendant consumed alcohol and drugs at various times during the evening preceding the murder and that these substances had an effect upon the Defendant's

> ability to conform his conduct to the requirements of law. The voluntary ingestion of drugs and alcohol possibly increased the Defendant's impulsiveness, but did not destroy his cognitive function. The Court finds that while the cognitive function was lessened, notwithstanding increased impulsiveness, there still remained abundant evidence that the Defendant possessed the capacity to control his actions and conform with the requirements of law. The Defendant's conduct in the days and hours before the actual commission of the crime establish beyond all reasonable doubt a clear pattern of premeditated purposeful behavior with full appreciation of his actions and their intended results to such an extent that the mitigating circumstances of the Defendant's extreme mental or emotional disturbance and impairment of capacity to appreciate or conform conduct of the requirements of law are insufficient to outweigh the aggravating factors which have been established beyond a reasonable doubt."

(R 890-891).

Appellee submits that the trial court was ably articulating that appellant was not under the influence of extreme mental or emotional disturbance and that appellant still appreciated the criminality of his conduct and could conform his conduct to the requirements of law. Whatever impairment there might be, it was not substantial enough to merit a finding under F.S. 921.141(6). As in Rogers v. State, **511** So.2d 526, **534** (Fla. **1987),** the trial court's order is sufficiently clear to permit appellate review.

Appellant also complains that the trial court found the killing of Jill Piper to be atrocious and cruel but argues that he did not find it be "especially" so. Appellee responds that appellant incompletely and unfairly describes the trial court's order. The trial court explained:

> "The Defendant shot Jill Piper in the back. She was aware of her wounds and attempted to escape further injury by fleeing into the house. Undeterred by either the resistance of the mortally wounded woman or her pitiful pleas, the Defendant continued to pursue her until finally he overtook her in front of the house. It has been established beyond all reasonable doubt that Jill Piper experienced a pre-death apprehension of physical pain from her wounds. Jill Piper perceived her impending death with helpless apprehension. When she could no longer continue her struggle for life, the Defendant pitiously and torturously executed Jill Piper, notwithstanding her pleas for mercy."

(R 891).

This factual recitation is more than adequate to meet this court's standards of an especially heinous, atrocious or cruel homicide. See, e.g., Copeland v. State, 457 So.2d 1012 (Fla. 1984); Clark v. State, 443 So.2d 973 (Fla. 1983); Adams v. State, 412 So.2d 850 (Fla. 1982); Jackson v. State, 522 So.2d 802 (Fla. 1988); Cooper v. State, 492 So.2d 1059 (Fla. 1986); Francis v. State, 473 So.2d 672 (Fla. 1985) (cases approved HAC finding where victim had apprehension of death).

ISSUE IX

> THE TRIAL COURT ERRED IN SENTENCING HAROLD GENE LUCAS TO DIE IN THE ELECTRIC CHAIR BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

(A) Heinous, Atrocious or Cruel -

Under this argument, appellant first complains that the state failed to prove that the homicide of Jill Piper was especially heinous, atrocious or cruel. Appellant correctly points out that this Court previously approved the finding of this statutory aggravating factor as applied to Lucas. As stated in Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979):

> We find that the record in this case supports the finding of the trial judge. The evidence shows (at least by one witness's version) that appellant shot the victim, pursued her into the house, struggled with her, hit her, dragged her from the house, and finally shot her to death while she begged for her life.

Appellant suggests that the evidence in the instant proceeding may have differed from that presented in the previous sentencing proceeding which invites reconsideration. But even appellant recognizes in his statement of facts the testimony of Richard Byrd, which appellee submits amply supports a finding of the presence of this aggravating factor. According to Byrd, Piper fell to the floor complaining "The son of a bitch has shot me" (R 419). Additionally, as recounted at page 16 of appellant's brief:

> "Byrd could hear a fight going on. (R 422) He 'could hear a man's voice at times cussing,' and he heard Piper screaming and begging for her life, saying, 'Dear God, don't kill me,' and 'Dear God, make him leave me alone.' (R 422) He also heard 'what sounded like blows passed,' or 'very hard hitting.' (R 422) It was 'real loud' and 'real scary.' (R 422) Then Byrd heard more shots and it got quiet. (R 423)"

The medical examiner who performed the autopsy on Jill Piper found seven gunshot wounds caused by five different bullets (R 459).

There can be no question that the trial court found the presence of this aggravating factor. The judge's order recites at (R 891-892):

> The Defendant shot Jill Piper in the back. She was aware of her wounds and attempted to escape further injury by fleeing into the house. Undeterred by either the resistance of the mortally wounded woman or her pitiful pleas, the Defendant continued to pursue her until finally he overtook her in front of the house. It has been established beyond all reasonable doubt that Jill Piper experienced a pre-death apprehension of physical pain from her wounds. Jill Piper perceived her impending death with helpless apprehension. When she could no longer continue her struggle for life, the Defendant pitiously and torturously executed Jill Piper, notwithstanding her pleas for mercy. The Court finds that this sadistic and cruel sequence of events, established by the evidence beyond a reasonable doubt, fulfills the meaning of atrocious and cruel.

Nor can there be any doubt that the evidence meets this Court's previously announced criteria that placing the victim in imminent fear of an impending execution constitutes heinous, atrocious or cruel homicide. See Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987); Melendez v. State, 498 So.2d 1258 (Fla. 1986); Jackson v. State, 522 So.2d 802 (Fla. 1988); Cooper v. State, 492 So.2d 1059 (Fla. 1986).

(B) Cold, Calculated and Premeditated -

It is apparent to appellee that the trial court found the presence of this aggravating factor. The sentencing order recites, in pertinent part:

> The Court finds that during the days immediately preceding the murder and throughout the evening until just minutes before the fatal incident, the Defendant had threatened death and serious bodily harm to Jill Piper. The evidence has established beyond a reasonable doubt that during this period of time the Defendant had a substantial period for reflection and thought. He repeated his threats under circumstances which the Court finds establishes that he methodically planned and calculated his act. With his courage bolstered by alcohol and drugs, he set about his nefarious scheme and doggedly pursued his victim until she was dead.

(R 891)

Appellant complains that application of this factor violates ex post facto but that argument had previously been rejected by this Court. See, Combs v. State, 403 So.2d 418 (Fla. 1981); Justus v. State, 438 So.2d 358 (Fla. 1983); Stano v. Dugger, 524 So.2d 1018 (Fla. 1988). It should be rejected again.

Appellant must be denied relief for yet another reason; the record reveals no complaint or request for relief in the trial court with respect to the instructions given at the penalty phase on the ground now asserted and therefore the issue has not been preserved for appellate review. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Appellant's failure below to seek a more limiting instruction defining cold, calculated and premeditated precludes review of the claim now (and the state does not concede any impropriety below). Appellant had no objection at R 801.

As to the argument that the facts do not support a finding of cold, calculated and premeditated, the state disagrees. This Court has approved the finding of this aggravating factor where the killer stalked his victim through underbrush and executed him. Mills v. State, 462 So.2d 1075 (Fla. 1985). In his statement of facts, appellant acknowledges sufficient facts to support the finding:

> (1) Appellant was upset that Piper was seeing someone else during the week preceding the homicide (R 611).
>
> (2) On the Sunday night before the killing, Lucas put a knife to her side and threatened to cut her guts out (R 389).
>
> (3) Appellant had remarked to others he was going to put Piper "in a hole" (R 380-381, R 412).
>
> (4) There was testimony that after a fight appellant came to the car where Piper was sitting and said "you're a dead bitch" (R 267).
>
> (5) Appellant said he was going to kill Jill Piper (R 399-400).
>
> (6) Richard Byrd heard the victim screaming and begging for her life followed by more gunshots (R 422-423).
>
> (7) Appellant subsequently admitted to Deputy Schmitt that he had all of the lies from the Piper girl he could stand (R 678).

The trial court correctly found repeated threats, methodical planning and calculated acts; Lucas ". . . doggedly pursued his victim until she was dead" (R 891). Cf. Lamb v. State, 532 So.2d 1051 (Fla. 1988); Jennings v. State, 512 So.2d 169 (Fla. 1987);

Deaton v. State, 480 So.2d 1279 (Fla. 1985); Phillips v. State, 476 So.2d 194 (Fla. 1985).

The instant killing was an execution style murder following a prearranged design. Amoros v. State, 531 So.2d 1256 (Fla. 1988).

Appellant relies on Banda v. State, 536 So.2d 221 (Fla. 1988), to support a contention that there was a pretense of moral or legal justification for his actions, i.e., his apparent outrage that his girlfriend was seeing someone else and she was carrying a shotgun and may have fired at him. Unfortunately for appellant, the argument cannot be sustained as it was appellant who continued to make threats to kill the victim (prior to her handling a shotgun), the victim was not violent and appellant pursued and destroyed the victim as she begged for her life. Thus, appellant's conduct does not satisfy the Banda test; and if Banda was intended to encompass the instant situation, the court should take the first opportunity to recede from Banda.

(C) The treatment of mitigating evidence -

In Jackson v. State, 530 So.2d 269 (Fla. 1988), this Court opined:

> [11] In his final point, appellant maintains he was prohibited from presenting the philosophy of the present parole commission to not grant parole to defendants convicted of capital offenses as a mitigating circumstance. We find that claim without merit. That fact does not concern the appellant's character and, in any event, it is probable that none of the present parole commission would be serving at the time Jackson could be eligible for parole in

twenty-five years had a life sentence been imposed.

(text at 274)

Similarly, Mr. Wesley's proffered opinion below relating to life imprisonment was not related to the character of the accused or the circumstances of the offense. Cf. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978).

(1) Contemporaneous Convictions

Next appellant says that the lower court erred in rejecting the no prior significant history of criminal activity as a mitigating factor predicated on the two convictions of attempted murder. It cannot be said that the lower court erred simply because it was following what this Court said in Ruffin v. State, 397 So.2d 277, 283 (Fla. 1981). The fact that this Court may have changed its mind in Scull v. State, 533 So.2d 1137 (Fla. 1988) should not be attributed as error on the part of the lower court. It was following the law espoused by this Court at the time it imposed the sentence.

Regardless, we do not believe that Scull mandates reversal in the instant case. The issue in Scull arose as a result of a cross-appeal by the state contending that the trial judge erred in finding this mitigating factor (no significant criminal history) because of the contemporaneous convictions. Since the judge refused to find this factor was negated by the contemporaneous convictions the question arose as to whether or not the judge had abused his discretion in doing so and this

court found he had not. He had not because a contemporaneous conviction does not necessarily establish a history of prior criminal conduct. But, that does not mean that a contemporaneous conviction can never establish a history of prior criminal activity such as under the circumstances of the instant case. The contemporaneous crimes demonstrate a propensity to murder corroborated by prior acts of drug use, (R 593, 601-602), and sale, (R 610, 619), threats, intimidation (R 380-381, 389, 412) and violence (R 266). Under the facts of this case it cannot be said that the lower court abused its discretion in refusing to find that appellant had prior history of criminal activity; more so, since the history predates the sentencing by years.

Regardless, even assuming that the lower court may have erred in relying on the contemporaneous convictions as evidence negating a prior insignificant criminal history, this Court has the final sentencing authority in Florida, can independently review the record that was considered by lower courts and determine that this finding is supported by the record. Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983).

(2) Consideration of Non-Statutory Mitigating Factors

Finally, appellant argues that the lower court erred in not considering all of the non-statutory mitigating facts which he proffered. Of course, this Court has often emphasized the distinction between considering a mitigating factor and finding a mitigating factor. While a sentencing judge must consider all of

the mitigating factors proffered by the defense he need not find that they exist, Hargrave v. State, 366 So.2d 1 (Fla. 1978), Daugherty v. State, 419 So.2d 1067 (Fla. 1982), or that they had mitigating value, or, even if supported by the record, that they outweighed the aggravating factors. Rogers v. State, 511 So.2d 526 (Fla. 1987). In Rogers, this Court suggested a three tier analysis that a sentencing judge should follow with respect to mitigating circumstances; viz: (1) First whether the alleged mitigation is supported by the evidence, (2) second, whether, if supported by the evidence, the factors are capable of mitigating the punishment and (3) three, if they are, whether the mitigating evidence outweighs the aggravating.

The problem which Rogers does not address, however, is one of identifying the mitigating factors. A sentencing judge should not be faulted for failing to consider a mitigating factor unless that factor has been identified to him as such.

A mitigating factor may not be as apparent at the trial level as appellate counsel would want us to believe. For instance, the fact that a defendant may have had sexual relations with a woman out of wedlock and had an illegitimate child which depended upon him for support may be considered by some as an aggravating instead of a mitigating factor. Nevertheless, the defendant may, as occurred in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), want it considered as a mitigating factor. Unless the defense identifies it as a mitigating factor the judge cannot be faulted for having failed to perceive it as such.

Additionally, once the judge allows a mitigating factor to be proffered it should be assumed that he considered it. The burden should be on the appellant, as with all other appellate issues, to establish that, in fact he did not. Appellant enumerates several mitigating factors which he claims the lower court did not consider: (1) remorse, (2) appellant's generally non-violent character, (2) the fact that he had grown calmer since being incarcerated, and (4) the fact that people trusted him with money and with their children.

This case exemplifies the identification problem. Appellant did present evidence of remorse to the jury, (R 506, 538, 598, 619, 908) and counsel argued this to the jury, but he does not appear to have urged it to the court (R 894-901). When the lower court entered its sentencing order it reflected that the following mitigating circumstances had been urged upon it by the defense:

> (1) that the defendant had no significant history of prior criminal activity;
>
> (2) that the defendant was under the influence of extreme mental or emotional disturbance;
>
> (3) that there was substantial impairment of the defendant's capacity to appreciate the criminality of his conduct or conform to the requirements of law, and
>
> (4) the age of the defendant at the time of the crime.

Significantly, those are the factors that were urged upon the court by counsel on the day of sentencing (R 894-901).

Neither (1) remorse, (2) appellant's generally non-violent character, (3) the fact that he had grown calmer since being incarcerated, nor (4) the fact that people trusted him with money and with their children were urged upon the court as factors it should consider in mitigation. Concededly, there was testimony during the penalty phase considering these factors, but unless such imprecise mitigating factors are called to the court's attention in a manner which puts the court on notice that the defense wishes them to be considered as specific identifiable factors a court cannot be faulted for not specifically commenting on them. More importantly, they can be utilized to sandbag the court by simply having a witness mention the mitigating factor in passing and then arguing that the judge refused to consider it. What this Court said in the first Lucas appeal to the effect that an appellate court should

> ". . . not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law"
> (Lucas v. State, 376 So.2d 1149, 1152 [Fla. 1979])

is as applicable today as it was them. By this, we mean that if appellant's counsel had separately identified these mitigating circumstances, as such, and asked the court to consider them, the court would have done so and this Court should not presume otherwise.

ISSUE X

THE TRIAL COURT ERRED IN SENTENCING HAROLD EUGENE LUCAS TO DEATH BECAUSE SUCH A SENTENCE IS DISPROPORTIONAL TO THE CRIME HE COMMITTED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Appellant is claiming that his sentence violates the constitution of the United States because his sentence is disproportionate to the crime which he committed. He is sadly mistaken. While this Court may apply proportionality as a matter of Florida law, a proportionality analysis is not constitutionally required. Pulley v. Harris, 465 U.S. 37, 79 L.Ed.2d 29, 104 S.Ct. 871 (1984).

With deference, the undersigned must say that exactly why this court needs to conduct a disproportionality analysis when the constitution of the United States does not require it escapes the undersigned. The fact is, the weighing process involving the aggravating and mitigating circumstances should suffice to determine whether anyone should be put to death for a crime without the additional necessity of computerizing the crime and comparing it with other crimes that have been committed to see if it compares in gravity. The fact is, no two crimes are identical. Indeed if the constitution requires individualized sentencing, how can it require proportionality? Lockett v. Ohio, 433 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978) requires that two factors be considered: the circumstances of the crime and the character of the defendant. Under a proportionality analysis,

Adolph Hitler could escape the death sentence because, hypothetically, the particular murder of which he may have been convicted was not sufficiently grave.

Regardless, the cases cited in appellant's brief all involve situations concerning paramour or husband and wife conflicts where the murders are committed in a fit of rage or jealousy. In the instant case, appellant cold-bloodedly planned, stalked and killed his victim after threatening her on several occasions. Two juries have not had any trouble recommending and two judges have not had trouble in imposing the sentence of death in this case.

ISSUE XI

THE COURT BELOW ERRED IN REFUSING TO ALLOW COUNSEL FOR APPELLANT TO ELICIT FROM STATE WITNESS, TERRI RICE, WHETHER THE HOMICIDE VICTIM HEREIN, JILL PIPER, WAS A DRUG USER.

Three appeals ago, this Court affirmed the appellant's judgment of guilt. Lucas v. State, 376 So.2d 1149 (Fla. 1979). The proceedings below were held to determine whether appellant should be sentenced to death. Appellant has not demonstrated how the victim's use or non-use of drugs would be relevant to determining the appropriate penalty for her murder.

The United States Supreme Court has recently reaffirmed that evidence relating to the personal characteristics of the victim related to the moral culpability of the defendant should not be considered. South Carolina v. Gathers, 45 Cr.L. 3076 (1989).

Appellant relies on Cruz v. State, 437 So.2d 692 (Fla. 1st DCA 1983), Duncan v. State, 450 So.2d 242 (Fla. 1st DCA 1984) and Weeks v. State, 241 So.2d 203 (Fla. 2d DCA 1970), but those cases are inapposite in that they dealt with cross-examining the witness about the witness's use of drugs. In the instant case, appellant sought to cross-examine witness Rice about the drug use of another person.[2]

In summary, whether the victim had ever used drugs previously was not relevant or probative of any aggravating or mitigating factor. Appellant failed to explain in the lower court the relevance of any question about drug usage and apparently did not attempt to review the point in subsequent testimony.

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[2] In the lower court appellant explained only "we feel it's proper impeachment to show that perhaps she was in fact using drugs." (R 287). No further explanation was afforded as to how the question was proper impeachment. To the extent that appellant may now be changing the basis of his argument, it should not be permitted. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities, the sentence of death 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 Robert F. Moeller, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830, this 9 day of August, 1989.

OF COUNSEL FOR APPELLEE