IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,534

MAC RAY WRIGHT,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR ST. LUCIE COUNTY, FLORIDA CRIMINAL DIVISION

****

BRIEF OF APPELLEE

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INTRODUCTION

This is an appeal by the Defendant/Appellant, **MAC RAY WRIGHT**, of convictions and sentences for First Degree Murder, Burglary of a Dwelling and two counts of Battery on a Police Officer, imposed by the Honorable Dwight L. Geiger, Circuit Court Judge, of the Nineteenth Judicial Circuit, St. Lucie County, Florida.

Throughout this brief, the Appellant shall be termed "the defendant" or "Wright." The Appellee, **THE STATE OF FLORIDA**, will be termed "the State." Reference to the Record on Appeal, Supplement to the Record on Appeal, and Transcript of Proceedings will be made by the use of the symbols "R," "S," and "T" respectively.

The State disputes the defendant's Statement of the Case and Statement of the Facts as contained in his initial brief and it therefore includes its own hereinafter. However, the State also reserves the right to argue additional facts not contained therein where necessary in the argument portion of its brief.

STATEMENT OF THE CASE

On July 17, 1986, the defendant was indicted for the First degree murder of Sandra Ann Ashe, Burglary of a dwelling with the intent to commit an assault, and three counts of Battery on a Law Enforcement Officer.[1](R.1896-1899). The defendant entered a written plea of not guilty. (R.1901, 1908; S.5).

Prior to trial, numerous defensive motions were heard and considered by the trial court. Those relevant to the issues raised in the defendant's appeal included his Motion to Dismiss the Indictment And/Or Motion to Declare the Death Penalty Unconstitutional (R.1935-1940, 1987-2009), Motion to Dismiss Count II of the Indictment (R.2027-2028), and Motion to Sever the battery counts from the first two charges (R.2034-2035). After full hearings on these issues, the trial court denied the motions. (T.94, 119, 143). The defendant's motion to sever was renewed during jury selection and was again denied. (T.299-314).

At one pretrial hearing, the defendant interrupted the trial court, interjecting himself into the proceedings, stating "I don't even want to be bothered with people there no more. (indiscernible)" before exiting the court room without leave of

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[1] Count IV, Battery on Law Enforcement Officer, William Reddick, was nol prossed by the State prior to trial because Officer Reddick had left his job, relocated to another area, and was unwilling to return for trial. (R.2; T.172, 983, 1009-1010).

the court. The following colloquy took place on the record after Wright's departure:

> **THE COURT:** All right. Mr. Wright has voluntarily exited the Court room. Under those circumstances I'm not gonna require him to be here. There's gonna be a disruption if I try that. Is there any objection to his being excused from appearance in the Court room at this time?
>
> **MR. WALSH:** (Prosecutor): No objection, Your Honor, I would ask to put something on the record. This is an individual charged with first degree murder. The State is seeking the death penalty. This is a very violent individual who's given problems to the-- the jailers in the past and I would just ask that to be reflected on the record because I can see this being a problem when we try this individual.
>
> **THE COURT:** ...Mr. Wright was in the Court room--came into the Court room before the bench, made a comment, which I believe is in the record and then went back to the holding room. And I let him go. I didn't tell anybody to stop him. Experience tells me not to tell somebody to stop him... I'm going to have him transported at this time because I think we have a potential problem situation with him in the holding room with other prisoners... I'm going to ask that the Court room be cleared also while he's transported. Again this is just for everyone's safety. This is a person who I know does have a history of disruption... (T.26-27).

The defense made no objection to the statements made by the court and the prosecutor, nor did it at any time move to recuse the court. (T.26-27, 1-1893).

Jury selection took place from August 27 to August 30, 1990. The parties and trial court utilized a process wherein peremptory strikes of jurors were exercised by submitting that juror's name to the court on a piece of paper. (T.162). During voir dire, both the court and the defense asked the venire numerous questions relating to their attitude about police officers and whether or not they would accord their testimony greater weight than that of other witnesses. (T.372, 376-379,406-407). The venire was also instructed by the court that they should not accord the testimony of any witness greater weight than that of another merely because of what he or she did for a living. (T.212).

Prior to the commencement of voir dire, panel member Gary Salter asked the court to be excused from service as a result of the financial hardship he and his family would suffer if he was required to sever. (T.189-190). Several other jurors also claimed financial hardship and sought to be excused; the defense refused to stipulate that these jurors should be excused for cause despite the fact the State contended their feelings might interfere with their ability to concentrate on the case. (T.272-274). The court, based upon the defense's position, therefore declined to excuse these individuals for cause.

During jury selection, the defense objected that the State was systematically striking black jurors solely on the basis of race and directed the court's attention to Jurors Hayes, Salter, and McFolley stating that the defendant was black and all three named jurors were black. (T.546,594-595). The trial court at no time found that the defense had met its threshold showing that the State was, indeed, improperly exercising its peremptory strikes. (T.596). Nevertheless, the court requested that the State put its reasons for striking these jurors in the record. (T.596). The State did so, pointing out that the panel still contained black jurors. (T.596).

The prosecutor stated that McFolley's and Hayes' answers during voir dire indicated that they had difficulty understanding questions relating to the defenses of involuntary intoxication and insanity which the defense planned to rely upon at trial. (T.596). Additionally, the prosecutor felt that he had no communication with them. (T.597). Mr. Walsh also stated that he struck Juror Salter both because he felt that Salter could not relate to prosecution witnesses and victims and because he believed Salter would relate too strongly to the defendant. (T.597,601). Significantly, Mr. Walsh stated he struck Salter because Salter refused to look at him at all during the entire jury selection process and this made him uncomfortable in choosing Salter for the panel. (T.597).

The court then examined the entire list of jurors who had been stricken peremptorily or excused for cause. (T.603-605). It noted that: Juror Goldstein, a white female had been excused for cause as a result of her forthcoming wedding (T.366), Juror Zink, a white male had been excused for cause because of a hearing problem (T.367), the defense peremptorily struck Juror Flagg, a black male (T.281), Mr. and Mrs. Johnson, who were both black, were excused for cause since they were intimate with the defendant and his family and could not be fair (T.604), the defense peremptorily struck Juror Johnson, a black female (R. 109;T.604), Juror Bellavance, a white male was struck for cause (T. 604), and Juror Lee was struck by the State because he, like Salter, had expressed reservations about serving because of financial hardship and the trial court had refused to strike anyone for cause on that basis due to the defense's objection. (T.605).

The trial court did not in find that the first prong of Neil, i.e. that the defense had made a showing that the State was excluding jurors solely on the basis of race, had been met; nevertheless, because several of the jurors who were stricken were black, it considered the second prong of the test to determine if the reasons proffered were race neutral. (T.606). The court found that there was a logical and rational reason for each of the questioned excuses not based solely upon the prospective juror's race; it therefore denied the motion.

(T.607). Defense counsel, Mr. Williams, then indicated that given the court's ruling he would systematically exclude white jurors. (T.608).

Thereafter, the State, after unsuccessfully attempting to challenge them for cause, struck Jurors Washington and Wortham, who stated under oath that they were long-standing personal friends of the defendant and his family. (T.622,626-629,655-657,668). The defense again objected based on Neil. (T.688). The court, after argument by counsel, stated that it could not find that the challenges were based solely upon the prospective panelists' race and again denied the objection. (T.691-692).

The defendant's trial was conducted from September 1 through September 4, 1987. (T.730-1463). During the testimony of the victim's mother, Mrs. Bessie Webster, the defense belatedly objected to the introduction of a written lease agreement, claiming, the State had violated the rule established by Brady v. Maryland. (T.747-748). The court found that the rules of discovery had not been violated and the trial continued after the defense declined additional voir dire on admissibility of the document. (T.757-759).

The defense moved for and was denied motions for judgment of acquittal both at the close of the State's case and at the close of its own case. (T.1136,1144,1312,1319). The jury

returned verdicts of guilt on all four remaining counts. (T.1460).

The penalty phase of the defendant's trial took place September 8-9, 1987. (T.1469-1828). The jury, after both sides presented evidence in support of aggravating and mitigating factors, returned a recommendation of life imprisonment (R.2046;T.1810). The State moved the trial court to override the jury's recommendation and instead impose the death penalty for the murder of Sandra Ashe. (T.1815).

A sentencing hearing was conducted by the court on September 11, 1987. (T.1831-1855). Following argument by counsel, the court stated that although it felt that jury recommendations should not be overridden, it nonetheless found that in this case something had gone wrong and that the jury had not reached a reasoned decision in recommending a life sentence. (T.1853). After weighing the aggravating and mitigating factors presented and considering evidence not presented to the jury in the form of psychiatric reports, court files relating to prior convictionsand presentence investigation reports, the court determined that sufficient aggravating circumstances existed and insufficient mitigating circumstances were present so that no reasonable person could differ as to the appropriateness of the death penalty in this case. (T.1853-1854). Specifically, the court found that the record supported four aggravating circumstances:

the defendant had been previously convicted of three felonies involving the use or threat of violence against another, the murder was committed while the defendant was engaged in the commission of or attempt to commit a burglary, the murder was especially heinous, atrocious, and cruel and the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The court also found that the three statutory mitigating factors argued, i.e. that the vicitm was a participant in the defendant's conduct or otherwise consented to the act, that the defendant was under the influence of extreme mental or emotional disturbance at the time, and that the defendant was unable to appreciate the criminality of his conduct or was unable to conform his conduct to the requirements of the law, did not exist. The trial court did state that other, nonstatutory, mitigating circumstances were present; however, because these were in large part controverted by other evidence, it found they were of insufficient weight to overcome the aggravating factors present. The trial court therefore adjudicated the defendant guilty of first degree murder and imposed the death penalty. (R.2043,2049,2054-2058;T.1854). Additionally, the defendant was sentenced to life imprisonment on the armed burglary count and was also sentenced to two concurrent terms of five years for the battery counts. (R.2047-2053;T.1855).

On November 2, 1987, a hearing was conducted on the defendant's motion for new trial as to both phases of the

proceedings. (R.2063-2065,2067-2068;T.1857-1887). After considering argument of counsel, the trial court denied the motion. (R.2075;T.1887). This appeal ensued. (R.2076).

STATEMENT OF THE FACTS

The Guilt Phase

At trial, Mrs. Bessie Webster, the mother of the victim, testified that she owned the premises located at 1911 Avenue Q and that, at the time of her death, her eldest daughter Sandra was renting the property from her through a government low income housing program. (T.734-735). Under the terms of the lease, Sandra was the sole individual obligated to pay the rent. (T.736). Mrs. Webster testified she had been unwilling to rent the property to Sandra earlier because she was uncomfortable with her daughter's living with a man to whom she was not married. (T.737). She consented to have Sandra and her three children move into the house only after Sandra came to her crying saying she was leaving Wright because she was tired of him beating her. (T.737). Mrs. Webster told Sandra if she wanted to get rid of the defendant she would allow her to move in with the children; the government housing agreement prohibited Wright form living there. (T.737-738). Despite this provision, Wright lived at the house on and off; Mrs. Webster did not know where else he lived. (T.735).

During the course of her lease, Mrs. Webster collected rent from Sandra; sometimes when the payment was late, Wright would bring the rent to her house. (T.738). Although the rent was due on the first of each month, Mrs. Webster did not receive

payment for the month of June 1986 until the 8th when Sandra gave her the money. (T.739-740).

Eight months prior to her daughter's murder, Mrs. Webster, at her daughter's request, sat in the Avenue Q. house and watched as the defendant packed his things and moved out. (T.761,745-746). Mrs. Webster never saw anything in the house belonging to Wright after that time even though she was frequently at the house. (T.746). Sometime later, the defendant returned to the house. (T.761). Mrs. Webster admitted that Sandra had lived with Wright off and on since 1983; the couple had a history of breaking up and getting back together. (T.761-762). In the past, Sandra told her mother she was in love with Wright and wanted to marry him. (T.761-762). Although Mrs. Webster could not testify from personal knowledge, she stated that she had heard from other unnamed persons that Sandra had confronted a woman Wright was having an affair with at Dixon's store. (T.763).

Mrs. Webster tesified that, on June 9, 1986 at 2:00a.m., Sandra's children called her from the hospital to tell her that Wright had broken their mother's nose. (T.740,764). Mrs. Webster did not go to the hospital because she was sick and tired of hearing about her daughter's domestic problems. (T.765). Instead, Mrs. Webster went to Sandra's home later that afternoon; she found Sandra in bed with a swollen nose and mouth. (T.741-742). Sandra told her mother that Wright had broken her nose and that

she had changed the locks to the house because she no longer wanted Wright in the house. (T.742). Mrs. Webster asked her why she hadn't called the police if she didn't want him there and Sandra told her that she had in fact called the police and changed the locks. (T.743).

While Mrs. Webster was at the house, the phone rang. (T.743). Sandra did not want to answer it so one of the children did saying "its my daddy."(T.744). Sandra refused to talk to Wright so Mrs. Webster picked up the phone and asked Wright why he kept beating Sandra; Wright did not reply other than to tell her to ask Sandra. (744). Mrs. Webster also told him if he didn't want Sandra he should just leave her alone or someone was going to be killed. (T.744). Mrs. Webster handed the phone to her daughter who again refused to speak with Wright. (T.744). Mrs. Webster did not see any guns in the house that day and had not seen any weapons there during the prior three years. (T.739,744). None of the doors or locks to the house were broken that day. (T.745). Mrs. Webster did not see any clothing of Wright's on the premises. (T.746).

The court found thirteen year old Latonya Ashe competent to testify regarding the events of June 10, 1986. (T.775). Latonya testified that on the Sunday prior to her mother's death, her mother picked all three children at Wright's mother's house where they had spent the night. (T.779-780). They went to

Wright's mistress, Dee Dee's, house where they saw Wright's car; her mother started crying because she said that Wright had told her a story that he wasn't "messing with" Dee Dee anymore. (T.780). They went home and her mother was going to take them to their grandfather's home in Orlando. (T.780). They never made it, however, because on the way, the car's engine overheated. (T.780-781). Later that night, around 11:30 p.m., Latonya awoke when she heard Wright "fussing" with her mother. (T.781). Latonya heard her mother ask Wright what he was doing at Dee Dee's and then heard Wright respond "what was you doing in that lady's yard?"(T.782). Latonya then heard a slap and her mother fell against the heater. (T.782). Sandra came out of the kitchen wiping blood off of her face. (T.782). Wright asked her mother "could she dish it out or could she take it?"(T.782). Wright then told her mother to put his clothes in the trunk of his car, a blue and white Thunderbird; she saw her mother comply with Wright's demand while Wright went around wiping Sandra's blood from the walls with a rag. (T.782-783). None of Wright's clothing or tools were in the house after that night. (T.786).

Latonya asked her mother if she wanted her to call the police, but Sandra did not reply. (T.783). Wright came in and put the phone in front of Latonya's face and asked her if she wanted to call the police before slamming the phone against the wall. (T.783-784). They did not call, however, because when Wright was leaving, Sandra asked him for his house key stating "Mac Ray, if

you don't give me my key I'm gonna go to the police."(T.784). Wright told her "If you go to the police I'm gonna kill you. (T.784). Latonya was positive she heard Wright threaten to kill her mother if she went to the police. (T.784). Wright left without returning the key; he did not return. (T.785,787).

Latonya then helped her brother and sister dress and they all went to the hospital because her mother's nose was broken and her lips were swollen and bleeding. (T.785-786). At the hospital, Latonya called her grandmother who refused to come claiming she was sick and tired of running up there to see what had happened to Sandra. (T.785). The doctor who treated her mother at the emergency room said that Sandra had sustained a broken nose. (T.785). The next day when Latonya came home from school, Sandra was having the locks changed; despite all their prior fights, Sandra had never changed the locks before. (T.787,813). The lock to the back door had not been changed because the lock was jammed shut. (T.790). Latonya testified that Sandra instructed the children they were not to talk to Wright or let him in the house. (T.787).

On Tuesday evening, June 10, 1986, Sandra and her children were in the living room watching television; the air conditioning was on and all the windows were shut except for one window in the girls' bedroom which would not shut all the way. (T.788-789). Latonya was awake when Wright came to the house; her sister was

asleep and she did not know if Mac Junior was awake. (T.791). She first realized Wright was there when she heard him try his key in the front door lock. (T.792). When it would not fit, Wright went around to the master bedroom and told Sandra to open the door, but no one answered. (T.792). Wright then went to the girls' room, pushed the screen out and, calling Latonya by name, told her to open the door. (T.792). When he received no response, the defendant went to Mac Junior's room calling "Junior, Junior, open the door" before returning to the girl's windows. (T.792).

Wright then went to the back door and knocked it down. (T.792). He started into the living room from the kitchen with a rifle, shooting at least twice that she could see. (T.792-793). Latonya said "Daddy, don't;" Sandra begged "No Mac Ray, please don't shoot."(T.793). Wright replied "Yeah, mother fucker, I told you to open the door. Didn't I tell you to open that door?"(T.793,813). He then fired one more time from in the living room. (T.793).

Latonya testified that while Wright was shooting, her mother was trying to escape out the front door. (T.794). After the shooting stopped, her mother opened the door tripped, and fell face down on the drive between the front door and the garage. (T.794). Wright followed Sandra outside kicked her and turned her over with his feet. (T.794-795). He then went back inside the house to pick up some little things off of the floor before jumping in his car and speeding off. (T.794-795,797).

Latonya stated that when Wright moved out that Sunday, he took his rifle with him. (T.806). When he returned on the night of her mother's murder, he had it in his hands when he broke down the back door. (T.795). Although she had seen Wright drunk before, he was not drunk the night he killed her mother. (T.797,813). Wright did not slurr his words nor did he stagger; he even stood on one foot when he turned Sandra over after shooting her. (T.797,799,813).

Nadieal Ashe, Latonya's eight year old sister, also known as Nana, was also found competent by the court to testify. (T.824). Nana recalled that on the night her mother was killed, she was sleeping on the living room floor on a pallet with her siblings and mother when shots awakened her. (T.827). She saw her father fire the rifle five times, starting in the kitchen and moving into the living room. (T.828). Nana heard her father say "Yeah, mother fucker, didn't I tell you to open that door," before firing again. (T.829). When her mother fell outside, Wright went out after her, turned her over with his foot, and smiled. (T.828-830). He then went back inside and picked up the brass from the rifle before getting into his car and speeding off. (T.828-831,834).

Charles Webster, Sandra's stepfather, had been married to her mother for twenty-two years. The week following Sandra's

funeral, he went to the house on Avenue Q. to pack the children's things. (T.840-841). Mr. Webster did not find anything belonging to the defendant or to any man. (T.841). He noticed two load locks and a barbecue grill outside by the driveway but did not know who owned them. (T.842).

George Mendez, director of customer service for the Fort Pierce Utilities Company, testified that company records kept in the normal course of business showed that as of August 2, 1983 Sandra Ashe was responsible to pay for utilities services provided to the Avenue Q. address. (T.843-845). Mendez admitted that the company's records did not reflect the composition of households it provided service to. (T.846).

Officer Glen Parks of the Fort Pierce Police Department testified that on June 9, 1986, Sandra Ashe, who was accompanied by another woman, came into the station to ask for assistance in filling out a complaint affidavit against a man who had beaten her. (T.850). Officer Parks took a statement and had Ms. Ashe sign an affidavit. (S.20-26,32-37;T.850). The offense report showed that at 1:00 a.m. on June 9, 1986, Mac Ray Wright perpetrated a battery upon Ms. Ashe. (S.20-26,32-37;T.851). Officer Parks then, per departmental procedure, forwarded the report to the State Attorney's Office for further action. (T.852). He did not recall whether Ms. Ashe told him about threatening remarks made by the defendant, but believed he would,

most likely, have included this in his report had she done so. (T.853).

Dorothy Walker lived across the street from Sandra Ashe; she knew Sandra since the time she was a little girl and knew Wright all his life. (T.855-856). Mrs. Walker did not know Wright lived at the Avenue Q. address because he was not there every night. (T.856). She did know that Wright drove a dark blue and white or black and white car. (T.857).

Mrs. Walker testified that on the evening of June 10, 1986, she was sitting outside in her carport relaxing when Sandra came over. (T.857). Sandra's lip and nose were all swollen and she showed Mrs. Walker her side saying Wright had beaten her and stomped on her there. (T.857). Sandra told her "Oh, Miss Dot, I changed the locks on my doors. You reckon that will help?"(T.857). Sandra told her that she had the locks changed because she wanted Wright out of the house. (T.857). Later that night she heard gunshots so she called the police. (T.858). She ran out of the front door and saw Wright get into his car and speed off. (T.858,860-861). Sandra's children ran up to her crying that their father had killed their mother. (T.858,860).

Marion Mathews, another neighbor of Sandra's, also heard shots on the evening of June 10th, but did not know where they were coming from. (T.868-870). Mr. Matthews attention was drawn

Sandra's house when Wright backed quickly out of the driveway and then sped off. (T.870-871).

Dedilia Gayle, also known as Dee Dee Morgan, was the defendant's girlfriend for three years prior to Sandra's murder. (T.873-875). Morgan testified that Wright would spend several nights each week at her apartment. (T.875). Morgan saw the defendant the afternoon of the shooting when he put antifreeze in her car; a friend of hers, who was at the apartment also had Wright put some in her car and gave him ten dollars. (T.876). Morgan testified that Wright was acting calmly and had several beers before leaving to go to the local bar. (T.876,888).

Morgan testified that she saw Wright again later that evening at around 10:00 p.m. on 20th Street talking to Odessa Ingram. (T.877,881,887). Morgan claimed that Wright saw her as she passed by and waived her down. (T.881). When she went over to where the defendant was, he asked her where she was going. (T.882). Morgan told him she was going home and Wright told her he would be over later. (T.882). Later that evening, someone started banging on her back door; Morgan got dressed and went to answer the door. (T.882-883). Wright never used her back door, so she did not know it was him. (T.883). When she opened the door, she saw Wright's car and thought he was playing a joke on her. (T.882). She later heard that Sandra was dead. (T.882).

Officer Dale Burger of the Fort Pierce Police Department and his training officer, Larry Newberry, were dispatched to the house at Avenue Q. at 11:30 p.m.; he believed that on their arrival, they were flagged down by a woman who told them that a woman had been shot. (T.911). Officer Burger saw a black female lying face down on the concrete driveway. (T.911,915). The woman was attired in a short nightgown and was partially covered by a small brown rug. (T.911). Blood was on the ground around her. (T.911). The woman had a faint heartbeat; he assisted fire rescue in turning her over and watched as she was treated. (T.913,916). Officer Burger then took steps to preserve the scene and spoke with neighbors who gathered in the front yard. (T.911,915). After talking with witnesses, Officer Burger ascertained the identity of the suspect and issued a BOLO for Wright and his vehicle. (T.913).

Detective Peggy Gahn was dispatched to the scene, arriving at 11:45; the victim was being loaded for transport by fire rescue when she arrived. (T.920). Officers Burger and Newberry informed her that the scene was secured. (T.920). Detective Gahn noticed a large pool of blood by the front door of the residence, where the Officers told her they first found the victim. (T.921). Inside, the house was neat and clean. (T.921). The door leading from the utility room into the kitchen had been torn out of the door jamb and was hanging precariously about to fall. (T.921-922). Although the outer rear door still had a knob, the locking mechanism was torn off and lying on the floor. (T.998-999).

After securing the scene, Detective Gahn proceeded to the hospital to ascertain the status of Sandra Ashe and to speak with her children and other family members. (T.930). Detective Gahn's investigation revealed that the defendant and Ashe had lived together on and off since 1982 or 1983 and that the couple had a long history of problems. (T.957,963). She also learned that Sandra had been to Lawnwood Medical Center on June 9th for treatment following a beating administered by the defendant. (T.964). Sandra's children and other family members informed her that the defendant had taken his things and moved out of the house following the beating. (T.1006). After talking with Latonya, Detective Gahn confirmed the BOLO that had been issued for Wright. (T.930,933-934). When the BOLO did not turn up the suspect, she obtained two warrants for the defendant's arrest. (T.934-935).

The following day, Detective Gahn returned to the hospital emergency room, attended the autopsy of Sandra Ashe's body, and returned to the Ashe residence. (T.933). Photographs and physical evidence relating to the crime were obtained both immediately after the shooting and thereafter at the scene and the hospital. (T.891,893,898-899,905-906,922-926).

Detective Gahn was later informed by a uniformed patrol unit that the defendant's car had been located at Dee Dee

Morgan's apartment. (T.930,953). The car was searched, however, neither the murder weapon nor any cartridges were found. (T.930). Although all four tires were on the car, casts were not made to compare them to the skid marks located on the drive of the house on Avenue Q since it was impossible to determine when, in fact, the marks had been made. (T.928,956,1004).

On June 16, 1986, Detective Gahn was contacted by Sergeant Sandifer who informed her that the defendant had turned himself in at the county jail. (T.936). Detective Gahn gathered her reports regarding the case and proceeded to the jail; she requested that a jailer accompany her to the interview room where Wright was so that someone would be present. (T.936). She carried with her an expandex folder containing case reports, a tape recorder, Miranda waiver forms, and a copy of the warrants which had been issued for the defendant's arrest. (T.936).

When Detective Gahn arrived at the interview room, the defendant was already present; he was sitting in a chair with his feet up on a table smoking a cigarette. (T.936,984). After Detective Gahn introduced herself, the defendant asked her "What am I being charged with?"(T.936). The Detective told him that warrants had been issued for murder and armed burglary. (T.936). While she was attempting to read him his Miranda rights, the defendant, without provocation, picked up the metal table hitting her and a jailer with it. (T.936,996-997,1007-1008). She

sustained a three inch laceration to her arm; the tape recorder, which did not have a tape in it, was broken. (S.130-135;T.936,1007-1008). Because she was closest to the door, Detective Gahn tried to flee to obtain help. (T.936-937). She saw the defendant pick up a chair and heard him say "I'm gonna kill you."(T.937). She screamed for help, summoning a number of other deputies and jailers who together succeeded in subduing the defendant. (T.937).

Prior to the time Detective Gahn entered the interview room to speak with the defendant, no one spoke to her regarding the circumstances surrounding the defendant's surrender. (T.985). She later learned that the defendant had appeared at the jail accompanied by a woman and another man and had turned himself in. (T.981,998). Additionally, she found out that the defendant appeared to be staggering at the time and that corrections officer, Marie Ryan, had called for additional officers to assist him. (T.981,998). However, when Detective Gahn entered the interview room, her own observations of the defendant did not lead her to believe that he was drunk. (T.998). The defendant was neither "falling down drunk" nor was he slurring his words or otherwise indicating he was intoxicated; to the contrary, he appeared calm, coherent and willing to be interviewed. (T.984,997,1007).

Medical Examiner Dr. Leonard Walker performed the autopsy of Sandra Ashe on June 11, 1986; she had been pronounced dead at 12:49 a.m. that morning. (T.1021,1022). Examination revealed four bullet wounds to the body. (T.1023). One bullet entered the body at the left upper arm/shoulder/chest area traversing the body and coming to rest in the ball joint of the opposite arm (T.1036). Another bullet went through the right arm, entering at the right chest and traveling downward, lacerating the left lung, penetrating the diaphragm and entering the liver. (T.1036). The third bullet entered the right back before traveling upward causing extensive injuries to the right lung; a fragment of the bullet was located in the victim's neck. (T.1036). The fourth bullet entered the victim's left buttock where it penetrated a considerable amount of muscle tissue before shattering against the pelvic bone. (T.1037). Numerous bullet fragments from this wound were found. (T.1037). The Doctor's examination also revealed two recent cutaneous skin injuries one of which, located on the lower right abdomen, was about 3 1/2 inches long and had been caused by blunt impact trauma. (T.1037). A linear skin bruise in the left lateral buttock area was also present. (T.1038). A small bruise was located on the victim's left upper lip. (T.1051). Although the Doctor did not notice the vicitm had a broken nose, he conceded that a subtle fracture would not have been noticed in either his examination or in an x-ray. (T.1051,1055). An analysis of the victim's blood revealed that she had a .01 percent blood alcohol level at the time of her death; the legal limit is .1 percent. (T.1052).

Dr. Walker testified that three of the four wounds would have been fatal. (T.1041). The victim died as a result of bleeding to death internally from extensive perforation of internal organs and blood vessels. (T.1040). Dr. Walker found this to be consistent with the victim having been shot at approximately 11:30 p.m. and dying two hours and ten minutes later. (T.1041). He was certain that Sandra did not die immediately and was conscious following the shooting. (T.1040).

The Doctor further testified that the wounds were inflicted by .22 caliber long rifle rim fire bullets. (T.1049). He testified he determined, with reasonable probability, that the bullets were fired from a rifle because they had more energy than those fired from a handgun. (T.1052). He could not determine the sequence in which the bullets were fired, but did determine that the bullets were fired at an intermediate distance of at least eighteen inches. (T.1039,1051). The injuries were consistent with having been inflicted from across a room and the victim was most likely on the ground or in a bent over position. (T.1040,1045,1049).

Criminalist Tony Laurito was declared an expert in the field of firearms and ballistics by the court. (T.1062). Mr. Laurito received the bullets and bullet fragments removed from Sandra Ashe with a request that he determine whether there were

sufficient marks on them to establish whether they were fired from a rifle or a handgun and whether they were all fired from the same weapon. (T.1063-1065). He ascertained that the caliber was consistent with that of a .22 caliber bullet and that they had all been fired from the same weapon.[2] (T.1065). Mr. Laurito could not determine if the bullets were fired from a handgun or a rifle because the lines and grooves on them had been damaged after they struck the victim(1066).

Corrections Officer Marie Ryan McNamara was on the front desk at the county jail the night the defendant turned himself in. (T.1084). Wright entered the jail with two women and another man; they said they were there to turn him in. (T.1084). When Officer Ryan asked his name, the defendant said "Mike Wright."(T.1084). She could not locate any outstanding warrants for anyone of that name so his sister said "Mac Ray Wright. Please don't---he's messed up, he, you know, didn't mean it, his name is Mac Ray Wright."(T.1085). Officer Ryan was then able to locate information on the defendant's warrants. (T.1085).

Officer Ryan testified that when Wright came into the jail, his hair was a mess and his eyes were very big. (T.1085-1086). She did not smell alcohol on his breath. (T.1086). While

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[2] The only exception to this conclusion was the third bullet fragment which, because of its small size, could not be properly analyzed.(T.1065-1066).

she was alone on the desk talking with Wright he lunged toward her; she was frightened because he was a big man so she called for assistance. (T.1089,1092). She believed Wright might need help to get into the back area because of the way his family was holding onto him, so she went and got Officer Morris who, in turn, summoned additional officers to the front. (T. 1086-1087). Although the officers only came to the desk to escort Wright to the back of the jail and did not harrass the defendant, his brother began screaming "Don't fuck with him. Don't fuck with him, you know, he came to turn himself in, don't mess with him. You're harassing him." (T.1086). The defendant walked alone to the back of the jail with the corrections officers following behind; he was not staggering or swerving.(T.1086-1087,1089).

Corrections Officer Lee Morris was called to the front desk by Marie Ryan. (T.1098). Officer Morris noticed that the defendant appeared reluctant to turn himself in and the individuals who were with him were talking to him. (T.1098). He noticed that the defendant's eyes were bloodshot and his face was a bit droopy; Wright said he had been drinking earlier that day. (T.1098). When he asked the defendant if he had anything in his pockets other than his hands, Wright told him "Well, I have a thirty-eight," pointed his fingers at Morris' head like a gun and said "I'm gonna blow your fucking head off you cracker." (T.1098). The defendant did not have a gun.(T.1098). His answers to Officer Morris' booking questions were appropriate and

responsive; he knew where he was. (T.1089-1099). When the defendant was escorted to the rear of the jail, Officer Morris walked behind him; the defendant did not stagger or do anything to indicate he could not walk unattended. (T.1099,1100). Although the defendant looked like a wild man because of his appearance, he thought Wright was sober. (T.1105).

Corporal Farless instructed Officer Morris to place the defendant in an interview room when Detective Gahn arrived; the defendant again walked without assistance to the room without stumbling or staggering. (T.1099-1100). Officer Morris returned to the booking desk where he heard a big crash and a scream. (T.1100). Morris looked down the hall and saw Detective Gahn running out of the interview room holding her arm which was covered in blood. (T.1100). He ran into the room and saw the defendant hit Corporal Farless in the face with his fist. (T.1100). The defendant attempted to run toward the steel door by the booking area after forcing Farless and Officer Reddick out of the interview room. (T.1101). The Officers tried to subdue Wright who swung at, hit, and kicked them. (T.1101).

Corporal Gary Farless stated that he initially had the defendant placed in a holding cell when he turned himself in. (T.1110). When Detective Gahn arrived, she asked to have Wright placed in an interview room with another officer present. (T.1110). Corporal Farless assigned Officer Reddick to the room,

while he watched through a two-way mirror. (T.1110). Gahn entered the room after Wright was brought in and began to read him his Miranda rights. (T.1111,1118). Although Detective Gahn had a tape recorder with her, Corporal Farless did not see her turn it on. (T.1118,1120). Wright was sitting in a chair leaning back with his feet on the table smoking a cigarette when Detective Gahn entered the interview room. (T.1111). After she read the charges against him Wright, for no apparent reason, stood up, picked up the table, said "Get the fuck off me," and threw the table on Gahn and Reddick. (T.1111). Corporal Farless saw that Detective Gahn was hurt and wanted to get her out of the room, so he entered as Wright started out the door. (T.1111). He told Wright to just hang on and Wright hit him in the face with his fist. (T.1111). He again told Wright to settle down and Wright hit him again; he grabbed Wright who said "Now I'm gonna hurt you." (T.1111). With the help of several other officers, he was able to subdue the defendant. (T.1111). Although Wright appeared as though he had been drinking earlier that day, he did not appear drunk at the time. (T.1113,1116).

The first defense witness, Sam Eubanks, was a used car dealer who sold Wright a 1982 Thunderbird for which Sandra Ashe used her 1975 Volkswagon as a trade in. (S.139-140,143-146;T.1147-1148). Although the address listed for Wright was the house on Avenue Q., Eubanks admitted that his paperwork did not reflect where Wright was living in June of 1986. (T.1151,1155).

Judith Johnson, custodian of customer accounts at Sun Bank, testified that Wright's signature card at the bank listed his address as being on Avenue Q. (S.149;T.1158-1159). Checks made payable to Wright listed an address on Avenue K. as did the defendant's deposit slips and June 1986 bank statement. (S.154-169,170-1786;T.1163-1164). Ms. Johnson stated that the addresses on these documents was not proof of where Wright lived since anyone opening an account could provide whatever information they chose. (T.1167-1168).

Similarly, Susan Ryan of Credit Theft, formerly General Finance, testified that Wright financed a car through the company. (T.1128-1129). Although their files listed the defendant's address as Avenue Q. she also had no knowledge of where, in fact, the defendant lived in June of 1986. (T.1231).

George Mandez, director of customer service of the Fort Pierce Utilities Company, testified that service provided under Wright's name to a residence on Avenue K. had been transferred to a residence on Avenue Q. under Sandra's name.(T.1223-1226).

Eunice Pilloway, records custodian for Southern Bell, testified that service was provided to Avenue K. under Wright's name until October of 1983 at which time it was transferred to the Avenue Q. address under the name of Sandra Wright. (T.1306-1308).

Odessa Ingram also testified on the defendant's behalf. Ingram, the mother of eleven children, had a six year old daughter by the defendant. (T.1178). She knew Sandra Ashe and considered herself to be a friend of Sandra's; she also remained close to Wright. (T.1178-1179). Ingram testified that prior to the murder Sandra came to her house with a bandage on her face and told her that she and Wright had had a fight and he had left taking his clothes. (T.1184-1185). She did not see anything of Wright's in the house on June 9, 1986. (T.1188).

Ingram testified that she saw the defendant on June 10, between 8:30 and 9:00 on Avenue D. and 20th Street sitting in his car and drinking. (T.1179-1180). She described his appearance as wild and his speech as slurred. (T.1180). Ingram talked to the defendant for about ten to fifteen minutes, telling him he should go home and go to bed because he was drunk; he did not respond to her advise. (T.1180-1181). Ingram recalled Dee Dee Morgan pulling over and speaking with Wright although she did not recall the substance of their conversation. (T.1183-1184). She had no idea of Wright's condition two to three hours later. (T.1185).

Sergeant Danny Williams testified that he became custodian of Wright's file after Detective Gahn was reassigned to road duty. (T.1191). Sergeant Williams spoke with Wright's defense counsel several times and not only provided them access to the

entire police file but also provided them with a complete set of crime scene photographs. (T.1192,1194).

Rose Wright Ray, the defendant's sister, testified that on June 16, 1986 her brother called her. (T.1201). She told Wright that the police were looking for him and said he should turn himself in. (T.1201). Wright agreed, telling her that was why he had called. (T.1201). Wright did not tell her where he was; he instead asked her to meet him behind the J.C. Penny's parking lot near the jail. (T.1204). Rose called her brother George and also called Dee Dee. (T.1205). When she met Wright he was drinking an open can of beer. (T.1206). They met George and Dee Dee at the jail. (T.1206-1207). Wright leaned against the railing and insisted on finishing his beer; he brought the can inside with him. (T.1206-1207). Rose claimed that they got a hold of him and got him inside the jail but he was so drunk the Officers had to take him through the doors into the back. (T.1207,1209). Rose stated that Wright and Sandra fought often and that either he would leave or she would put him out before they would get back together again. (T.1213-1214). She also claimed that Sandra had changed the locks plenty of times before when they argued, but she always took Wright back. (T.1215).

Tammy Edge testified that her father employed Wright as a mason at two different companies he was affiliated with. (T.1234). She described Wright as a very good friend who would

often drop by alone or with his kids to visit her family. (T.1236-1237). She also claimed that two to three months before the murder the defendant pawned a rifle to her father and then repaid the money; he did not take the rifle back because her father wanted to try it out. (T.1237-1238). She did not know if Wright owned any other rifles or firearms. (T.1239). Edge had seen Wright quite drunk before but he was never violent or stumbling down drunk on those occasions. (T.1239).

The Penalty Phase[3]

In 1973, attorney Rupert Koblegard was employed at the State Attorney's office where he prosecuted the defendant for two counts of aggravated assault for the shooting of Daisy Hickman and Renee McCoy. (T.1481-1484). The defendant shot Hickman, his then girlfriend, and McCoy because he was upset to find a man visiting at Hickman's house. (T.1485-1486). The defendant was convicted of both charges and received sentences of five years concurrent on each. (R.288-290;T.1488). Richard Schopp was the public defender assigned to defend Wright in that case. (T.1492-1494). Schopp testified that Wright's convictions were upheld on appeal. (R.294-296;T.1497).

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[3] The tesimony of witnesses at the penalty phase who also testified earlier at trail will only be presented with regard to those matters that are different or in addition to what was testified to at the guilt phase of the trial.

Sergeant Robert Sandifer was a patrol officer on June 6, 1978 when he was dispatched as back up to Officers Jones and Barnes who were engaged in a confrontation with the defendant. (T.1500-1502). All three officers became engaged in a struggle to subdue the defendant; as a result of the altercation, Wright was charged with three counts of battery on a police officer. (R.291-293;T.1502). Steve McCain, the Assistant State Attorney assigned to that case, negotiated a plea agreement whereby Wright plead guilty to one count of battery on a police officer and two counts of simple assault. (T.1510-1513). Wright was sentenced to two years for the battery conviction and time served on the assault charges. (R.291-293;T.1510-1513).

Officer Larry Newberry testified that he and his training officer, Officer Burger, were dispatched to the house on Avenue Q. at 11:30 on June 10, 1986, arriving four minutes later. (T.1547,1551). On his arrival, Officer Newberry observed a black female lying on the driveway on her left side with her head cradled in her left arm. (T.1547-1548). Her eyes were closed, but she was making low mumbling, sounds. (T.1548). Officer Newberry advised her that she should hang in there, that fire rescue was on its way; her eyes were open when he spoke to her with the eyeballs moving. (T.1548). *She did not speak.*(T.1548).

Dr. Leonard Walker testified that it was a medical certainty that Sandra had remained conscious between fifteen and

thirty minutes following the shooting. (T.1552,1556,1558, 1561,1572). The bullets did not impact on any physiological structures which would have rendered Sandra unconscious; instead, she bled internally to the point that she finally lost consciousness. (T.1561). Sandra therefore would not only have been aware of what was happening around her and would have heard her children crying, she also would have felt the severe pain associated with her injuries. (T.1554-1556). Dr. Walker testified that all of the injuries would have caused pain, particularly the two bullets which struck bone. (T.1553-1554).

Rose Wright Ray testified in mitigation that their brother, John Daniel Wright, was accidentally shot to death in 1978 or 1979 in a bar incident.(T.1580-1581). As a boy, Wright was enrolled in special education classes and he was teased about it by his peers. (T.1582). Additionally, Rose testified that her brother and Sandra frequently fought but that he always provided for his family. (T.1582). She asked the jury to spare her brother's life because she felt he was worth it. (T.1596).

Marie Wright, the defendant's mother, testified that Wright was one of eight children she raised alone after she separated from their father in 1977. (T.1597-1598). One of her sons was killed in a shooting incident in 1979. (T.1597). Mrs. Wright testified that the defendant complained of headaches as a small child and was a very nervous child. (T.1598). The

defendant was enrolled in special education classes in school and was treated at a mental health clinic. (T.1598-1599). She was aware of mental illness in Wright's father's side of the family; two of Wright's great aunts died in mental institutions. (T.1598). Wright was close to his sisters Rose and Sarah who would talk to him to try to calm him down when he had nervous attacks. (T.1599-1600). She claimed that Sandra Ashe told her Wright was a good provider.(T.1600).

The defendant was employed for about one week prior to his arrest by Richard Ketchum, a general contractor. (T.1604,1606). Ketchum found the defendant to be a good worker; he controlled himself on the job and did not appear to be drunk at work. (T.1607).

Odessa Ingram stated that she had a six year old child with Wright for whom he provided support. (T.1610-1611). She felt that no one could replace Wright as her child's father and wanted him to live because of their child. (T.1611-1612).

George Wright, the defendant's oldest brother, also testified regarding the death of John Wright. (T.1631-1632). He stated that Wright had a drinking problem but would not say that he was violent when he drank. (T.1632,1634). Mr. Wright admitted that he had been convicted of several crimes but claimed to be unsure of exactly how many. (T.1633-1634).

The defendant also took the stand during the penalty phase of his trial. (T.1637-1664). Wright testified that he attended public school until third or fourth grade; he had difficulty in school and did not really enjoy it. (T.1638). He attended special classes the last two years he was in public school. (T.1639). Wright testified that his parents separated when he was around nine years old and that he did not like it.(T.1639).

Wright claimed that he held himself out to be married to Sandra Ashe; they first began living together in November of 1977. (T.1639). Sandra had one child at the time, but Wright claimed that he loved Latonya the same as the two children he had by Sandra. (T. 1640). He also stated that during the time they were together, Sandra used the name Wright. (T.1641). He stated that they had a good relationship the first four to five years but then started to fight a lot. (T.1641).

On the day of the murder, Wright stated he went to work for Richard Ketchum by whom he had been employed approximately three weeks. (T.1641-1642). He claimed to have been worked steadily as a block mason for five or six years and always supported his family when he was working. (T.1642). After work, Wright stated he went to Foremost Liquors then to Dee Dee's house to drink; he stated he never went straight home after work. (T.1643,1652). After leaving Dee Dee's, he went to 20th Street

and Avenue D. where he sat and drank. (T.1643,1652). He also stated that he took some pills which he purchased on the street which he said were Percodan. (T.1644,1658). However, Wright's description of the pills did not match that provided by the manufacturer of Percodan. (T.1658-1659).

Wright claimed to have called Sandra before going over to the house to pick up a level. (T.1645,1652). He denied going around the house to the windows, stating that Sandra knew he was coming and let him in when his key did not work on the front door lock. (T.1657,1661). Wright claimed that he and Sandra sat on the back porch talking about money; they got into an argument and broke through the back door while they were "tussling." (T.1645,1654). He attributed the bruise on Sandra's side to the fight.(T.1661).

Wright claimed that Sandra did not beg him not to shoot her stating she ran to the front room with a butcher knife which was depicted in photos that the police did not bring to court. (T.1654-1655). Wright admitted that he did not shoot in self-defense, but added that "It was just something that happened out of the spur of the moment and I just started shooting and walked on out the door. I got in the car and left." (T.1655). He testified that the gun was over the kitchen cabinets, that he reached for it and it just "went off" four or five times. (T.1662-1663).

Wright claimed that Latonya and Nana lied in ninty percent of their testimony. (T.1652). He claimed that Nana lied when she said that he shot Sandra with a rifle because he had a nine shot .22 pistol. (T.1647,1653). Wright stated that he did not dispose of the gun and that the police should have it because he threw it in the car when he left the house on Avenue Q. (T.1656). Wright further insisted that Nana also lied when she said he walked over to where Sandra was lying on the ground and and turned her over with his foot. (T.1653). Latonya lied when she claimed he told Sandra he would teach her not to lock the door. (T.1657). She also lied when she said he went around to the windows asking to be let in and lied yet again when she said he picked up the rifle shells from the floor. (T.1655,1657). Wright stated that both girls lied when they said there was no gun in the house. (T.1663). Additionally, Wright claimed that Dorothy Walker lied on the stand and that the prosecutor had also lied throughout the proceedings. (T.1651,1662). According to Wright, he was the one witness or participant at trial who told the truth.(T.1651).

Wright admitted that he did not go to the police to say he had made a mistake the day after the shooting or even the day after that when he sobered up .(T.1664). Wright claimed he did not go over to the house intending to shoot anyone but that all he remembered was "this big explosion or this quick snap what had happened." (T.1646). He said "Well, I don't like what happened.

I know nobody else don't like it and I'm sorry that it happened..." (T.1646). He claimed to still love Sandra and the children to whom he sent birthday cards to since he had been in jail. (T.1647). Wright stated he believed it was fair for him to be punished but that he wanted to live. (T.1647-1648). Wright admitted that he has been convicted of six other felonies. (T.1650). Although he knew that under the laws of this State it was unlawful for a convicted felon to possess a firearm, he claimed he had not broken the law because the gun was not in his possession. (T.1650).

Psychiatrist Dr. Carmen Ebalo testified that she interviewed the defendant on three separate occasions. (T.1701). The first interview occurred on June 21, 1986 when she was called by Joe Basaloso, Wright's social worker, after he assaulted several corrections officers at the jail. (T.1673-1674). Athough she was also called because Wright was having difficulty eating and sleeping, she admitted the main reason she was asked to see him was because of his aggressive behavior. (T.1675). They did not speak about the crime of which he stood accused at that time. (T.1701). Dr. Ebalo believed that Wright's behavior was attributable to difficulty in adjusting to prison life, stating it was normal for a prisoner to experience this. (T.1676,1702). Following a fifteen minute interview, the doctor prescribed anti-anxiety and anti-depressant medications; the defendant discontinued the medications of his own accord within a week of their having been prescribed. (T.1676,1682).

Dr. Ebalo visited the defendant for the second time in July of 1986 again at the request of Mr. Basoloso who was unable to prepare a psycho-social evaluation of because the defendant was being uncooperative. (T.1677,1702). This interview lasted approximately thirty to forty-five minutes. (T.1704). Dr. Ebalo had an aquaintance of Wright's, Mr. Stevens of the TASK force, also speak with him. (T.1677-1678). On this occassion, the defendant seemed more responsive, although he appeared to have difficulty with regard to time elements, and Dr. Ebalo was able to obtain background information. (T.1679,1680). Wright related nothing of significance with regard to a prior mental health history with the exception of the fact that he had always had a problem with his temper. (T.1680). On that visit, Wright also told her he was in jail for allegedly killing his common law wife. (T.1681).

After this visit, Dr. Ebalo contacted the defendant's mother who stated she had no knowledge of her son having a drug and alcohol abuse problem. (T.1690). Mrs. Wright related that her son had always had trouble controlling his temper and had experienced behavioral difficulties while growing up. (T.1690). She claimed to have taken Wright to a mental health clinic for treatment while he was young; however, Dr. Ebalo was unable to locate any medical records whatsoever relating to treatment of Wright although she testified that such records were kept by the clinic. (T.1690).

Dr. Ebalo saw Wright for the third time on April 16, 1987, pursuant to the trial court's order, to evaluate him as to his sanity at the time of the crime and his competence to stand trial. (T.1682,1703). The defendant was fully aware why he was being examined during the hour and a half interview. (T.1684,1704). Wright related the same background information previously given. (T.1685). Wright referred to Ashe as the mother of his children and his common law wife. (T.1685, 1686). He stated that they had a stormy relationship, that his mother had tried to counsel them, and that for the last months he hardly stayed with Sandra because of her constant nagging. (T.1686). Wright told the doctor he and Sandra had a pattern of having a big argument every few months, breaking up, and getting back together before it would happen again. (T.1686). He claimed to be a good provider, working two jobs to support the family, until he caught her in bed with another man a few years ago; they stayed together for the sake of the children, one of whom was not his. (T.1686).

Wright claimed to be unable to recall what occurred on the night of Sandra's death, stating only that they had a fight. (T.1687). The next thing he claimed to recall was walking on the street and being told that the sheriff had a warrant for his arrest; he claimed he could not believe it and continued to drink for the next three or four days. (T.1687). Wright admitted

having a long and varied history of drug and alcohol abuse and claimed to have consumed eight Percodans and some gin prior to Sandra's death. (T.1687,1689). He related a family history of explosive tempers and alcoholism. (T.1689). Wright did not inform the doctor that there was a history of mental illness in his family; this information was provided to her later by defense counsel. (T.1689-1690).

Dr. Ebalo found no acute evidence of psychosis in the defendant. (T.1691). She diagnosed the defendant as suffering from: 1)substance abuse disorder mix, 2) explosive intermediate disorder, and 3) adjustment disorder with depressed mood as a result of his confinement. (T.1691). She believed that it was possible Wright was under mental and emotional disturbance at the time of the murder because of his alleged alcohol and drug use; she thus believed if he was, in fact, under the influence at the time, his capacity was diminished. (1697,1699). Wright was not insane at the time of the crime. (T.1721).

Dr. Ebalo conceeded, however, that her entire diagnosis was based upon information provided by the defendant and that if he, in fact, possessed information he did not reveal about the events of June 10, 1986 and his condition at that time it would substantially affect her diagnosis. (T.1705-1706).

Dr. Ebalo admitted that Percodan was not a street narcotic and that if the defendant described the pills he took as being different than that produced by the manufacturer, this too would affect her diagnois. (T.1707-1708,1713). She testified that Percodan was a muscle relaxant and that if the defendant took eight pills and drank alcohol he would not be able to stand on one foot to turn a the victim's body over. (T.1708).

Dr. Ebalo did not know that Wright had threatened to kill Sandra two days before the murder; she considered the facts of the crime highly significant, but admitted that she was not aware of them prior to making her diagnosis. (T.1714). Additionally, she was not aware that Wright not only told Mr. Stevens facts of the murder he did not relate to her but also testified to additional facts during the penalty phase of his trial. (T.1739). Dr. Ebalo found this to be highly significant and tesified that this would affect her diagnosis since at the time she evaluated him, Wright told her he could not remember what occurred on the evening of Sandra's death. (T.1739-1740). Dr. Ebalo also stated that she would find it significant if Wright had called his brother Gregg hours after the shooting and that Gregg said he did not sound drunk as Wright told her he wandered for days in a drunken haze after the shooting. (T.1747-1748).

In evaluating the defendant, Dr. Ebalo reviewed some of the records relating to his prior incarcerations, as well as, the

reports prepared by Stevens and Basaloso. (T.1756,1759,1762). She considered significant the 1978 DOC Psychological Screening Report wherein Wright was noted as having no signs of psychopathology, no severe mental illnesses and no sleeping problems, nervous conditions, or drinking problems. T.1757). Although one medical record from the jail reflected that Wright complained to a nurse of headaches since adolescence, he at no time during their interviews complained of headaches to her. (T.1757). Dr. Ebalo found it significant that Basaloso's report reflected an incident which occured during his incarceration pending trial in which Wright set fire to the jail stating "I set the mother fucker on fire, what are you going to do about it." (T.1759-1760). She was not aware at the time she rendered her opinion that Wright had been convicted of shooting a former girlfriend and another woman. (T.1760). She did consider the fact that he had been convicted of battery on a police officer in the past, but did not realize until after her evaluation that the officer stated Wright was not under the influence at the time. (T.1760-1761).

Significantly, Dr. Ebalo receded from her diagnosis stating that only "in some ways" did she stick with her conclusions of violent antisocial personality disorder and explosive intermittent disorder.

ISSUES ON APPEAL

I.

DID THE TRIAL COURT ERR IN FINDING THAT THE STATE DID NOT IMPROPERLY UTILIZE ITS PEREMPTORY CHALLENGES TO EXCLUDE BLACK JURORS?

II.

DID THE TRIAL COURT ERR IN ALLOWING THE LEASE AGREEMENT INTO EVIDENCE?

III.

DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION TO SEVER COUNTS ONE AND TWO FROM THE REMAINING COUNTS CHARGING BATTERY ON A POLICE OFFICER FOR TRIAL?

IV.

DID THE TRIAL COURT ERR IN OVERRULING THE DEFENDANT'S HEARSAY OBJECTION?

V.

DID THE TRIAL COURT ERR IN RESTRICTING THE DEFENSE FROM CONDUCTING REPETITIOUS QUESTIONING DURING VOIR DIRE?

VI.

DID THE TRIAL COURT ERR IN INSTRUCTING THE JURY ON FLIGHT WHEN AMPLE EVIDENCE WAS PRESENTED AT TRIAL TO THE EFFECT THAT THE DEFENDANT FLED FOLLOWING THE MURDER TO AVOID PROSECUTION?

VII.

WAS THE CHARGE OF FIRST DEGREE MURDER IMPROPERLY SUBMITTED TO THE JURY ON ALTERNATIVE THEORIES OF PREMEDITATION AND FELONY MURDER?

VIII.

DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE BURGLARY CHARGES?

IX.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN INSTRUCTING THE JURY ON THOSE COUNTS CHARGING BATTERY ON A LAW ENFORCEMENT OFFICER?

X.

WAS THE TRIAL COURT PREJUDICED AGAINST THE DEFENDANT SO AS TO DEPRIVE HIM OF EITHER DUE PROCESS OR A FAIR TRIAL?

XI.

DID THE TRIAL COURT ERR IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE WHEN THE FACTS SUGGESTING DEATH WERE SO CLEAR AND CONVINCING NO REASONABLE PERSON COULD DIFFER?

XII.

DID THE TRIAL COURT CONSIDER NONSTATUTORY AGGRAVATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY?

XIII.

WAS THE DEFENDANT DENIED HIS RIGHTS TO CROSS-EXAMINATION AND CONFRONTATION DURING SENTENCING WHEN HE DID NOT OBJECT TO THE PROCEEDINGS AND FULLY PARTICIPATED IN THEM?

XIV.

WAS THE DEFENDANT DENIED HIS RIGHT TO BE PRESENT DURING CRITICAL PHASES OF THE TRIAL?

XV.

DID THE TRIAL COURT ERR IN IMPOSING ITS SENTENCE ON THE BURGLARY CONVICTION?

XVI.

IS FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL?

XVII.

ARE THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST IN THIS CASE UNCONSTITUTIONAL?

SUMMARY OF THE ARGUMENT

I.

The trial court correctly found that the State had not improperly utilized its peremptory challenges to exclude black jurors since the State gave valid race neutral reasons which justified its excusal of the jurors.

II.

The trial court properly allowed the lease agreement into evidence when the defendant failed to make an appropriate objection and the inquiry conducted by the court established both that the State did not willfully fail to produce a document in its possession and the defendant was in no way prejudiced by its admission.

III.

The trial court did not err in denying the defendant's motion to sever the murder and burglary counts from the two counts charging battery on a law enforcement officer when the charges arose from related acts and evidence relating to the first two counts would be admissible in a trial of the remaining counts.

IV.

The trial court correctly overruled the defendant's hearsay objection when the objection was untimely, the statement was not offered to prove the truth of the matter asserted, and the trial court read a cautionary instruction to the jury.

V.

The trial court acted within its discretion in preventing the defense from conducting overly repetitious questioning of the venire during voir dire. The court did not deny the defense the opportunity to pursue a line of questioning, but instead restricted it from asking duplicitous questions on matters already fully explored by it.

VI.

The trial court properly instructed the jury on flight when ample evidence to support such an instruction was presented at trial making the issue one for the jury's determination.

VII.

The charge of first degree murder was properly submitted to the jury on alternative theories of premeditated and felony first degree murder under the laws of this State. The defendant was not denied an unanimous verdict merely because the verdict form did not require the jury to select which theory its finding of guilt was based upon when it was instructed, without objection by the defense, with the standard instructions on both theories of law and was also instructed that its verdict must be unanimous.

VIII.

The trial court correctly denied the defendant's motion for judgment of acquittal on the burglary charge so as to allow the issue to go to the jury when it was clear from the evidence adduced at trial that the defendant's status as an invitee or guest on the property had been terminated.

IX.

The trial court did not reversibly err in instructing the jury on the counts charging battery of a law enforcement officer when the defense did not object to the instruction and the defense did not contest that Detective Gahn and Corporal Farless were in fact law enforcement officers.

X.

The trial court was not prejudiced against the defendant so as to deprive him of either due process or a fair trial merely because the court took appropriate security steps when the defendant voluntarily absented himself from the court room. The lack of prejudice on the part of the court is clear in view of the defendant's failure to either object to the comments he complains of or to seek recusal of the judge.

XI.

The trial court properly overrode the jury's recommendation of a life sentence to impose the death penalty when the facts suggesting death were so clear and convincing that no reasonable person could differ as to the appropriateness of the death penalty.

XII.

The trial court did not consider nonstatutory aggravating factors in imposing the death penalty since it could properly consider matters not submitted to the jury in reaching its decision in sentencing.

XIII.

The defendant was not deprived his rights of cross-examination and confrontation during sentencing when he did not object to the prosecutor's argument or the use of the materials and fully participated in the proceeding.

XIV.

The defendant was not denied his right to be present during critical phases of the trial when he voluntarily and without leave of court absented himself from the proceedings or when counsel, during hearings dealing with administrative matters or legal argument chose to proceed without him.

XV.

The trial court acted within the scope of its authority when it imposed a life sentence for the burglary conviction since the sentence was supported by facts set forth in the written sentencing order which was filed at the time sentence was pronounced.

XVI.

Both this Honorable Court and the Supreme Court of the United States have held that Florida's death penalty statute is Constitutional both on its face and as applied.

XVII.

The three aggravating factors found to exist in this case, i.e., that the murder occurred during the course of another dangerous felony, that the murder was heinous, atrocious, and cruel, and that the murder was cold, calculated, and premeditated without pretense of moral or legal justification, are constitutional both on their face and as applied to this case.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE STATE DID NOT IMPROPERLY UTILIZE THEIR PEREMPTORY CHALLENGES TO EXCLUDE BLACK JURORS.

In this case, the defendant asserts that the trial court improperly denied his Neil objection, specifically relying upon the State's challenge of Jurors Salter, McFolley, and Hayes. Although he also mentions the State's challenge of Jurors Washington and Wortham, he apparently conceeds that they were properly stricken given their acknowledged close personal friendships with the defendant since he has all but abandoned his discussion of them.[4] A review of the voir dire of all of these prospective jurors, however, clearly establishes that the trial court was eminently correct in finding that the State did not improperly exercise its peremptory challenges to systematically exclude black veniremen from the panel.

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[4] The State's motion to excuse Juror Washington for cause was denied by the trial court even though Washington stated that the defendant had been a "close personel friend" of long duration, he hung around with the defendant alot, and he knew Wright's family well.(T.622,626-629). Juror Wortham testified that he considered himself a personel friend of the defendant for fifteen years, adding he had been a visitor in Wright's home and knew almost his entire family.(T.655-656). Wortham admitted that he was not sure that his relationship with Wright would not affect his ability to impose the death penalty.(T.657). The trial court found the State's subsequent exercise of its peremptory challenges of these jurors to be race neutral.(T.691)

In this case, the defendant did not object after Jurors Hayes and Salter were peremptorily challenged by the State and subsequently excused by the court. (T.445,487). When Juror McFolley was excused, the defense stated "...Mr. Walsh has used peremptories against three blacks consecutively, but maybe not consecutively, but has used peremptories to excuse three blacks." (T.546). During argument, the defense stated that it noticed a pattern of exclusion of black jurors by the State and moved the court to compel the State to set forth nonbiased reasons for the strikes. (T.594). Only at that point in time was it noted, on the record by the court, that the three jurors mentioned, Salter, Hayes, and McFolley, were black and that the defendant was also black. (T.595).

Neil v. State, 457 So.2d 481 (Fla. 1984), as expanded by State v. Slappy, 522 So.2d 18 (Fla. 1988), requires a defendant to not only demonstrate that the challenged persons are members of a distinct racial group, he must also show that there is a strong likelihood that they have been challenged solely because of their race. Here, the defendant failed to do more than state the three jurors are black. As this Court has recognized "under the procedure prescribed by Neil, the objecting party must ordinarily do more than simply show that several members of a cognizable racial group have been challenged in order to meet his initial burden." Reed v. State, 14 FLW 298 (Fla. June 15, 1989), reh. granted, 15 FLW 115, 116 (Fla. March 9, 1990). See also:

Parker v. State, 476 So.2d 134, 138 (Fla. 1985); Smith v. State, 538 So.2d 926 (Fla. 1st DCA 1989). To find otherwise would undermine the recognized presumption of Neil that peremptories are exercised in a nondiscriminatory manner unless the defense establishes otherwise . Neil v. State, supra at 485.

After the defense's inadequate Neil challenge, the court then asked the State what its position was; it did not, as the defendant asserts, initially compel the State to set forth its reasons on the record.(T.595). Only after the Prosecutor volunteered to put his reasons on the record did the court state that it "believed" that at that point the State would be obliged to make a showing.(T.596).

The Prosecutor volunteered that one of his objectives in jury selection was to pick those individuals who would be most receptive to the State's case and witnesses, many of whom were black. (T.596,601). Mr. Walsh noted that in evaluating prospective jurors' amenability to his case, he could consider a panelist's background and race so long as that was not the sole reason he sought to exclude them. (T.601). It was acknowledged that a black juror was still on the panel.(T.596).

The State struck Jurors Hayes and McFolley not, as the defense asserts because of their lack of higher education,[5] but because they "indicated difficulty in understanding" questioning during voir dire relating to the defenses of insanity and voluntary intoxication, both of which the defense had indicated it would rely upon. (T.596). The Prosecutor stated that he felt that he was not able to communicate with the two jurors. (T.597).

A review of questions posed to Juror Hayes during voir dire reflects that the Prosecutor's concern was well warranted.[6]

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[5] The only mention of educational background was by defense counsel, Mr. Finney, during argument.

[6] **THE COURT:** Are you conscientiously opposed to capital punishment, that is the death penalty?

MR. HAYES: Well, I don't know what the difference is between what you're saying.

THE COURT: Do you have any feeling that you're opposed just in general to the death penalty?

MR. HAYES: I can't say?(T.421-422).

MR WALSH: In regard to the death penalty... do you see times with aggravating circumstances where it would be appropriate to sentence a person to death for killing another person?
MR. HAYES: Well, my opinion about that is, is all the way I feel, it all depends between the person... (T.423).

MR. WILLIAMS: And when we say mitigating factors we simply mean that there are reasons and factors and facts that will support a verdict for recommendation of life, life imprisonment or a penalty less than death. Do you understand that?
MR. HAYES: I think so. I'm not sure. I don't know anything about that. (T.430).

MR. WILLIAMS: ...that same principle that says to you as an individual that if the State proves its case beyond and to the exclusion of every reasonable doubt, that it's only fair for you

For example, Mr. Hayes could not state what his feelings about the death penalty were and also expressed a lack of understanding regarding the concepts of the State's burden of proof and aggravating versus mitigating circumstances. (T.425,431). Juror Hayes also did not know how he felt about serving on the jury if picked and was unsure as to whether he felt comfortable with the responsibility of being a juror. (T.426,428). He admitted being a former heavy drinker.(T.433).

The defendant argument also ignores the fact that the trial court denied the State's motion to excuse Mr. Hayes for cause because of his expressed doubt regarding the death penalty and his lack of understanding regarding legal concepts central to the case. (T.438-439). This clearly establishes that the State's peremptory strike of Juror Hayes was appropriate. The defendant also ignores the absence of any challenge by the defense of the reasons given by the State in striking Jurors Hayes and McFolley, i.e., their lack of understanding and the prosecutor's lack of communication with them.[7] The record shows that Ms. McFolley's

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to return a verdict of guilty, the reverse of that principle is equally true...do you understand that?
MR. HAYES: I'm going to be honest with you. I really don't know nothing about that court words or nothing like that because I have never been involved in anything. You know, I just can't say yes or no to those words. I don't want to say things that, you know. (T.430-431).

[7] This Court has not adopted the rationale of Hill v. State, 547 So.2d 175 (Fla. 4th DCA 1989), relied upon by the defendant, instead establishing that the failure to challenge reasons given in support of peremptory strikes is deemed acquiescence in them. See: Floyd v. State, infra.

answers during voir dire were extremely curt and were strictly limited to yes or no. (T.481-500). This was in direct contrast to other potential jurors who were more forth-coming with their responses during the voir dire process. Significantly, Juror McFolley did not respond when asked by the defense if she was able to bring an open mind to the case. (T.496). The prosecutor's assessment that he did not have any real communication with her was well founded; Juror McFolley's lack of communication was equally apparent during questioning by the court and the defense. The ability to communicate with and relate to a juror is essential to any trial attorney. In evaluating the reasons given by the prosecutor as reflected by a cold record, it is necessary to remember that the trial judge, who was present at all times and was therefore able to observe the panelists and their demeanor, found that the jurors had been validly challenged. Adams v. State, 15 FLW D701 (Fla. 3rd DCA March 13, 1990); Taylor v. State, 491 So.2d 1150 (Fla. 4th DCA 1986), rev. denied, 501 So.2d 1284 (Fla. 1986). (Prosecutor's striking of two male jurors because they were approximately the same age as the defendant and because the prosecutor did not like the way in which they related to him or their attitudes found race neutral). The trial court is in the best position to evaluate the answers given by the State because the judge has not only already heard the juror's answers and the tone in which they were made, the judge has also had the opportunity to observe the juror's demeanor while giving them. The trial court's acceptance of the State's reasons as

valid is thus accorded great weight and should not be second-guessed on appeal on the basis of a cold record. Woods v. State, 490 So.2d 24 (Fla. 1986), cert. denied, 479 U.S. 954, 107 S.Ct. 446, 93 L.Ed.2d 394 (1986); Adams v.State, supra; McCloud v. State, 536 So.2d 1081 (Fla. 1st DCA 1988).

Although the State did not ask either Mr. Hayes or Ms. McFolley about their educational backgrounds, this fact is totally irrelevant, since the State did not strike the jurors because of their lack of education but rather because of their lack of understanding of issues central to the case. Therefore, the defendant's claim that the fifth Slappy factor has been met is erroneous since the defendant totally misconstrues the State's reason in striking these two jurors. Neither is the propriety of the State's actions dependent upon the number of questions the Prosecutor asked any particular venireperson. As this Court recognized in Slappy, the propriety of the striking of a particular juror "must be weighed in light of the circumstances of the case and the total course of the voir dire...". State v. Slappy, supra at 22.

The record also establishes that the State did not act improperly with regard to its peremptory strike of Juror Salter. The prosecutor stated that he felt that Mr. Salter would strongly identify with the defendant because they were both black males who were "married," had children, and worked to support their

families and these similarities would thus cause Mr. Salter to be less receptive to the State's case.[8] (T.596-597). "Within the limitations imposed by State v. Neil, the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended." Reed v. State, 560 So.2d 23 (Fla. 1990). "[I]f the party [exercising its peremptory challenges] shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end..." State v. Neil, supra at 487. Here, the background of a prospective juror and that juror's ability to relate to the defendant was central to a defense that did not deny guilt but attempted to excuse Wright's behavior because of his background.

Also of significance to the challenge of Salter was the fact Mr. Walsh stated that "...Mr. Salter and I had no eye contact whatsoever. I could not get Mr. Salter to look me in the eye during the entire time that we had conversations, he never once looked me in the eye. And I felt uncomfortable about that and that's why I struck Mr. Salter." (T.597). Although both the trial court and the defense had the opportunity to object on the

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[8] The defendant's reliance upon Thompson v. State, 548 So.2d 198 (Fla. 1989) is misplaced since this Court did not address the reasons given by the State for its challenges, but instead reversed based upon the trial court's failure to inquire into each challenge once it became clear that the State might have been improperly utilizing them.

record that the reason, i.e., that Mr. Salter refused to make eye contact with the prosecutor, was untrue, no objection was made. (T.597-598). The defendant's failure to do so is clearly an acknowledgement that the State's observation was factually correct. "When the state asserts a fact as existing in the record, the trial court cannot be faulted for assuming it is so when defense counsel is silent and the assertion remains unchallenged." Floyd v. State, 15 FLW S465 (Fla. September 21, 1990).

It is also necessary in judging the correctness of the trial court's acceptance of the State's reasons, to note that Mr. Salter had, prior to jury selection, indicated an unwillingness to serve on the jury due to the financial hardship it would cause him. (T.189-190). The court obviously recognized that "not wanting a reluctant juror is not evidence of discrimination," Taylor v. State, supra at 26, fn 4, particularly where the trial court had denied the State's motion to excuse jurors for cause on the same basis and the defense refused to stipulate to it. (T.271-274). Parker v. State, supra at 138.

The trial court carefully reviewed the reasons any juror had not been seated who had been either excused for cause or peremptorily challenged. The court held that it had difficulty saying that the State's exercise of it peremptory strikes were, on their face, based solely upon race and that after hearing the

State's reasons, it found that there was a logical and rational reason for each which was not based soley upon the prospective juror's race. (T.603-607).

Because of its unique position, the trial court has broad discretion in determining whether a party is exercising its peremptory challenges in a racially discriminatory manner. Reed v. State, supra; Dinkins v. State, 15 FLW D2246 (Fla. 1st DCA September 4, 1990). The trial court's findings in this case should not be set aside given the defendant's failure to meet his high burden of proof. State v. Neil, supra; Reed v. State, supra; Williams v. State, 465 So.2d 1229 (Fla. 1985); Skipper v. State, 400 So.2d 797 (Fla. 1st DCA 1985).

II

THE TRIAL COURT DID NOT ERR IN ALLOWING THE LEASE AGREEMENT INTO EVIDENCE.

The defendant contends that the trial court erred in allowing a copy of the victim's lease agreement into evidence and in not conducting an adequate Richardson inquiry into the State's alledged violation. The record below establishes that the trial court acted within its discretion in allowing the documents into evidence and did not fail to conduct an adequate inquiry.

The record reflects that during her testimony, Mrs. Webster was holding the lease while discussing its contents prior to the time the State sought to introduce it into evidence. (T.746-747). The substance of the agreement was therefore already before the jury as a result of her testimony. The defendant, at the time the State sought to move the lease into evidence, initially stated that "these things weren't listed on the Exhibit list (indiscernible) Your Honor, so I mean he can't be bringing this stuff in now." (T.747). This does not amount to a "Richardson" objection. Then, the defense objected, claiming the State had violated the dictates of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), by failing to disclose the existence of evidence required under Fla.R.Crim.P. 3.220(a)(1)(xi). (T.748-749). However, Brady holds that the suppression of evidence favorable to the defendant, despite his request, violated due process requirements when the evidence was

material either to the defendant's guilt or punishment irrespective of the prosecution's good faith or lack thereof in producing the material. Brady v. Maryland, supra at 373 U.S. 87; 10 L.Ed.2d 218.

It is apparent from the record of the hearing conducted by the trial court that the State did not improperly withhold the lease agreement since it was not available as that term is defined pursuant to Fla.R.Crim.P. 3.220. The State did not have the lease agreement in its possession and control and, in fact, did not even learn of its existence until the witness appeared at trial to testify. (T.747-748,750-751). Voir dire of the witness regarding the document revealed that Mrs. Webster told the prosecutor she was not sure if she had the lease as she generally threw them away seeing no reason to retain them. (T.755-756). The first time she told the prosecutor she had found the lease agreement was the same morning she testified. (T.754). The provisions of Fla.R.Crim.P.3.220 only come into effect if the document the prosecutor intends to use at trial is within the State's possession or control and if it was not obtained from the accused. Here, the defendant asserts that the State "intended" to use the lease prior to trial and purposely sandbagged the defense by not revealing its existence. It is difficult, if not impossible, to imagine how the State intended to use something at trial that it was not sure even existed. Mrs. Webster clearly stated during voir dire that she had not produced the document

prior to that very day and that up until then she herself did not believe she had kept it. (T.754-756). The record establishes that the State did not know of the document and did not have it in its possession. A State Attorney cannot be held responsible, short of clairvoyance, for knowledge of the document under these circumstances. The defense purposely misconstrues the prosecutor's statements regarding the fact that Mrs. Webster was listed as a witness and was, in fact, deposed by the defense to somehow arrive at the assertion that the State knew the document was in Mrs. Webster's possession and intended to use it at trial. The comments by the prosecutor merely illustrated the fact that the defense was engaging in bad faith and had failed to exercise due diligence given the fact it had ample opportunity to discover that the lease had at one time been in her possession. See: Thomas v. State, 375 So.2d 508 (Fla. 1979), cert. denied, 445 U.S. 972, 100 S. Ct. 1666, 64 L. Ed.2d 249, stay gr.,788 F.2d 684, stay denied, cert. denied, 475 U.S. 1113, 106 S. Ct. 1623, 90 L. Ed.2d 173 (1979).

Additionally, the document itself establishes that it was hardly material to the case and it certainly was not favorable to the defense. The document and testimony about it adduced at trial showed that the property was owned by Mrs. Webster and was leased to her daughter for her and her children's use through a low income government housing agency. (S.111-123;T.746-747,760). Thus, the two remaining elements of Brady were not met. Doyle v.

State, 460 So.2d 353 (Fla. 1984). The trial court properly allowed the document into evidence in view of the objection made by the defense at trial.

Curiously enough, the defense objection regarding the lease was not termed a "Richardson" violation until long after trial. At the time the objection was made, everyone, including the court and the prosecutor, dealt with the matter as a Brady claim. The fact that the defense has recharacterized the issue for purposes of appeal flies in the face of the rules of court which require a party to make timely, specific objections to place the court on notice of the nature of the claimed error and to give it the opportunity to correct itself. See e.g.: Delmarco v. State, 406 So.2d 1169 (Fla. 1st DCA 1981), rev. denied, 415 So.2d 1349 (Fla. 1982). The defense is hardly in the position to now critize the trial court for failing to conduct an inquiry it did not inform the court of the need for via an appropriate objection.

Nevertheless, the on the record colloquy regarding the admission of the lease agreement satisfies the requirements of Richardson. Richardson v. State, 246 So.2d 771 (Fla. 1971) requires the court, upon proper objection by the claiming party, to determine if the alleged discovery violation was wilful or inadvertent and whether the complaining party was prejudiced as a result thereof. In this case, the voir dire of Bessie Webster

established that the State had not wilfully omitted mention of a document it, in fact, knew existed in discovery. The State's discovery responses were in fact appropriate since it did not know that she had the lease. Furthermore, the agreement itself establishes that the defense was not prejudiced by the State not producing it. The theory of the defense was not affected by the agreement at all and the introduction of the agreement into evidence had no impact upon the case, since Mrs. Webster could have and did testify about the nature of the lease without the agreement being physically introduced. Furthermore, the defendant did not object to the scope of the inquiry that was conducted regardless of whether it was conducted pursuant to Brady or Richardson and in fact declined the opportunity to make additional objections, present additional argument to the court, or conduct additional voir dire. (T.759). The defendant's claim as to this issue is simply without merit.

III.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SEVER COUNTS ONE AND TWO FROM THE REMAINING COUNTS CHARGING BATTERY ON A POLICE OFFICER FOR TRIAL.

The defendant asserts that the trial court erred in denying his motion to sever the murder and burglary counts from the counts charging battery on a law enforcement officer. In essence, he claims that the counts charging battery on a law enforcement officer were unrelated to the other charges and that he was prejudiced because the counts were jointly tried. However, it is apparent that the trial court, relying on Puhl v. State, 426 So.2d 1226 (Fla. 4th DCA 1983) and Brown v. State, 502 So.2d 979 (Fla. 2d DCA 1987), acted within its discretion in denying the motion to sever.

The defendant in this case correctly asserts that Fla.R.Crim.P. 3.152(a)(1) provides that where offenses are improperly joined in a single indictment or information, a defendant shall have the right to a severance upon the filing of a timely motion. Nevertheless, the defendant in this case was not entitled to severance of the battery charges from the murder and burglary charges at trial because they were, in fact, properly joined. Fla.R.Crim.P. 3.150 specifically states that "two or moere offenses which are triable in the same court may be charged in the same indictment or information in a separate count

for each offense, when the offenses...are based on the same act or transaction or on two or more connected acts or transactions." Although the murder and burglary were separated from the batteries by six days, they are nonetheless related acts. As this Court stated in its recent opinion in Garcia v. State, 15 FLW S445, S446 (Fla. September 6, 1990), "To summarize well-settled law, the connected acts or transactions requirement of Rule 3.150 means that the acts joined at trial must be considered in an episodic sense." The facts of the crimes joined for trial in this case are not separate episodes, separated in time which are only connected by the defendant's participation in each.

The facts of this case establish that after breaking into the house on Avenue Q. and brutally shooting his common law wife in the back while she pled for mercy, the defendant fled. (T.792-795,827-831,858-861,870-871). The defendant knew he was wanted for murder because he was told on the street there was an outstanding warrant for his arrest; his sister also told him to turn himself in when he contacted her. (T.1085,1201,1687). When the defendant appeared at the county jail, he gave a false name and appeared reluctant to turn himself in. (T.1084,1098). After Detective Gahn read Wright the warrants and attempted to Mirandize him, Wright, for no reason, stood, picked up a table and committed a battery upon her and another corrections officer; he also committed a battery on another officer while they were attempting to subdue him as he was trying to leave. (T.936,996-

997,1007-1008,1100-1101,1111). These facts establish that the murder/burglary charges were closely connected with the battery counts. Both State and Federal courts have held that where evidence of crimes are so inextricably intertwined so that one case could not be presented without substantial mention of the other, the failure to sever is not error. Pugh v. State, 518 So.2d 424 (Fla. 2d DCA 1988); United States v. Alberti, 727 F.2d 1055 (11th Cir. 1984). Here, evidence relating to the murder and burglary would have been admissible at a trial of the battery charges; the converse of that proposition is also true. This Court, in Clark v. State, 379 So.2d 97 (Fla. 1979), held that a trial court did not abuse its discretion in denying a motion for severance and consolidation of the offenses did not prejudice his right to a fair trial where some evidence relevant to one charge would be admissible at the trial of the remaining charges. See also: Jacobs v. State, 396 So.2d 713, 717 (Fla. 1981), (no need to sever charges of murdering two state troopers from charge of kidnapping a third person because all the charges arose from one continuous sequence of events); Clark v. State, 379 So.2d 97, 103 (Fla. 1979), cert. denied, 450 U.S. 936 (1981), (no error in trial court's failure to sever extortion charge from murder and kidnapping charges).

Furthermore, even if this Court were to determine that the offenses were, indeed, improperly joined, the trial court's denial of the motion to sever would still not require reversal.

This Court, beginning with Livingston v. State, 13 FLW S187 (Fla. March 10, 1988), has held that the harmless error rule applies in cases in which there has been an improper joinder of cases in a single indictment or information. United States v. Lane, 474 U.S.438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986); Beltran v. State, 15 FLW S477 (Fla. Septmber 28, 1990). It is indisputable that the denial of the defendant's motion for severance, if error, is merely harmless given the great weight of the evidence of Wright's guilt.[9] The defendant, under either analysis presented above, is thus not entitled to a new trial.

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[9] This evidence includes, among other things, eyewitness testimony of the defendant's daughter and "step-daughter's" that the defendant shot the victim after breaking down two doors, testimony by eyewitnesses that Wright fled the scene, and testimony by the victims of the batteries.

IV.

THE TRIAL COURT DID NOT ERR IN OVERRULING THE DEFENDANT'S HEARSAY OBJECTION.

The defendant contends that the trial court improperly overruled his hearsay objection to testimony by Bessie Webster regarding statements made to her by her daughter. However, not only did the trial court properly overrule the one objection made, the defendant failed to object with regard to the statement he argues the most strongly on appeal. As the record amply reflects, he cannot prevail on this issue.

The record reflects that the prosecutor asked Mrs. Webster to relate the circumstances surrounding her being contacted on June 9, 1986 by her grandchildren with regard to the injuries Sandra sustained at the defendant's hands. (T.740). Defense counsel, Mr. Finney, objected, stating that the response, already partially given by the witness, called for hearsay.[10] (T.740). The State, in response to the court, indicated at sidebar that it was offering the statement to establish the state of mind of the victim as to why she did not want the defendant in the house. (T.740). The court stated that it would, and did in fact, give a cautionary instruction to the jury to the effect that the statement could not be considered to prove the truth of the

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[10] Prior to the objection, Mrs. Webster stated "Monday morning around 2:00 the children called and said "My Daddy broke my Mama..."(T.740).

matter asserted. (T.740-741). Significantly, no other objection was made by the defense as to other statements by Mrs. Webster with regard to her daughter's having told her that Wright broke her nose or that Wright was no longer allowed in the house.

Additionally, the defendant's objection to the already answered question was untimely. It has long been recognized that an objection which is interposed after a question has been answered is too late since the purpose of the objection is to prevent the question being answered until the court can rule upon its propriety. Rowe v. State, 120 Fla. 649, 120 So.2d 22 (Fla. 1935).

Furthermore, admission of the victim's statement was not improper as it was not offerred to prove the truth of the matter asserted. As this Court recognized in an opinion relied upon by the defendant, Breedlove v. State, 413 So.2d 1 (Fla. 1982), out-of-court statements constitute hearsay only when they are offered in evidence to prove the truth of the matter asserted. The fact that a statement would not be admissible for one purpose does not mean that it is not admissible for another. Not only was the statement admissible to establish that Sandra did say it, it was also admissible to prove her intention not to allow the defendant to return to the house. Van Zant v. State, 372 So.2d 502 (Fla. 1st DCA 1979).

Even if this Court were to determine that admission of the statement was error, it was merely harmless given the fact that the objection was made after the answer was all but completed. Also significant is the fact that although the defense did not request one, the trial court read a cautionary instruction to the jury informing them that they were not to consider the statement as proof of the matter asserted. (T.741). The United States Supreme Court, in Greer v. Miller, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618, 631 fn.8 (1987) stated that "we normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions and a strong likelihood that the effect of the evidence would be devastating to the defendant." A harmless error analysis is appropriate in a case such as this where the evidence of the defendant's guilt was overwhelming.

Finally, no objection was made to statements by the witness regarding Sandra's intention to keep the defendant out of the house. Therefore, the matter was not preserved for the review of this Court. Jackson v. State, 451 So.2d 458 (Fla. 1984); Roseman v. State, 293 So.2d 64 (Fla.1974).

V.

THE TRIAL COURT DID NOT ERR IN RESTRICTING THE DEFENSE FROM CONDUCTING REPETITIOUS QUESTIONING DURING VOIR DIRE.

On appeal, the defense contends that it was improperly restricted by the trial court during voir dire from questioning prospective jurors as to whether or not they believed police officers could ever be mistaken in their testimony. A review of the record in this case reveals that the defendant totally misrepresents what occurred with regard to this line of questioning since he was given ample opportunity to explore this line of thought. It is clear that the court acted within its discretion in curtailing repetitive questioning when the defense persisted in beating a long dead horse.

The record below establishes that defense counsel questioned the prospective panel of jurors at length as to whether they had family members or knew individuals who were in law enforcement. (T.372). The defense also engaged in an extensive examination of the panel regarding their attitudes about the potential errors of police officers and whether or not the panel would accord their testimony greater weight than that of other witnesses merely because of their positions. (T.372-379,406-407).[11] Not only did the jurors respond to this line of

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questioning, the defense also questioned them extensively regarding whether they had ever gotten speeding tickets and if they disagreed with the radar gun, whether they understood that officers were trained in the police academy how to testify in court, and whether or not they believed that officers treated persons of different races and backgrounds differently than other individuals. (T.376-385,406-407). Only after a series of repetitious questions on this subject did the State object. (T.406-407). The court agreed that the defense had already exhausted this line of questioning and sustained the objection. (T.407).

It has long been recognized that the trial court controls the length and extent of voir dire, Blackwell v. State, 101 Fla.

> **MR. WILLIAMS:** ...And what I'm driving at, since we on officers now...that police offiers can make errors just like any other human being can?
>
> **MISS BOYD:** Oh, definitely...(T.376).
>
> **MR. WILLIAMS:** Do anyone think that police officers are beyond or above the law?
>
> **A:** All prospective jurors say no.
>
> **MR. WILLIAMS:** Do anyone feel that a police officer can be negligent or just fail to do their duty on occasion, but not always, but like other human beings,...can be negligent and not do their job?
>
> **A:** Prospective jurors say yes.(T.379).

997, 132 So. 468 (1931); Barker v. Randolph, 239 So.2d 110 (Fla. 1st DCA 1970), as well as, the scope of the examination. Peri v. State, 426 So.2d 1021 (Fla. 3d DCA 1983); Underwood v. State, 388 So.2d 1333 (Fla. 2d DCA 1980). "The extent to which parties may be permitted to go in examining prospective jurors on voir dire is subject to the trial court's sound discretion, the exercise of which will not be interfered with unless it is clearly abused." Essix v. State, 347 So.2d 664 (Fla. 3d DCA 1977). "While counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors, it is the trial court's responsibility to control unreasonably repetitious and argumentative voir dire." Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). Here, not only does the record establish that the defense was permitted to engage in extensive voir dire, it also shows that the court granted it wide latitude with respect to the scope of the examination it conducted. See: Essix v. State, supra. The trial court did not abuse its discretion in precluding the defense from repetitious questioning, particularly where, as here, the defense exhaustively questioned the panel regarding subjects involving the testimony of police.[12] See e.g.: Coney v. State, 348 So.2d 672 (Fla. 3d DCA 1977). Also

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12 The cases relied upon by the defendant as thus distinguishable from this one, since in those cases, the defense was prohibited from examining the panel on a particular line of questioning and here, the defense was precluded only from repeating the same line of questioning over and over again.

significant is the fact that the defense indicated its full satisfaction with regard to the panel that was ultimately selected and did not object or otherwise indicate its dissatisfaction with the trial court's ruling curtailing this line of questioning. Furthermore, the panel was instructed by the trial court on more than one occassion that it was not to accord the testimony of police officers greater weight than that of other witnesses. (T.212). Thus, the trial court did not abuse its discretion and the defendant cannot prevail on this issue.

VI.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON FLIGHT WHEN AMPLE EVIDENCE WAS PRESENTED AT TRIAL TO THE EFFECT THAT THE DEFENDANT FLED FOLLOWING THE MURDER TO AVOID PROSECUTION.

The defendant contends that the trial court erred in giving an instruction on flight to the jury since he claims there was insufficient evidence to support it. However, the evidence adduced at trial amply supports the giving of an instruction on flight.

The question of whether the trial court properly gave an instruction on flight to the jury is in turn dependant upon whether sufficient evidence to support such an instruction was presented at trial. Proffitt v. State, 315 So.2d 461 (Fla. 1975). Evidence that a suspected person in any manner endeavors to escape or evade threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications of desire to evade prosecution is admissible against the accused, the relevance of such evidence being based upon the individual's consciousness of guilt inferred from such actions. Washington v. State, 432 So.2d 44 (Fla. 1983); Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911, 80 S.Ct. 883, 49 L.Ed.2d 1221 (1976).

Here, ample evidence was presented at trial to raise a jury question so as to support the giving of an instruction on flight. Among other things, this evidence consisted of testimony establishing that: Wright removed the gun and cartridges from the scene (T.794-795,828-831), Wright sped away from the scene after shooting Sandra four times in the back (T.795,797,831,834,858,860-861,870-871), Wright did not turn himself in for six days after the murder although he knew of the pending warrants against him (T.1084, 1201), Wright lied about his name when he finally did go to the jail to turn himself in and was reluctant to be there (T.1085,1098), and Wright committed batteries upon a dectective and several corrections officers at the jail while attempting to flee the jail. (T.936,996-997,1007-1008,1101,1111). The facts of this case are thus totally distinguishable from the cases relied upon by the defendant in which the probative value of the flight evidence of those defendants was seriously weakened. Merritt v. State, 523 So.2d 573 (Fla. 1988) (defendant's escape was not an attempt to avoid prosecution for murder where he escaped custody while being held on unrelated charges eight months after being informed of an investigation for murder that occurred three years before), Shively v. State, 474 So.2d 352 (Fla. 5th DCA 1985) (evidence showed that defendant was fearful for his life due to threat by the vicitm's friend and defendant immediately informed poplice he stabbed victim), Payne v. State, 541 So.2d 699 (Fla. 1st DCA 1989) (defendant locked a window and door against police

momentarily delaying arrest). In contrast, the evidence presented here clearly supported the giving of a flight instruction; the trial court did not err in its instructions to the jury. See e.g.: Bundy v. State, 471 So.2d 9 (Fla. 1985), cert. denied, 479 U.S.894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986).

VII.

THE CHARGE OF FIRST DEGREE MURDER WAS NOT IMPROPERLY SUBMITTED TO THE JURY ON ALTERNATIVE THEORIES OF PREMEDITATION AND FELONY MURDER.

The defendant contends that the trial court improperly submitted the case to the jury on alternative theories of premeditated and first degree felony murder and that as a result he was denied a unanimous verdict. He also asserts that he was improperly denied notice of the State's intention to proceed on a felony murder theory. In support of his argument he urges this Court to recede from its ruling in Gorham v. State, 521 So.2d 1067 (Fla. 1988) and to hold that Knight v. State, 338 So.2d 201 (Fla. 1976) is no longer good law. It is clear, however, that the defendant's argument is totally without merit on either point.

The defendant first contends that the trial court improperly submitted the case to the jury on alternative theories of murder, aserting that Knight v. State, supra is no longer good law and that he was not provided proper notice of the theory on which the State intended to proceed. However, it is clear that Knight is still the rule of law under which this Court operates. In Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988) the court considered the exact claim raised by the defendant herein. That court held that the issue was one of state law and had already been determined by this Court stating "at the time of

Petitioner's trial, Florida law permitted (and still does) the state to prosecute under premeditated or felony murder theories when the indictment charged premeditated murder." Id. at 725. Also of significance, unlike the defendant in Knight, Wright did not at any time object to either the State charging him in this manner or to the jury instructions or jury forms on first degree murder, nor did he ever file a motion for a bill of particulars.[13] Like Knight, the defendant asserts that he was denied notice of the theory under which the State intended to proceed. However, he was given notice through the indictment of the charges of premeditated murder. Knight v. Dugger, supra at 725. Regardless of whether the jury decided Wright was guilty of premeditated or felony first degree murder, Knight is applicable and Wright "was not prejudiced by not knowing the specific theory upon which the state would proceed." Bush v. State, 461 So.2d 936 (Fla. 1984). As the evidence adduced at trial shows, there was ample evidence to support a finding of guilt on either theory.[14]

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[13] The State would note that the only motions for bill of particulars filed by the defendant were addressed to a statement of aggravating circumstances the State intended to proceed under. (R.1930-1931,1983-1984).

[14] The State will limit its argument herein with regard to the underlying felony and instead present the substance of its argument on that point in issue eight. Evidence of premeditation produced at trial included, but was not limited to the following facts: Wright threatened to kill Ashe prior to the murder (T.784), no guns were in the house after Wright moved out (T.739,744,806), when Wright broke down the doors of the house on June 10, 1986 he had the gun in his hands and began shooting from another room while Ashe tried to escape him out the front door. (T.792-793,795,828).

Finally, the defendant asserts that he was denied a unanimous verdict since the jury instructions did not require the jury to select which theory it was operating under in reaching its verdict. See: Hildwin v. Florida, 490 U.S. ___, 109 S.Ct. ___, 104 L.Ed.2d 728 (1989). The State submits that this Court's rationale in Gorham v. State, supra, is directly on point. In this case, as in Gorham, the jury instructions read to the jury were the standard instructions on first degree murder under both premeditated and felony murder theories. Additionally, Wright, like the defendant in Gorham, did not object to the instructions that were read and the jury was also instructed that it must reach a unanimous verdict. (S.313:T.1438). The record supports a finding of guilt on either theory; the defendant simply was not deprived of a unanimous verdict.

VIII.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE BURGLARY CHARGE.

On appeal, the defendant contends that the trial court erred in denying his motion for judgment of acquittal on the burglary charge since he asserts that he had a possessory interest in the property as a legal tenant. Despite his contentions, however, the record below establishes that not only was the defendant not a legal tenant of the premises his status on the premises as a guest terminated at the time he left, taking his possessions with him, when the legal resident no longer wanted him on the premises.

The evidence produced at trial established that under the terms of the lease agreement only Sandra Ashe and her three children were legal residents of the premises. (S.111-123). Sandra was the sole individual responsible for payment of the rent; although Wright on occassion would bring Mrs. Webster the money for the rent when Sandra was late with it, the record is devoid of proof that Wright actually paid the rent himself. (T.738). Although it appeared from the record that Wright stayed there on and off, it was clear that he did not live there all the time, and in fact stayed frequently with his mistress during the three years prior to Sandra's death. (T.735,875). Most significant is the fact that Wright, a guest on the premises, had

removed his clothing and tools prior to the murder. (T.746,782-783,786,840-841). The fact that Wright refused to return his key when Sandra demanded it illustrates the fact that he was no longer welcome in her home, as does the fact she changed the locks to deny him access. (T.742,787,813,857). The defendant's argument that the lock to the rear door had not been changed to deny him access fails as the record below showed that the rear door lock was jammed shut.

F.S. 810.02 defines the crime of burglary as the entering a structure with the intent to commit an offense therein unless the individual is invited to enter. Here, even if one were to assume that Wright was previously an invitee or guest of Sandra's, it is obvious that his status as such terminated when she demanded her key back and informed him personally he was no longer welcome and and told others, including her three children, he was no longer welcome. The defendant relies upon United States v. Brannan, 898 F.2d 107 (9th Cir. 1990) in support of the proposition that a wife retained actual authority to consent to the search of the marital home even after she moved out and the husband had the locks changed. This analysis ignores several key facts in Brannan including the court's finding that the wife in that case had been effectively forced out of the house due to fear of her husband and had left "a substantial amount" of her personnel posessions in the house. Id. at 108. Here, not only were the parties not married and there was no evidence whatsoever

of Wright's actual payment of rent, Wright left of his own accord and took all of his possessions with him. Furthermore, the defendant's claim flies in the face of the holding of this Court in Cladd v. State, 398 So.2d 442 (Fla. 1981) wherein the Court held that a party's martial relationship did not immunize him from burglary charges of a premises possessed solely by the wife. See also Smith v. State, 543 So.2d 325 (Fla. 3d DCA 1989) in which the conviction for burglary of a former month to month tenant who became a guest of the resident was upheld. The trial court thus acted appropriately in denying the defendant's motion for judgment of acquittal since the State presented sufficent evidence to submit the question to the jury and to sustain a verdict of guilty. The case was therefore properly presented to the jury. Downer v. State, 375 So.2d 840 (Fla. 1979).

IX

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN INSTRUCTING THE JURY ON THOSE COUNTS CHARGING BATTERY ON A LAW ENFORCEMENT OFFICER.

The defendant contends that the trial court erred in instructing the jury that Officer Peggy Gahn and Corporal Gary Farless were law enforcement officers after instructing the jury on the elements comprising battery on a law enforcement officer. He further asserts that this directed a verdict of guilty, particularly in view of the fact that the jury's question as to whether or not they would be following the law if they found the defendant guilty of simple battery went unanswered. Not only does the record belie the assertion the jury question went unanswered, it is clear that even if the trial court erred in telling the jury these individuals were law enforcement officers, any error was not only at most harmless, the issue simply was not preserved by an objection.

The record reflects that at no time during either the charge conference or during the actual reading of the instructions to the jury did the defense object to the jury instruction he now complains of. As such, the matter is not preserved for the appellate review of this Court. Harris v. State, 438 So.2d 787 (Fla. 1983), cert. denied, 466 U.S. 963, 104 S.Ct. 2181, 80 L.Ed.2d 563, habeas corpus gr'd in part, 874 F.2d 756, reh. denied 885 F.2d 877, cert. denied, 110 S.Ct. 573, 107

L.Ed.2d 568. Furthermore, the testimony of Detective Gahn, Corporal Farless, Officer Morris and Officer Ryan established that both Gahn and Farless were law enforcement officers at the time the defendant committed a battery upon them. (T.918-919,936,1109-1111).

Additionally, it is clear that the court did not direct a verdict on the battery charges where the requisite elements of: whether Wright intentionally touched them, whether Wright knew they were law enforcement officers, and whether they were engaged in the lawful performance of their duties were left to the jury's determination. Also of significance is the fact that while these other elements of the crime were disputed by the defendant, he at no time challenged whether Gahn and Farless were law enforcement officers.

Finally, the defendant claims that the instruction had great impact on the jury's finding him guilty of the batteries because a jury question as to whether they would not be following the law if they found Wright guilty of simple battery went unanswered. This is certainly not the case. First of all, the record below reflects the question was answered with the consent and full participation of the defense. (R.1458). It is also clear on the face of the record that the jury was appropriately instructed that in considering the evidence they should consider the possibility that although the evidence may not convince them

that the defendant was not guilty of the crime charged, there may be evidence that would support a finding of guilt on a lessor charge. (T.1421). Therefore, the jury was not forced into finding the defendant guilty of battery on law enforcement officers. As a result, even if the trial court should not have instructed the jury that Gahn and Farless were law enforcement officers, any error was harmless.

X

THE TRIAL COURT WAS NOT PREJUDICED AGAINST THE DEFENDANT SO AS TO DEPRIVE HIM OF EITHER DUE PROCESS OR A FAIR TRIAL.

The defendant contends that he was denied both a fair trial and his right to due process since the trial court was prejudiced against him as a result of what he terms "pre-trial inflammatory accusations" against him. A review of the record, however, establishes that the claim is totally without foundation.

The defendant erroneously states he was unrepresented at the March 26, 1987 hearing claiming Lorenzo Williams was not present and Linneas Finney was not appointed co-counsel until three months later. Nevertheless, it is clear that Mr. Finney was not only an associate at Mr. Williams law firm, he attended the March 26 hearing on Williams' behalf. In fact, it is apparent that the court and the prosecutor recognized that Mr. Finney was appearing on the defendant's behalf for Mr. Williams as did Mr. Finney himself who stated he was appearing on behalf of Williams. Also significant is the fact that the defendant, who was present at the hearing did not indicate any dissatisfaction with Mr. Finney appearing on his behalf.

Furthermore, the defendant ignores the actual events of the hearing in which, for no reason, the defendant interrupted

the proceedings and walked out of the courtroom.(T.26-27). The trial court declined to attempt to stop him and the prosecutor noted on the record that Wright had been a problem in the jail and was a potentially dangerous individual. (T.27). The trial court added that it was returning Wright to the jail since it felt that Wright might prove to be a problem in the holding cell. (T.27).

Significantly, no objection to either the prosecutor's or the trial court's remarks was made by the defense. This failure to object naturally waives the right to complain on appeal. Furthermore, it is interesting to note that although this hearing occurrred on March 26, the defendant's trial did not commence until September 1, 1987. Although the defendant had a period of some six months to do so, he at no time moved to recuse Judge Geiger because of the judge's so-called bias against him. Fla.R.Crim.P. 3.230 specifically provides that "...the defendant may move to disqualify the judge assigned to try the cause on the grounds: that the judge is prejudiced against the movant...". The rule further provides that a written motion for recusal must be filed no less than ten days before the case is called for trial.

It is abundantly clear that the defendant did not move, either in writing or orally, to recuse the trial judge because no grounds to do so existed. His failure to adhere to the

procedural requirements of this Court bars his claim on appeal since his claim amounts to a sandbagging of the lower court which was denied an opportunity to consider a proper motion. See e.g.: Ferry v. State, 507 So.2d 1373, 1375 (Fla. 1987).

Finally, the defendant's argument also ignores the obligation of the judge to conduct the trial with a view to its orderly progress. This, of necessity, includes concern for the safety and well-being of all participants. In this case, the defendant, who stood accused of first degree murder and multiple batteries on law enforcement officers, announced for no reason that "I don't even want to be bothered with people there no more. (indiscernible) " before marching from the court room. (T.26). He did not respond when the trial court attempted to speak with him and his manner and actions indicated to the court that the wisest course would be to transport him back to the jail. It is inappropriate for the defendant to attempt to second-guess the court's actions at this stage of the proceedings, particularly when he did not object or seek a substitute judge. Furthermore, it is also apparent that defense counsel also recognized that Wright was "difficult to manage" since counsel was himself trying to "hold this client's hand without getting [his] nose punched." (T.43). Therefore, the defendant cannot prevail on this issue.

XI

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE WHEN THE FACTS SUGGESTING DEATH WERE SO CLEAR AND CONVINCING NO REASONABLE PERSON COULD DIFFER.

The defendant, relying upon Tedder v. State, 322 So.2d 908 (Fla. 1975), argues that the trial court erred in imposing the death penalty after the jury recommended a life sentence. In making this assertion, he relys upon a long list of mitigating factors which he asserts could have formed the basis of the jury's recommendation. A review of the record in this case establishes that these factors were either controverted by other credible evidence presented during both phases of the trial or were worthy of very little weight. The mere existence of any mitigating factor does not, as the defendant claims, render a jury override improper. Pentacost v. State, 545 So.2d 861, 863, fn. 3 (Fla. 1989).

For example, while the defendant did express some degree of remorse for his actions, the depth and sincerity of that sentiment is questionable, particularly when viewed in light of his proven pattern of dealing with problems that he experienced with the women in his life. His past record and past behavior, both with another victim and with Sandra Ashe prove that the defendant has a habit of shooting down women he has relationship problems with. (S.288-290; T.1483-1486). Wright's remorse must

also be viewed in light of the circumstances of the actual shooting. (T.792-797,828-830). Also of importance in the analysis is the fact that Wright never admitted his actions, testifying that the gun just went off of its own accord and claiming that everyone else lied about the events of that night. (T.1652, 1662-1663).

The defendant also asserts the jury could have placed great weight on his good employment history because his employer testified that he would take him back but for the trial. However, this factor was flatly controverted in light of the actual testimony presented. Rick Ketchum, the defendant's employer at the time of his arrest, testified that Wright worked for him only one week prior to his arrest. (T.1604,1606). This would hardly give Mr. Ketchum an opportunity to determine whether Wright was a good worker. Interestingly enough, the individual who employed Wright for the longest period since his last release from prison, Mr. Edge, did not testify. His daughter Tammy did however, testifying that Wright drank on the job and in fact had an accident in one of her father's trucks because of it. (T.1241).

The defendant also asserts that the jury could have reasonably placed great weight on the fact that two of Wright's great aunts were confined in mental institutions. Little tesimony was presented on this point; in fact, the only individual who

mentioned it was the defendant's mother who was present to plead for her son's life. The defendant, at no time, mentioned this family history of mental illness to his own psychiatrist. (T.1689). In fact the psychiatric testimony and reports considered by the trial court established that Wright had no mental illness which would have affected his actions at the time of the crimes for which he was being charged.

The defendant also argues in mitigation, that he provided for Sandra and the children. This factor did not support a recommendation of life in view of the fact that again the only testimony as to this fact came from Wright and his family. No concrete evidence of this fact was produced at trial and is hardly credible in view of the fact that Ashe and her children received substantial amounts of government aid. (T.735,958).

The record also fails to substantiate a finding in support of the fifth factor, that Wright's brother died in a shooting. Not only did Wright never even mention this fact to his psychiatrist, the record is devoid of any testimony as to how this incident, which occurred about ten years before,[15] even impacted upon him. The same is true of factor six, that Wright's father left when Wright was ten years old.

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[15] Wright's mother, when testifying about it, could not even remember the exact year her son had been killed.

Wright's history of substance abuse, although testified to at length by the defendant and certain other witnesses, did not affect his behavior on the night in question. The eyewitnesses to the crime, one of whom was Wright's natural daughter, testified that Wright was not drunk at the time; his actions as shown by their testimony were those of a rational, sober individual. (T.791-834). Additionally, Wright's description of the drugs he consummed did not comport with description of those drugs provided by the manufacturer of that drug. His own expert admitted that if he consummed the quantity and nature of substances he claimed to have on the night in question he could not have acted in the manner described by the eyewitnesses. It is thus clear that this factor was not proven.

The defendant also places great import on other nonstatutory mitigating factors on which he claims the jury could have based its recommendation. However, as the following analysis shows, these factors were also not proven. The defendant first points to the fact he suffered abuse from other children because he was in special education classes. The record contradicts that claim since he was not "abused" but was, at most, he was teased about this. No testimony was presented as to how that affected him later in life; Wright himself did not relate this as being a problem to Dr. Ebalo. (T.1680). The defendant also asserts the jury could have placed great emphasis on his prior mental history and headaches. However, the record establishes that Wright

himself did not find these things to be significant since they were never mentioned to his treating physician.(T.1680,1696,1758,1771). No testimony was introduced to establish how these headaches even related to the crimes of which Wright was convicted. Additionally, no records were found to substantiate Wright's claim of prior treatment as a child for mental illness. Dr. Ebalo testified that although she searched for the records of Wright's alleged treatment at the mental health center after she learned of it from Wright's mother, she was unable to locate any records relating to him even though the center retained records of former patients. (T.1696).

Finally, Wright claims that his mental state due to the termination of his family relationship with Sandra and the children was a mitigating factor which the jury could consider. However, this factor, which was never argued during the penalty phase, is totally unfounded. The defendant bears the burden of identifying, with specificity,the nonstatutory mitigating factors on which he seeks to rely. Lucas v. State, 15 FLW S473, 475 (Fla. 1990). The facts of this case are simply not comparable to those of Cochran v. State, 547 So.2d 928 (Fla. 1989), relied upon by the defendant, as the evidence shows that Wright left the family home of his own accord.

The foregoing analysis clearly establishes that the sinsufficient mitigating factors existed to outweigh the numerous

weighty aggravating facors found to exist. The presence of any mitigating factor does not bar an override of the jury's recommendation of a life sentence. Burch v. State, 522 So.2d 810 (Fla. 1988).

The defendant, relying on Garron v. State, 528 So.2d 353 (Fla. 1988) and similar cases, asserts that death is not the appropriate penalty because "the instant case involved a highly emotional domestic dispute between [Wright] and Sandra Ashe which resulted in death." (Defendant's brief page 60). His reliance on these cases is misplaced since in those cases death resulted immediately following or during a domestic dispute. Here, the defendant voluntarily terminated his relationship with Ashe and did not have any contact whatsoever with her for several days. On the evening of Sandra's murder, the parties had no argument, or for that matter conversation, before Wright broke the doors down and began shooting. There was no immediate heated confrontation.

The defendant also asserts that the jury could have found several nonstatutory mitigating circumstances despite the fact that the trial court found that they did not exist. The record, however, supports the trial court's determination since no credible evidence established that the defendant was either under the influence of extreme mental or emotional disturbance or unable to appreciate the criminality of his conduct. The events of the crime itself establish that Wright was fully under control

at the time. Furthermore, the defendant is incorrect in his assertion that Dr. Ebalo testified that he was, in fact, under the influence of disturbance at the time. In reality, Dr. Ebalo testified that Wright was only possibly under the influence of mental or emotional disturbance at the time of the murder.(T.1697). Additionally, all of Dr. Ebalo's findings and opinions were based largely upon what Wright told her; given the falsities included in that information, as well as, the information ommitted, it is clear that even Dr. Ebalo found those opinions to be suspect. (T.1706,1709,1714-1715,1739).

Furthermore, the defendant's assertion that he was unable to appreciate the criminality of his conduct is also highly suspect given the testimony presented at both phases of the trial regarding his actions. The fact that Wright testified at trial that he could not recall the shooting is ludicrous, particularly in view of the report prepared by James Stevens which contained specifics of the crime provided by Wright. Nor is the defendant's claim of impairment substantiated by Dr. Ebalo's assessment since she testified that the fact Wright related specifics of the crime to Stevens would have affected her opinion. (T.1706).

Finally, it is clear that ample evidence to support the aggravating circumstances was proven at trial.[16] Since the aggravating factors so clearly and convincingly outweighed the mitigating factors in this case so that no reasonable person could differ, the trial court properly overrode the jury recommendation and imposed the death penalty. Echols v. State, 484 So.2d 568 (Fla. 1985), cert. denied,479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986). Here, as in Francis v. State, 473 So.2d 672 (Fla. 1985), cert. denied, 474 U.S. 1094, 106 S.Ct. 870, 88 L.Ed.2d 908 (1986), the jury's recommendation was the result of defense counsel's impassioned closing argument. (T.1853). Since nothing was presented in mitigation to provide reasonable support for the jury's recommendation, the trial court properly imposed the death penalty. Brown v. State, 473 So.2d 1260 (Fla. 1985), cert. denied, 474 U.S. 1038, 106 S.Ct.607, 88 L.Ed.2d 585 (1986).

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16 The facts establishing these factors will be fully discussed in Issue XVII infra.

XII.

THE TRIAL COURT DID NOT CONSIDER NONSTATUTORY AGGRAVATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY.

On appeal, the defendant asserts that the trial court, over its objection, improperly considered nonstatutory aggravating circumstances in reaching its decision imposing the death penalty. A review of the record, however, reveals that not only was no proper objection made by the defense so as to preserve the matter for the appellate review of this Court, the matters complained of were appropriate for the trial court's consideration.

In its sentencing order, the trial court noted that it considered evidence relevant to the nature of the crime and the character of the defendant, including his past record, a PSI report, and several psychiatric evaluations.(R.2069-2070). The defendant asserts that in doing so, the trial court improperly considered evidence urged upon it by the prosecutor which was not contemplated by F.S.921.141(5). He also claims that he objected to the consideration of: his 1971 larceny conviction, the facts surrounding his 1973 aggravated assault conviction, his escape conviction, and the PSI report.

The record establishes, however, that at no time during the prosecutor's argument did the defense object; in fact, the

most the defense did was to state that it felt it was "inappropriate" for the State to urge the consideration of these matters. Defense counsel's belief that something is inappropriate does not rise to the level of a proper objection that preserves an issue for the review of this Court. Riley v. State, 366 So.2d 19 (1978), app. after rem., 413 So.2d 1173, cert. denied, 103 S.Ct. 317, reh. denied, 103 S.Ct. 773 (1979).

It is clear that the trial court may consider evidence not submitted to the jury in sentencing. Spaziano v. State, 433 So.2d 508 (Fla. 1983). The trial court's consideration of the defendant's prior convictions for aggravated assault was appropriate. Id. Also see: Lemon v. State, 456 So.2d 885 (Fla. 1984). Although the facts underlying those charges were argued, the sentencing order reflects that the trial court limited itself to the conviction itself. Similarly, the court did not consider the fact the defendant should have been prosecuted for possession of a firearm while a convicted felon. Dobbert v. State, 409 So.2d 1053 (Fla. 1982).

The defendant's objection to the court's consideration of the PSI and psychiatric reports is unfounded since they were disclosed to him in advance of sentencing. Finally, the trial court's order shows that it found aggravating circumstances based upon the evidence presented fror the jury's consideration. (R.2070).

XIII.

THE DEFENDANT WAS NOT DENIED HIS RIGHTS OF CROSS-EXAMINATION AND CONFRONTATION DURING SENTENCING WHEN HE DID NOT OBJECT TO THE PROCEEDINGS AND FULLY PARTICIPATED IN THEM.

On appeal, the defendant asserts that he was denied his rights of cross-examination and confrontation during the sentencing hearing with regard to the prosecutor's argument to the trial court. As the defendant concedes, he failed to make any objection to the prosecutor's remarks. That fact alone prevents the Court from reaching the merits of the issue on appeal. United States v. Phillips, 664 F.2d 971 (11th Cir. 1981), cert. denied, 457 U.S. 1136, 102 S.Ct. 2965 (1981); Duest v. State, 462 So.2d 446 (Fla. 1985). The defendant's argument also ignores the wide latitude that is granted both parties with regard to argument. Furthermore, the defendant does not and cannot argue that he was prejudiced as a result of the prosecutor's use of this material since he was aware of it prior to trial and fully explored the matters raise therin through his own expert's testimony. Thus, he may not prevail.

XIV.

THE DEFENDANT WAS NOT DENIED HIS RIGHT TO BE PRESENT AT CRITICAL PHASES OF THE TRIAL.

The defendant claims on appeal that he is entitled to a new trial because he was denied the right to be present at several pretrial hearings. The record clearly reflects, however, that in the instances complained of the defendant either voluntarily absented himself from the proceedings, or his counsel elected to proceed without him at hearing during which he would not, in any case, have been able to participate.

In the first instance complained of the record establishes that Wright, without any perceivable reason, got up during a pretrial hearing[17] stated his unwillingness to talk to anyone, and stalked out of the court room. His decision to voluntarily absent himself does not entitle him to a new trial. Herzog v. State, 439 So.2d 1372 (Fla. 1983). The defendant's argument that Mr. Finney was an "interloping" lawyer and that the comments of the prosecutor and the court constituted improper nonstatutory aggravating circumstances are dealt with elsewhere.

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17 The matters pending at this hearing were the defendant's motions for a psychiatric evaluation for sanity and for appointment of an investigator, neither of which were crucial matters.

The defendant next asserts that his own counsel prevented him from being present at the April 23, 1987 hearing and June 8, 1987 pretrial conference. This argument overlooks the fact that the defendant is not guaranteed the right to be present at noncrucial hearings prior to trial and also attempts to circumvent trial strategy choices of counsel who may wish to deal with administrative matters alone. See: Junco v. State, 510 So.2d 258 (Fla. 3d DCA 1987). The matters dealt with during these hearings concerned administrative or procedural issues and legal argument, all matters in which, even if he were present, the defendant could not participate. Thus, even if he should have been present, he is unable to make the requisite showing of prejudice so as to justify a new trial. Roberts v. State, 510 So.2d 885, 890-891 (Fla. 1987); In re Shriner v. Wainwright, 735 F.2d 1236, 1241 (11th Cir. 1984).

The defendant's argument that trial counsel improperly waived his right to silence by "agreeing" to a psychiatric evaluation is unworthy of discussion as the defense sought a psychiatric evaluation of the defendant as to his sanity at the time of the offense and of his competence to stand trial. (T.29). This does not amount to a waiver of his right to remain silent.

The record also disputes the defendant's claim that trial counsel "vilified" him, prejudicing him in the eyes of the court, since it clearly establishes that defense counsel vigorously

defended him throughout the proceedings. His claim that defense counsel's admission that he was in reality a difficult client somehow prejudiced him is mere conjecture.

XV.

THE TRIAL COURT DID NOT ERR IN IMPOSING ITS SENTENCE ON THE BURGLARY CONVICTION.

The defendant contends that the trial court erroneously imposed a consecutive life sentence for his burglary conviction because it neither utilized a guidelines scoresheet nor entered a written order justifying entry of a departure sentence. The trial court was, however, correct in imposing a departure sentence.

The trial court apparently did not utilize a sentencing guidelines scoresheet in this case since the primary offense at conviction, first degree murder, is exempted from guidelines calculation. Fla.R.Crim.P. 3.701(c). Nevertheless the trial court did not err in entering a departure sentence as to the burglary conviction, since such a sentence was justified by the first degree murder conviction which would be unscored. The sentence was further validated by other facts set forth in the written sentencing order signed by the trial court. Also significant in the entry of a departure sentence is the defendant's history of violent behavior and the long list of offenses not considered in aggravation at trial. Since the trial court's findings of fact were entered at the time of the pronouncement of the sentence, the matter need not be remanded for resentencing.

XVI.

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

In this appeal, the defendant contends that the death penalty imposed by the trial court is unconstitutional both on its face and as applied. However, the arguments raised by him have been both addressed by and disregarded by this and other courts. The defendant simply may not prevail.

The contention that Florida's death penalty is unconstitutional has been rejected both by this Court and the United States Supreme Court. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 913 (1976). See also: Diaz v. State, 513 So.2d 1045 (Fla. 1987); Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Claims such as the defendant's alleging that Florida's death penalty has been imposed in a racially discriminatory manner have also been rejected. McClesky v. Kemp, ___U.S.___, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); Stewart v. Dugger, 847 F.2d 1486 (11th Cir. 1988).

F.S. 921.141 provides, in essence, a trifurcated proceeding in which the jury, trial court, and finally this Court determine whether to impose a life or death sentence based upon aggravating and mitigating factors. See: Trawick v. State, 473

So.2d 1235 (Fla. 1985); Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986). The defendant is not correct in claiming there is no reweighing of the factors in the appellate process.

The defendant also asserts that the application of HAC and CCP as aggravating factors is similarly unconstitutional. This claim has also been rejected. Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984); Smalley v. State, 546 So.2d 720 (Fla. 1989); Maynard v. Cartwright, ___U.S.___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Nor does the use of Florida's standard jury instructions result in arbitrary and discriminatory verdicts. Lemon v. State, 456 So.2d 885 (Fla. 1984); Johnson v. State, 438 So.2d 774 (Fla. 1983). The standard instructions do not, as the defendant claims, minimize the importance of the jury in sentencing. Stewart v. Dugger, 847 F.2d 1486 (11th Cir. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988).

The defendant contends that a nonunanimous verdict for death is unconstitutional. This claim has also been adversely decided by this Court. Alvord v. State, 322 So.2d 533 (Fla. 1975); Hildwin v. Florida, supra. Although this Court has had ample opportunity to recede from its position on this issue, it has declined to do so. James v. State, 453 So.2d 786 (Fla. 1984); Fleming v. State, 374 So.2d 954 (Fla. 1979).

Finally, the defendant asserts that the trial court, defense counsel, and the procedural requirements adhered to at his trial all contributed to the unconstitutional application of the death penalty. This argument ignores several facts. The necessity of a contemporaneous objection as a matter of procedure to preserve issues for appellate review applies to all matters other than fundamental error. Even constitutional rights may be waived by a defendant. Procedural rules are absolutely necessary for the orderly progress of trial. The defendant also asserts that the appointment of trial counsel for criminal cases possibly involving the death penalty is unconstitutional. However, not only do the courts appoint only the most experienced attorneys for these cases, all types of financial resources are made available to them to prepare for trial. These individuals are simply not ignorant of the law or ineffective as the defendant claims. The Constitutions of the United States and this State do not ensure a criminal defendant a perfect attorney; such an individual has yet been found to exist. If we are to buy the defendant's argument, we would have to postpone all criminal trials until a perfect counsel and trial court are developed.

XVII.

THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST IN THIS CASE ARE CONSTITUTIONAL.

On appeal, the defendant alleges that the three aggravating factors found to exist in his case are unconstitutional. As both the preceeding argument and the following analysis establish, the factors are constitutional.

Although the defendant asserts that the use of the fact that a murder occurs during the course of another dangerous felony to aggravate the crime is unconstitutional, it is clear that this Court has rejected his claim. Mills v. State, 476 So.2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The defendant is simply incorrect in stating that this factor improperly creats "a presumption of death for the least aggravated form of first degree murder" and turns the lack of intent into an aggravating factor. The mere finding of this factor does not necessitate the imposition of the death penalty. Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir.1989).

The defendant also claims that the aggravating factor of HAC does not serve the channelling and limiting function required by the Constitution. This claim has also been considered by this and other courts and has been soundly rejected. See: Smalley v.

State, 546 So.2d 720 (Fla. 1989). The record herein provides ample support for the finding of this factor.

> The victim was shot two times in the back, once in the arm and chest and once in the side and neck, with a twenty-two caliber rifle while she tried to escape from the defendant who had just broken into her home while armed with that rifle. Defendant shot her first two times, then as she tried to open the front door of her house to escape, he shot her two more times. None of these wounds rendered her immediately unconscious, and she heard each of the four gunshots fired at her. ...She remained conscious, and the defendnt approached her and rolled her over with his foot so he could see her face and smiled. (S.2071).

The defendant also challenges the constitutionality of the aggravating factor of CCP which he asserts is properly limited to execution style or contract killings. This aggravating factor has been found to be both Constitutional and applicable to other types of crimes. Harich v. Dugger, 844 F.2d 1464, (11th Cir. 1988), cert. denied 109 S.Ct. 1355, 103 L.Ed.2d 822 (1989); Rutherford v. State, 545 So.2d 853 (Fla. 1989), cert. denied, 110 S.Ct. 353 (1989). In this case, the facts adduced at trial establish that the murder was cold, calculated, and premeditated. These include, among others, the fact that the defendant procured a weapon prior to his arrival at the house, fled the scene after removing evidence that would implicate him, threatened the victim with death several days before the murder, and told her, after shooting her twice, that that what would teach her not to open

the door for him when he told her to, before shooting her two more times. (R.2072).

Finally, the defendant challenges the aggravating factor of prior convictions for violent felonies. His argument apparently centers around the the use of his prior juvenile felony in aggravation. However, this Court, in Campbell v. State, 15 FLW S342 (Fla. June 14, 1990), was faced with the same contention and rejected it. Furthermore, in that case, Wright was not treated as a juvenile because of his already extensive record. Additionally, even if this adjudication was improperly considered, the defendant's criminal record provided an ample number of prior violent felonies to satisfy this aggravating factor. See: Daugherty v. State, 533 So.2d 287 (Fla. 1988), cert. denied, 109 S.Ct. 402, 102 L.Ed.2d 390 (1988).

CONCLUSION

Based upon the foregoing analysis, the Appellee, **the State of Florida**, hereby requests that this Court affirm the convictions and sentences imposed by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELEE** was furnished by mail to **JEFFREY L. ANDERSON**, Assistant Public Defender, 15th Judicial Circuit of Florida, 301 North Olive Avenue, 9th Floor, West Palm Beach, FL 33401 on this 19th day of November 1990.

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