IN THE FLORIDA SUPREME COURT

SAMUEL JASON DERRICK,

Appellant,

v.

CASE NO. 73,076

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

BRIEF OF APPELLEE

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(R. 698, 699, 701). He was placed on Navane and Prolixin antidepressant or antipsychotic drugs. (R. 699). He admitted having depression. (R. 699). He had spent over six months in jail before giving his testimony and could not remember the exact date upon which Appellant made his confession. (R. 701). He admitted having been twice convicted of a felony. (R. 702). A letter, written by James to an investigator from the public defender's office, was introduced which requested help in getting out of jail. (R. 704). James further admitted that he was in jail for attempted murder, felony possession of a firearm and arson. (R. 706). Counsel effectively made it sound almost ludicrous that James would come to court merely to clear his conscience without expecting any concession or bargain for his upcoming trial. (R. 706, 707, 710). Finally, it was established that other inmates were present when Appellant made his confession. (R. 708).

The court did not instruct the jury that lack of remorse was an aggravating factor nor did the prosecutor argue that James' testimony demonstrated Appellant's lack of remorse. (R. 712, 797).

Just before Appellant was about to take the stand, defense counsel reminded the judge that Appellant was still shackled. (R 509). During jury selection, defense counsel also reminded the court to allow the jury to leave ahead of Appellant so that they won't see him in manacles. (R. 109). Moreover, defense counsel must have been satisfied that the shackles were hidden from the juror's view inasmuch as the record does not reflect that counsel

ever raised any further objections to the shackles. (R. 1131). The prosecutor told the court that Appellant had a charge of introducing contraband and that he had a razor blade in his shoe. (R. 1130).

At the beginning of jury selection, the judge asked the panel whether they knew anything about the murder. The unanimous reply was negative. (R. 4). Further into the process, several prospective juror's remembered having read something about the incident but all the jurors indicated that they would have no problem setting aside whatever they had read. Moreover, the prosecutor correctly reminded the panel (and those who would become future panelists) that the judge would instruct them to set aside whatever they might have read or talked about and to decide the case based upon what was to be heard in the courtroom. (R. 37-38). Even future juror Marple had never heard of Rama Sharma before the trial. (R. 107). Another panelist, Mr. Chiaramonte, was excused for cause because he was personally familiar with Rama Sharma, had read about his murder, and felt that he could not be a fair and impartial juror. (R. 113, 114, 128). After all the juror's had been picked, the judge instructed them that they were not to read any newspaper accounts of the trial, nor listen or talk to anyone else who may comment about the trial. (R. 191). During the trial, the judge reminded the juror's not to read any newspaper articles about the case nor to talk to anyone about it. (R. 517). Finally, at the close of all the evidence, and just before the parties were about to conduct closing argument, the juror's were asked whether any of

them had read anything about the trial in the newspapers. The resounding response was "NO". (R. 575).

Defense counsel fully cross-examined witness Poehl about whether he had ever seen anyone with a skull's head knife in the Moon Lake General Store, and, thereafter, concluded his examination. (R. 283). Later on during trial, defense counsel connected up such testimony with that of David Lowry's. (R. 315-316, 345-346).

During the cross-examination of David Lowry, the prosecutor advised the court that some of Lowry's prior convictions were obtained while he was a juvenile. (R. 313). On further cross-examination, defense counsel demonstrated that David Lowry had an arguably poor memory. (R. 332, 335-336, 348-351).

Appellant's confession was recounted by various witnesses nine times throughout the course of the trial. (R. 307, 311, 339, 374, 376, 377-378, 413, 417, 418-420, 430).

At the beginning of the proceedings, the court instructed the jury that it was his responsibility to tell them which law applies, that the duties of the court and jury do not overlap, and that it was their responsibility to decide the facts of the case. (R. 215, 216). Naturally, the court told the jury that what the lawyers say is not evidence. (R. 216). At the close of the guilt phase, the court further instructed the jury that it was their duty to determine if the defendant is guilty or not guilty in accord with the law and that it was his job to determine the proper sentence. (R. 664, 665). Naturally, as Appellant has already noted, the court reminded the jury that it

was appropriately his job to tell them what the law is. (R. 651, 800). The prosecutor further argued to the jury that the judge was going to tell them that it was their duty to determine if the defendant was guilty and that it was the judges job to determine what the proper sentence would be if the defendant is found guilty. (R. 651)

As for the penalty phase instructions, the judge gave the requisite cautionary instruction that he will tell the jury what the law is. (R. 800). Moreover, the judge properly instructed the jury on how to weigh and consider the aggravating and mitigating factors. (R. 822-824).

The prosecutor, during the course of his closing argument, spoke directly about the elements of premeditated murder. (R. 601, 602). Shortly thereafter, he made it clear to the jury that they had a choice of how to convict Appellant of first degree murder; either premeditated or during the course of a felony. (R. 603, 605).

Appellant admitted to David Lowry that the killing of Rama Sharma was "easy". (R. 307). Craze's only threat to Rama Sharma was that he would "have the health department in here to close it (the Moon Lake General Store) down". (R. 346). Appellant admitted that he stabbed Rama Sharma in order to "shut him up". (R. 374). Appellant had been in Sharma's store before and had asked him for a job on a previous occasion. (R. 346, 347). Appellant was not the direct recipient of any of his father's "child abuse", inasmuch as the only incident so testified to at trial appears more like adolescent roughhousing than deliberate

punishment. (R. 736) He moved in with "Joe" (Harry Martin) at his own pleasure. (R. 737) He always had enough food and clothing. (R. 739) He voluntarily left home and lived on his own. (R. 740) His father gave him love and money to buy things, as best he could. (R. 741) His father testified that he never abused either Appellant or his brother Travis. (R. 742) Appellant's father took him on hunting and fishing trips. (R. 743) He continued to have a good relationship with Mr. Martin after Martin got out of jail, and even borrowed money from Martin. (R. 751) He didn't have to pay rent in his mother-in-law's home at the time of the murder. (R. 763, 764) He and his wife got free, federally funded child care for their infant. (R. 765) He was loved by his wife and her family right up to the time of the murder. (R. 768).

At the sentencing hearing, Appellant regaled the court with a detailed summary of the evidence offered in mitigation. (R. 845-847, 852-853). The judge indicated that he carefully considered the mitigating circumstances. (R. 855).

SUMMARY OF THE ARGUMENT

There was no discovery violation because the prosecution did not call Randall James to the witness stand to testify during the guilt phase of Appellant's trial. That Appellant chose not to take the witness stand cannot be blamed on the state. Appellant was given an opportunity to depose Randall James, after a hearing. Accordingly, it cannot be argued that he was prejudiced by the prosecutor's timely disclosure of Randall James as a rebuttal witness.

Appellant has not demonstrated any right to discovery of penalty phase witnesses. Even so, by the time Randall James was called during penalty phase, he had been deposed by Appellant. Juror Marple's comments to the media regarding lack of remorse are not to be considered when passing upon the validity of this judgment and sentence.

There is no evidence that the jury ever saw Appellant's shackles at any time during trial. Effort was made to hide them from the jury's view. Accordingly, there are no grounds upon which Appellant can argue that his shackles denied him a fair trial.

Upon inquiry by the judge at the close of all the evidence, the jury indicated that they had not read any newspaper articles about the trial. The mere existence of media coverage is an insufficient reason to grant Appellant a new trial, especially where the record affirmatively reflects that the jury was not exposed to any news stories. Because Appellant can show no prejudice, his contentions are meritless.

Appellants right to cross-examine state witnesses are not unlimited and is subject to a harmless error analysis. Appellant's cross-examination of Harry Lee called for inadmissible hearsay and was appropriately excluded. Appellant fully cross-examined witness Poehl about skulls head knives and cannot be heard to complain that the judge infringed upon such examination in any way. The trial court properly prevented Appellant from cross-examining David Lowry about his past convictions inasmuch as Appellant was not prepared to confront Lowry with certified copies of his prior convictions. Such an evidentiary ruling was not improper inasmuch as the judge followed well settled evidentiary principles. The court properly restrained Appellant from forcing the state's pathologist to give his opinion regarding a "frenzy" killing, especially since such an opinion was beyond the scope of his expertise and beyond the scope of the direct examination. Finally, Appellant's proposed cross-examination of Detective Vaughn would have been improper because it would have unduly exposed the jury to the collateral and irrelevant matters that are the subject of suppression hearings.

The prosecutor's guilt phase closing argument remark that they should disregard the consequences of their verdict at that point was not incorrect and, at best, constitutes harmless error inasmuch as both he and the judge adequately instructed the jury about the law and the juror's fact finding duties. Similarly, the prosecutor's penalty phase comment is equally harmless in light of the court's previous and subsequent jury instructions.

It was not error for the trial court to have allowed the jury to consider pecuniary gain and murder committed during the course of a robbery, together, as aggravating circumstances. Recent decisional law indicates that such is proper where, as here, the judge did not "double up" those findings when he sentenced Appellant to death.

The trial court's instructions on the aggravating factors of cold, calculated and premeditated and heinous, atrocious, or cruel are not unconstitutionally vague. Recent decisional law has already settled his issues.

The trial court's finding of cold, calculated and premeditated, heinous, atrocious, or cruel, and that the murder was committed in order to avoid arrest are amply supported by the facts of this case. The judge need not have listed every mitigating fact he rejected upon sentencing Appellant to die in the electric chair. Just because Appellant disagrees with the court's findings does not mean that this court must overturn them as being wrong.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT'S HOLDING OF AN ADEQUATE RICHARDSON HEARING WAS EVEN NECESSARY WHERE THE STATE'S RECENTLY DISCLOSED REBUTTAL WITNESS DID NOT EVEN TESTIFY DURING THE GUILT PHASE OF APPELLANT'S TRIAL.

Appellant's first point on appeal is that the trial court failed to hold a Richardson hearing[1] during the guilt phase of this trial when the prosecutor notified defense counsel that he intended to call Randall James as a rebuttal witness. It is Appellant's contention that he was prejudiced because of the allegedly late notification inasmuch as he elected not to take the witness stand. Appellant fails, at the very threshold level, to make out any case for "prejudice" or that a Richardson violation had occurred. Randal James didn't testify during the guilt phase of the trial.

Even a cursory glance at the vast number of cases dealing with Richardson issues displays one common theme; the dilatory party actually attempts to call the undisclosed or belatedly disclosed witness to the stand. During the guilt phase of the trial in question, Randall James was never called by the state to testify against Appellant. Appellant has not been able to cite a single decision wherein the complaining party was ever found to be prejudiced by the opposing parties "non-calling" of a witness

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[1] Richardson v. State, 246 So.2d 771 (Fla. 1971)

who's name has not previously been disclosed during the course of discovery.

Appellant's claim of reversible prejudice as a result of the mere disclosure and non-testimony during the guilt phase is akin to the same meritless argument as posed to the Supreme Court in McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967):

> The Petitioner does not explain precisely how he thinks his Sixth Amendment right to confrontation and cross-examination was violated by Illinois' recognition of the informer's privilege in this case. If the claim is that the State violated the Sixth Amendment by not producing the informer to testify against the petitioner, then we need no more than repeat the Court's answer to that claim a few weeks ago in *Cooper v. California*; "Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront a witness against him, because the State did not produce the informant to testify against him. This contention we consider absolutely devoid of merit." (Citations omitted)

Sub judice, what right can Appellant claim was violated during the guilt phase if the State did NOT call the very witness he has so vehemently denounced as the most heinous of discovery violations? That Appellant chose not to take the witness stand is not the fault of the state.

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved. (Citation omitted)

McGuatha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). If Appellant was afraid of the nature of the rebuttal testimony because it tended to negate the version of the crime to which he might have testified, then he can complain of no more "prejudice" than any other defendant who is subject to impeachment by rebuttal testimony. After all, Appellant is not entitled to lie. If he complains that he did not have an adequate opportunity to thoroughly investigate James's background and all the circumstances surrounding his receipt of the confession, then he has only too look at those decisions that, in Florida, require no more "due process" than granting an aggrieved party the opportunity to depose the recently disclosed witness. Stone v. State, 518 So.2d 342 (Fla. 1st DCA 1988); Wilkerson v. State, 461 So.2d 1376 (Fla. 1st DCA 1985); Ross v. State, 474 So.2d 1170 (1985). Obviously, Appellant had the full opportunity to depose Randall James and was indeed afforded a transcript of his testimony. (R. 710). Accordingly, Appellant can neither claim discovery violation nor prejudice.

Even if this Court were to further consider this issue despite its nonexistence, Appellant cannot further complain that the trial court's treatment of the situation was inadequate. Under Lucas v. State, 376 So.2d 1149 (Fla. 1979), he had the duty to object to the adequacy of the court's Richardson hearing if indeed he felt it did not fully address the states culpability. That he failed to lodge any sort of objection to the adequacy of the trial court's bench side discovery conference entitles him to have this issue summarily disposed of for having failed to preserve it for appellate review. Lucas, at 1151, 1152.

If this Court is not satisfied that Appellant has failed to present or preserve any kind of Richardson issue, Appellee, without waiving any of the foregoing arguments, presents the following analysis for consideration.

Though Appellant argues that the court's inquiry was not adequate or that it made no determination concerning prejudice to his case or fault on the part of the prosecutor, he fails to understand that a "Richardson hearing" does not necessarily entail some kind of grand and probing inquest complete with sworn testimony and copious factual findings. Failure to make formal findings is not error so long as the record supports a conclusion of no prejudice. Stone, at 659, Wilkerson, at 1379; Baker v. State, 438 So.2d 905 (Fla. 2d DCA 1983); Cauley v. State, 444 So.2d 964 (Fla. 1st DCA 1984). Moreover, the trial court need not even label the inquiry a Richardson hearing nor must he or she conduct any sort of mini trial before passing upon the matter. Stone. A conference will suffice. Loren, at 347.

Sub judice, the trial court heard from the prosecutor why he did not notify defense counsel about James's potential testimony at an earlier time. (R. 511, 514) He listened to defense counsel's arguments concerning prejudice and counsels ethical obligations to their client, Mr. James. (R. 512, 513, 521) The judge even heard Mr. McClure say that "[W]e're not alleging any discovery violation, because if you don't know about a witness, you can't list them". (R. 522) The court heard from both sides concerning prejudice. (R. 514, 515, 522, 523) The court undertook to relieve the public defender from representing

Randall James so that any conflict would be resolved. (R. 528) In light of the 30 plus record pages of argument concerning the disclosure of the rebuttal witness, it is indeed hard to conclude that the trial court conducted anything less than a thoroughly adequate inquiry into the circumstances surrounding the alleged discovery violation. It is only a trial court's total failure to hold any sort of hearing that gives rise to "per se" reversible error. State v. Hall, 509 So.2d 1093 (Fla. 1987) and the 10 cases cited in support therein. Accordingly, this Court is limited to determining whether the trial judge abused his discretion by not declaring a mistrial or excluding James from testifying at the penalty phase. Lucas, Baker, Ross, Dupree v. State, 436 So.2d 317 (Fla. 1st DCA 1983).

This Court has recognized that the trial court has broad discretion to determine the facts when a potential discovery violation is brought to its attention. Lucas, at 1151. Though Appellee has demonstrated that there is no need to second guess the trial court's determination of this issue below, Appellee offers the following brief analysis without waiving any of its previous arguments.

It is well established that the prosecutor need not list a rebuttal witness whom he does not reasonably anticipate calling at trial. Dupree, Grant v. State, 474 So.2d 259 (Fla. 1st DCA 1985); Pisegna v. State, 488 So.2d 624 (Fla. 1986). Herein, the prosecutor explained that he didn't even know about Randall James until shortly before informing defense counsel of his existence. (R. 510, 511) Defense counsel failed to establish just how

Appellant would be prejudiced if Randall James were to testify after having the public defender relieved from representation. How could any information concerning Randall James's crimes or confidences affect Appellant, especially if he was willing to waive the attorney/client privilege? (R. 514)[2] Moreover, as noted by the prosecutor, it is hard for Appellant to argue prejudice inasmuch as his two defense witnesses sought to establish that he did not commit the murder and that Rama Sharma died at 6:00 A.M. (R. 515) That Appellant was denied the opportunity to give first and last closing argument is of no moment. Appellant has been unable to cite any decisional law dictating that a defendant's procedural right is hampered when the prosecutor threatens to call a rebuttal witness! Finally, though Appellant ardently asserts that he was prejudiced as a result of not having enough time to gather further information about Randall James in addition to his deposition, such is the risk one must take when an individual who is not listed during discovery is permitted to testify. Wilkerson, at 1379. As argued above, opportunity to depose is sufficient to quell any prejudice before an undisclosed witness is called to testify. En toto, it cannot be concluded, in conformity with the decisional law cited herein, that the trial court either failed to conduct an adequate Richardson inquiry or that he abused his discretion by not granting a mistrial or excluding Randall James from

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2 Though Appellant takes issue with the representation that James was willing to waive the privilege, it bears reminding that the prosecutor is an officer of the court just the same as is defense counsel and that there is no need to cast dispersions upon his veracity simply because this is a capital case.

testifying (especially when he didn't even testify, during the guilt phase, in the first place).

Lastly, Appellant makes the unsupported bootstrapping argument that the prosecution commented upon his right to remain silent when he failed to inform defense counsel about Randall James before counsel told the jury, during opening statement, that Appellant would testify at trial. The judge informed the jury that anything the attorney's say is not evidence in the case. (R. 216, 575). Moreover, nothing prevented Appellant from testifying, except, perhaps, his own veracity. Rule 3.220(a)(1)(i) calls upon the prosecutor to disclose the names of all persons known to him to have knowledge which may be relevant to the offense charged. See also Waterhouse v. State, 522 So.2d 341 (Fla. 1988); Evenson v. State, 277 So.2d 587 (Fla. 4th DCA 1973). The prosecutor did not know about Randall James until late in the trial and thereafter disclosed him pursuant to his duty under the rule. See Johnson v. State, 416 So.2d 1237 (Fla. 4th DCA 1982), Judge Hersey, dissenting. Moreover, not all comments upon a defendant's right to remain silent constitute error unless it can be shown that the comment was fairly susceptible of being interpreted by the jury as a comment on his right not to testify. State v. Kinchen, 490 So.2d 21 (Fla. 1985). Appellant has not even endeavored to argue that the jury "most certainly" understood this chain of events to be an unconstitutional comment upon his right to remain silent. Accordingly, Appellant suffered no palpable error by his own willing failure to take the witness stand after telling the jury that he would testify in his own defense.

ISSUE II

WHETHER APPELLANT'S FULL OPPORTUNITY TO DEPOSE RANDALL JAMES BEFORE HE TESTIFIED DURING PENALTY PHASE WAS SUFFICIENT, ESPECIALLY WHERE APPELLANT HAD NO RIGHT TO DISCLOSURE OF PENALTY PHASE WITNESSES.

For his second point on appeal, Appellant extends his first issue regarding an alleged guilt phase discovery violation into a penalty phase discovery violation, topped off by an argument that Randall James's testimony had no relevance to the aggravating factor of cold, calculated and premeditated. However, Appellant bases his arguments on unsupported assumptions concerning the applicability of the rules of discovery to the sentencing phase of a capital trial.

First, Appellant again asserts that there was "an absence of an adequate Richardson hearing" during the guilt phase and that, by extension, that error infected the penalty phase since the testimony of Randall James was not excluded. Nonetheless, Appellee reasserts the same argument as advanced in Issue I that no discovery violation occurred and that any so-called Richardson hearing was far more than adequate to satisfy this Court that the trial court did not abuse its discretion. Thus, if this Court were to agree with Appellee's threshold argument's in Issue I, then there is no need to address any of Appellant's Issue II arguments concerning his opportunity to prepare for James's testimony. Any inquiry about the impact of the "discovery violation" should end here.

In the event this Court wishes to address the merits of Appellant's argument, Appellee offers the following.

Rule 3.220(a)(1)(i) calls upon the prosecutor to disclose "[T]he names and addresses of all persons known . . . to have information which may be relevant to the offenses charged, and to any defense thereto". This rule, by any reasonable interpretation, envisions fair discovery before trial concerning the offense. The rule does not contemplate the disclosure of all persons known to have information relevant to the sentence imposed. If notice of the aggravating circumstances upon which the state intends to rely is not required, Menendez v. State, 368 So.2d 1278 (Fla. 1979); Sireci v. State, 399 So.2d 964 (Fla. 1981), which necessarily include some indication of the sort of testimony that will be required to establish them, then there is no logical necessity to require the prosecution to disclose the names of the witnesses who will be called upon to support the aggravating factors. Accordingly, Appellant's basic assumption that he was somehow entitled to any prior notice concerning Randall James's testimony at penalty phase is unfounded.

Even those cases relied upon by Appellant do not support the proposition that the state has any obligation to give timely notice of penalty phase witnesses. Both Lightsey v. State, 364 So.2d 72 (Fla. 1978), and State v. Banks, 349 So.2d 736 (Fla. 3rd DCA 1977) do not address the states discovery obligations concerning sentencing witnesses. Bouie v. State, 15 F.L.W. S188 (Fla. 1990) discussess the timeliness of discovery only in the context of the guilt phase. Moreover, during a bench conference, defense counsel expressed that he "didn't know if there is anything that addresses that", i.e. discovery for

penalty phase witnesses. (R. 683). If indeed there is a duty on the part of the prosecution to disclose a penalty phase witness, it was incumbent upon Appellant to bring such decisional law to the court's attention. Lucas, supra. Thus, having failed at both the trial and appellate levels to establish any duty on behalf of the prosecution to disclose penalty phase witnesses, this issue should be found meritless. That Appellant received any notice at all concerning Randall James should be counted by him as a blessing.

If this Court is willing to find, arguendo, that the state had any obligation to disclose James as a penalty phase witness in any timelier a fashion than has already been established, then it is incumbent upon Appellant to show how he was prejudiced. Inasmuch as being given the opportunity to depose a tardily disclosed witness is satisfactory compensation, (See Issue I) then Appellant cannot be heard to complain. Though he denounces the prosecutor and the judge for denying him the opportunity to impeach James through the use of his deposition transcript, the record reveals that shortly before counsel ended his cross-examination, he made reference to the very transcript which he claims was denied him. (R. 710). Moreover, he never even bothered to ask the court to let him re-visit some of his cross-examination in order to take advantage of the recently delivered transcript. Thus, if anything, Appellant has waived his right to assert that he was denied the effective use of James' deposition.

In Bouie, supra, this Court noted that "[A]lthough having only days to develop the confession issue, defense counsel used

his time well". Sub judice, the prosecutor enlightened the court by recounting that defense counsel was given the opportunity to depose James at 11:00 o'clock on the very day he was first noticed. Apparently, neither defense counsel, co-counsel, nor any other member of their office saw fit to depose James. James was not even deposed the following morning. Not until the jury was out deliberating during the guilt phase did either counsel take his deposition. (R. 681). Surely, "in view of the fact that Appellant was facing the ultimate penalty", at least SOMEBODY from the public defender's office could have been dispatched to take James deposition at an earlier time or to get a start on securing his psychological records. Even if it was unanticipated that James would be called to testify during penalty phase, it would have been incumbent upon Appellant to depose James as soon as possible so that a record could be made to better support the argument that a continuance should have been granted in order to fully explore the ramifications of the deposition testimony. Alas, Appellant's failure to capitalize on the time at hand to depose and investigate the circumstances surrounding James's testimony cannot be blamed upon the state.

Notwithstanding the above argument, counsel still did an excellent job of cross-examining Randall James. He elicited the following facts from James. James was treated at the medical wing, the day after Appellant's confession by Dr. Teaman and Dr. Young, who are psychiatrists. (R. 698, 699, 701). He was placed on Navane and Prolixin antidepressant or antipsychotic drugs. (R. 699). He admitted having depression. (R. 699). He had

spent over six months in jail before giving his testimony and could not remember the exact date upon which Appellant made his confession. (R. 701). He admitted having been twice convicted of a felony. (R. 702). A letter, written by James to an investigator from the public defender's office, was introduced which requested help in getting out of jail. (R. 704). James further admitted that he was in jail for attempted murder, felony possession of a firearm and arson. (R. 706). Counsel effectively made it sound almost ludicrous that James would come to court merely to clear his conscience without expecting any concession or bargain for his upcoming trial. (R. 706, 707, 710). Finally, it was established that other inmates were present when Appellant made his confession. (R. 708). Thus, it cannot be concluded that Appellant did not get adequate mileage out of his opportunity to depose Randall James. Such is especially true when one considers that had the prosecutor not told counsel about James during the guilt phase, Appellant would have had absolutely no opportunity to depose him, given that the state has no obligation to furnish Appellant with the names of penalty phase witnesses.

Finally, Appellant contends that James' testimony was irrelevant in that the words "yeah, I killed the motherfucker, and I'll do it again" can only be taken to establish the improper aggravating factor of "lack of remorse". He even refers to juror Marple's comment to the media that it appeared that Appellant showed no remorse for his crime. However, he fails to realize that the court did not instruct the jury that lack of remorse was

an aggravating factor and that the prosecutor did not argue that James' testimony demonstrated Appellant's lack of remorse. (R. 712, 797). Nor did the judge cite lack of remorse in his findings in support of the death penalty. That a juror gave a gratuitous statement to the media is of no particular import inasmuch as a jury's reasons for deciding a case can rightfully be based on a multitude of factors quite apart from any point argued or instructed upon during a trial. It is rare that a party ever gets a glimpse at what any particular juror may have found to be of persuasive importance to their decision. That Ms. Marple alone gave a hearsay statement to yet another individual who later quoted her unsworn statement in a newspaper, after appropriate editing, is hardly the sort of sound evidence upon which this court has traditionally relied when passing upon the merits of such weighty matters as death sentence cases. See Songer v. State, 463 So.2d 229 (Fla. 1985) wherein this Court cited to section 90.607(2)(b), Florida Statutes for the proposition that "[U]pon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment".

Accordingly, Appellant is not entitled to a new penalty hearing.

ISSUE III

WHETHER APPELLANT HAS ANY GROUNDS UPON WHICH TO COMPLAIN HE DID NOT RECEIVE A FAIR TRIAL WHERE THERE IS NO EVIDENCE TO DEMONSTRATE THAT THE JURY EVER SAW HIS SHACKLES.

For his third issue, Appellant claims that being shackled while in Court denied him a fair trial. Though he claims that he was shackled throughout the entire trial, there is nothing to indicate whether any of the juror's ever saw his shackles. Rather, to the contrary, it appears that effort was made to hide them from the juror's view.

Just before Appellant was about to take the stand, defense counsel reminded the judge that Appellant was still shackled. He mentioned this to the court at side bar. (R. 509). During jury selection, defense counsel also reminded the court to allow the jury to leave ahead of Appellant so that they won't see him in manacles. (R. 109). Moreover defense counsel must have been satisfied that the shackles were hidden from the juror's view inasmuch as the record does not reflect that counsel ever raised any further objections to the shackles. (R. 1131). Thus, once again, this Court is being asked to consider a non-issue. Absent any evidence of, or specific objection based upon, the juror's actual view of the shackles, this Court is urged to dismiss this issue as meritless.

In the event that this Court wishes to further consider this point, Appellee offers the following.

Appellant seems to think that any and all shackling while on trial is unconstitutionally reversible error. He is wrong.

Though he claims that the instant case is distinguishable from Stewart v. State, 549 So.2d 171 (Fla. 1989), he overlooks its similarity. In Stewart, the defendant was known to have been a problem in the past and there were "allegations he may attempt to run". Sub judice, the prosecutor told the court that "[He] has a charge of introducing contraband", and "[H]e had a razor blade in his shoe". (R. 1130). Though Appellant is simply grasping at desperate straws by claiming that "it is not clear that he (the prosecutor) was referring to Appellant", pray tell, who else could the prosecutor have been referring to? The judge? Defense counsel? Another defendant in another place and at another time? Accordingly, given both the nature of the information from the prosecutor coupled with a total lack of any indication that the jury saw Appellant's shackles, under Stewart, this issue should be found meritless.

It should be noted that defense counsel did not ask the court to make any specific finding, nor cite to the court any authority contrary to the judge's understanding of the law. Counsel simply wanted to make sure the jury didn't see the shackles. In Lucas v. State, supra, this Court recognized that even in a death case, a reviewing court should not indulge in a presumption that a trial judge would have made an erroneous ruling had a proper objection been made and authorities cited contrary to his understanding of the law. Absent any kind of motion to poll the jury or make a finding that greater restraint was necessary, the trial court had a reasonable basis for maintaining the shackles as a security measure.

Appellant has taken the liberty of positing that the only effect the shackles could have had on the jury (if they saw them at all) was a negative one that invariably invited them down the path towards his death sentence. The majority in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987) recognizes that a contrary view exists:

> Arguments could be made that the jury's view of such a convicted murderer would have no effect on the sentencing or, indeed, may benefit the defendant. A jury may be more inclined to give a life sentence if it feels that the defendant can properly be restrained, it is not necessary to give the death sentence in order to protect against future harm.
>
> Elledge, at 1450.

Judge Edmonson wrote that:

> . . . most citizens would not be surprised at - and probably would endorse - the practice of physically restraining felons convicted of violent crimes when those felons are removed from the controlled environment of their penal institutions. The Supreme Court acknowledged this practical, "common human experience" reality in Holbrook when it noted that four uniformed troopers in the courtroom "are unlikely to have been taken [by the jury] as a sign of anything other than a normal official concern for the safety and order of the proceedings. Indeed, any juror who for some reason believed defendants particularly dangerous might well have wondered why [more extensive security precautions were not in effect.]" (Citations omitted) (Emphasis added.)
>
> Elledge, at 1455.

Without some indication that any one of the juror's was actually influenced by the sight of the shackles, the Appellant asks this

Court to assume that the restraints caused the jurors to find him guilty and recommend a death sentence. Appellant urges this Court to believe that a normal security measure, such as shackling, caused a death recommendation rather than the nature of the evidence adduced at trial. In Hildwin v. State, 531 So.2d 124 (Fla. 1988), this Court found that a juror's viewing of the defendant's "handcuffs, chains or other restraints is not so prejudicial so as to require a new trial". So too, in the instant case, the sight (if any) of shackles by the juror's should not categorically be branded error worthy of reversal and resentencing absent a showing that the restraints, rather than the overwhelming evidence and confession, caused Appellant to draw a guilty verdict and a death sentence.

Appellant fails to realize that the jury may have actually "felt sorry" for him because he was placed in shackles despite his lack of violent outburst during trial. Yet, in the face of the evidence placed before them, the juror's may have overcome their pity and recommended capital punishment. Such a scenario is as worthy of consideration as Appellant's theory that the shackles directly caused the guilty verdict and imposition of a death sentence. Again, Appellee urges this Court to avoid a blanket requirement of a hearing and require Appellant to show actual prejudice before limiting a trial courts duty to secure a courtroom and its occupants from potential harm.

ISSUE IV

BECAUSE THE JURY NEVER READ ANY PREJUDICIAL NEWSPAPER ARTICLES ABOUT EITHER THE APPELLANT OR THE TRIAL, APPELLANT CANNOT ARGUE THAT HE DID NOT RECEIVE A FAIR TRIAL.

For his fourth non-issue, Appellant complains that he did not get a fair trial because the media, particularly the newspaper, had published articles about the Rama Sharma murder that contained accounts of Appellant's criminal record. Apparently, because the trial court did not grant his motion to sequester the jury during trial, it can be assumed that they read such articles, in contradiction of the judges specific instructions, and therefore found Appellant guilty and sentenced him to death. The fallacy of this argument rests on the unspoken "given" that the juror's disobeyed the courts instructions, and lied to the court when they were asked whether they had read any articles about the murder. Such explains why Appellant's argument is riddled with such words as "if", "possibility", and "potentially". Simply put, there is no record support for his argument on this issue.

A complete look at the record reveals the following. At the beginning of jury selection, the judge asked the panel whether they knew anything about the murder. The unanimous reply was negative. (R. 4). Further into the process, several prospective juror's remembered having read something about the incident but all the jurors indicated that they would have no problem setting aside whatever they had read. Moreover, the prosecutor correctly reminded the panel (and those who would become future panelists)

that the judge would instruct them to set aside whatever they might have read or talked about and to decide the case based upon what was to be heard in the courtroom. (R. 37-38). Even future juror Marple had never heard of Rama Sharma before the trial. (R. 107). Another panelist, Mr. Chiaramonte, was excused for cause because he was personally familiar with Rama Sharma, had read about his murder, and felt that he could not be a fair and impartial juror. (R. 113, 114, 128). After all the juror's had been picked, the judge instructed them that they were not to read any newspaper accounts of the trial, nor listen or talk to anyone else who may comment about the trial. (R. 191). During the trial, the judge reminded the juror's not to read any newspaper articles about the case nor to talk to anyone about it. (R. 517). Finally, at the close of all the evidence, and just before the parties were about to conduct closing argument, the juror's were asked whether any of them had read anything about the trial in the newspapers. The resounding response was "NO". (R. 575). Yet, based upon all of the foregoing, or in spite of it, Appellant wants this Court to overturn his conviction based upon the wild (at the very best) speculation that he received an unfair trial merely because the articles were published. Such an argument is even more shockingly ludicrous when one considers the plain fact that the juror's denied having read any newspaper accounts of the trial! This issue should be summarily dismissed for being factually indefensible.

Nonetheless, Appellant has submitted over five pages of legal analysis which, if this Court were not inclined to find

them meritless based upon the facts, must be responded to. Accordingly, Appellee offers the following.

Appellant's own cited cases provide ample support for the meritlessness of his argument. In Robinson v. State, 438 So.2d 8 (Fla. 5th DCA 1983), the court wrote at length about the need for the trial court to follow a certain procedure when it comes to allegations that a jury may have been exposed to the undue influence of sensationalist headlines. The court noted that "[I]f any of the jurors indicate they have read the material, they must be questioned to determine the effect of the publicity. . . ." . Herein, when asked whether any of the juror's had read any newspaper articles, they responded with a resounding "no". Ergo, even according to Robinson, such a response constitutes the "end of the discussion" because if they have not read the offending article, they cannot be influenced thereby.

In Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), the High Court held that mere exposure to news accounts of a defendant's prior record, without more, do not presumptively deprive a defendant of due process. Once again, according to the true facts of this case, Appellant has not made out a case for even "mere exposure" let alone demonstrated any juror hostility. To the contrary, the prospective juror's indicated that they could set aside anything they had previously read and the jury itself never read anything about the trial. See Murphy, at 800-802. Accordingly, Murphy is of no help to Appellant.

In Duque v. State, 498 So.2d 1334 (Fla. 2d DCA 1986), the outright denial of a defendant's request to have the court inquire of the jury whether they had heard or read any midtrial news articles reciting prior convictions was found to be reversible error. Obviously, sub judice, and as duly noted in Appellant's footnote 10, the trial court did indeed inquire of the jury and they responded that they had not read any articles. Nowhere in Duque does the court mention that prosecutorial prodding or "great reluctance" to inquire of the jury whether they've read anything constitutes reversible error.

Even on the federal side, Appellant can find no support. In United States v. Williams, 568 F.2d 464 (1978), two jurors had actually seen a television newscast that detailed a prior conviction. In Williams, the newscast was found to be "probative of guilt and highly prejudicial" and, accordingly, was found to constitute inadmissible evidence worthy of inducing reversible error. Yet, Williams points out that "potential prejudice" is not the key to reversal. Rather, it is the effect such media accounts may have on the jury that is important. Below, nowhere can Appellant assert that the jurors read any of the complained of articles. Consequently, he cannot claim that he was prejudiced thereby.

Finally in United States v. Gaffney, 676 F.Supp. 1544 (M.D. Fla. 1987), the district court commenced its decision by reciting the rule that:

> A court must initially engage in the presumption that a jury has been impartial and unbiased. . . A defendant has the burden of proving juror partiality or bias and must

> do so by a preponderance of the evidence. . . Partiality or bias may be shown by proving that extraneous influences were considered by the jury and tainted the jury's deliberations. (Citations omitted).

Since Appellant is so insistent upon urging this Court to adopt federal decisions, Appellant should be held to the federal burden of persuading this Court that the jury saw, read, and was prejudiced by the news articles. In Gaffney, the jurors had actually seen detailed news accounts of the trial on which they were sitting. Additionally, the jurors had engaged in other misconduct, all of which gave rise to an unfair trial. Once repetitiously again, the jurors never read anything and therefore could not have been prejudiced by what they did not read. The "highly prejudicial" newspaper articles did not try Appellant. The impartial jury did. Accordingly, this Court can find no error and should not grant a new trial based upon this non-issue.

ISSUE V

THE TRIAL COURT CORRECTLY REFUSED TO LET APPELLANT CROSS-EXAMINE SEVERAL OF THE STATE'S WITNESSES BECAUSE SUCH EXAMINATIONS WOULD HAVE BEEN EITHER IRRELEVANT OR OTHERWISE IN VIOLATION OF THE RULES OF EVIDENCE.

For his fifth argument, Appellant has displayed a shotgun smattering of errors all of which he claims accumulate into reversible error because the trial court denied him his "absolute right" to cross examine the witnesses against him. Yet, despite his protestations, he has neglected to bring to this Court's attention the guiding decision on the constitutional aspects of confrontation: Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Therein, the Court wrote:

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And, as we observed earlier this Term, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Citations omitted, emphasis original).

At bar, it is obvious that Appellant wanted his cross-examinations to have gone wherever and to whatever extent he wished, without regard to the requirements of the Confrontation

Clause. Appellant wants a perfect trial, although the fair one he received is sufficient to pass constitutional muster. Van Arsdall, at 681, Grace v. State, 372 So.2d 540 (Fla. 1st DCA 1979). In order to determine whether Appellant received the fair trial to which he was entitled, the High Court has called for an analysis based upon the harmless-error doctrine:

> The harmless-error doctrine recognizes the principle that the central purpose of the criminal trial is to decide the factual question of the defendant's guilt or innocence, . . . and promote public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. (Citations omitted).

Appellant's first contention is that the court unduly restricted his right to inquire of state witness Harry Lee whether he was "personally aware" that Rama Sharma had problems with some of his customers in his store. After a bench conference, the judge sustained a hearsay objection against the question. Appellant has not argued that he was not attempting to elicit hearsay testimony from the witness. This Court has stated that the scope and limitation of cross-examination lies within the sound discretion of the trial court and is not subject to review except for a clear abuse of discretion. Sireci v. State, 399 So.2d 964 (Fla. 1981). See also Ho Yin Wong v. State, 359 So.2d 460 (Fla. 3rd DCA 1978); Mancebo v. State, 350 So.2d 1098 (Fla. 3rd DCA 1977). Limitations upon cross-examination based upon evidentiary rulings such as hearsay do not violate a defendant's right to cross-examine. Tompkins v. State, 502 So.2d

415 (Fla. 1986). Moreover, where the defendant is able to elicit similar testimony elsewhere at trial, any error caused by the curtailment can be considered harmless. Ho Yin Wong, at 461 where other methods of impeachment employed on cross examination served to give the defense an adequate opportunity to cross-examine. Consequently, because the question posed called for hearsay, and because, as Appellant has most adequately pointed out, there was other evidence adduced at trial concerning Rama Sharma's run-in with "Craze", no Confrontation Clause violation occurred.

Appellant's next argument is nothing less than another non-issue. He finds some kind of "chilling effect" out of the prosecutor's sustained, but unenforced objection to counsels interrogation of witness Poehl about whether he had ever seen anyone with a skull's head knife in the Moon Lake General Store. For some reason, he has written his way around the most glaring fact that defense counsel did indeed fully cross-examine Poehl about skull headed knives and thusly concluded his examination. (R. 283). Yet, he adequately informs this Court that he connected up such testimony with that of David Lowry later at trial. (R. 315-316, 345-346). Though the court warned the experienced defense counsel that he would have to "put up" such evidence later on, no legal scholar or legal neophyte could ever torture such full cross-examination into some sort of cognizable Sixth Amendment or due process violation![3] Accordingly, this non-issue should be dismissed without further consideration.

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[3] Perhaps Appellant should be advised that such outright record

Next, Appellant finds error of constitutional dimension out of his attempt to get David Lowry to admit to having committed more than two prior felonies. He claims that he should have been allowed to impeach Lowry through the use of a prior inconsistent statement he made at his deposition that he has several more felony convictions. The prosecutor advised the court that some of the convictions occurred when Lowry was a juvenile. (R. 313). Based upon the rule that impeachment through the use of prior convictions must only be accomplished by the introduction of certified copies of the witnesses convictions, the court sustained the prosecutor's objection. Martin v. State, 517 So.2d 737 (Fla. 4th DCA 1987); Williams v. State, 511 So.2d 1017 (Fla. 2d DCA 1987) and decisions cited therein. Even if the argument can be advanced that it would have been proper to allow impeachment by use of Lowry's prior statement, it cannot be said that the trial court clearly abused its discretion by applying settled and well known evidentiary law to the situation at hand. Tompkins, supra. Moreover, even if counsel had succeeded in reminding him of his prior statement on this point, it has not been argued that the jury might have received a significantly different impression of his credibility had Appellant been permitted to pursue his proposed line of cross-examination. See Van Arsdell, at 680. After all, as Appellant has so adeptly noted, the jury was made very well aware just how bad a person he was by having at least two felony convictions (and had a poor

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torturing just for the sake of coming up with the usual large number of death case issues is not to be condoned based upon the nature of his sentence alone.

memory to boot (R. 332, 335-336, 348-351) and thus cannot be heard to complain that he did not have the opportunity to effectively impeach David Lowry. Ho Yin Wong, at 461. Accordingly, no reversible error occurred.

Apparently, Appellant feels that just about every sustained objection amounts to reversible error. Despite the tradition that juries do not get to hear the why's and wherefore's of suppression hearings, he complains that he should have been given the chance to examine Detective Vaughn about his experience with having tape recorded confessions suppressed. Nonetheless, in the very first instance, Appellant has not come to grips with the law that says law enforcement has no duty to tape record or create any evidence for later use by the accused. State v. Powers, 555 So.2d 888 (Fla. 2d DCA 1990). Thus, to ask Detective Vaughn why he didn't create a tape was, at best, irrelevant, if not wholly prejudicial. Moreover, even if Vaughn had gone full tilt and said that THE reason why he didn't tape Appellant's confession was because he feared it might have been suppressed, there is no reason to believe that Appellant's confession was not voluntary and truthful. It was recounted at trial, by various witnesses, nine times with nothing short of remarkable consistency. (R. 307, 311, 339, 374, 376, 377-378, 413, 417, 418-420, 430). Such overkill dictates nothing less than a finding of harmless error.

Finally, Appellant claims constitutional error because he was not permitted to ask Dr. Corcoran whether Rama Sharma's multiple stab wounds could have been the result of a frenzy

killing. As the judge noted, the doctor was a pathologist, and not a psychopathologist. (R. 463). Though just about anybody could say that they were familiar with the term "frenzy" (R. 462), the pathologist was not qualified to give an opinion regarding the mental workings of the individual who caused the stab wounds. After all, the doctor was not called upon to tell the jury that the wounds were the result of premeditation or that they occurred during the course of a robbery. He only testified about the cause, time, and instrumentality of Rama Sharma's death. Accordingly, it would have been outside the scope of his expertise, and therefore irrelevant for him to have been forced to give an opinion regarding a frenzy killing. Appellant has not cited, and Appellee cannot find, any case holding that a capital defendant has any constitutional right to cross-examine a state expert witness on matter's outside his expertise and beyond the scope of the issue for which he was originally called to testify. Finally, Appellant didn't even bother to get his point across to the jury during either guilt phase or penalty phase closing argument. Surely defense counsel is allowed to argue any logical deductions that can be drawn from the evidence adduced at trial. Thus, even if this Court were to find that the trial court's legitimate evidentiary ruling somehow affected Appellant's right to cross-examine the pathologist, any such error was indeed harmless.

With respect to the non-issue's raised in Appellant's Issue's I and II, Appellee relies on its arguments advanced in response thereto and further reminds this Court that Appellant

didn't even bother to ask if he could revisit certain of his proposed areas of impeachment once he had the transcript in hand. At long last, it is important to note that Appellant has not raised any issue regarding the sufficiency of the evidence against him at trial. In Grace v. State, 372 So.2d 540 (Fla. 1st DCA), the court wrote a passage that appears tailor made for the instant case:

> It is not the function of this Court to substitute its judgment for that of the jury or the trial judge where the evidence is legally sufficient to support the verdict, the judgment, and the sentence.

It is virtually unbelievable that the jury, for example, would have totally disregarded David Lowry's testimony had it known he was convicted of 5 instead of 2 felonies, that the jury would have looked ascance upon Appellant's confession should defense counsel have brow beat Detective Vaughn about all the times he had taped confessions thrown out of court, or acquitted Appellant of both premeditated and first degree felony murder had Dr. Corcoran testified that the person who killed Rama Sharma did so in a frenzy.[4] Accordingly, even if this Court were to find some sort of confrontational error, such error is indeed harmless and is insufficient to warrant a new trial.

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[4] Who's to say that Appellant didn't plan to kill Rama Sharma and got so carried away with the thrill of the kill that he broke into a stabbing frenzy after having effected the first few planned plunges?)

ISSUE VI

THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS WERE NOT IMPROPER AND, AT BEST, CONSTITUTE HARMLESS ERROR.

For his sixth issue, Appellant finds reversible error over two of the prosecutor's comments during closing argument. First, he claims that the prosecutor improperly told the jury to disregard the consequences of their verdict while deliberating during the guilt phase of the trial. An amplification of the facts, however, is necessary in order to demonstrate just how miniscule and non-prejudicial this not altogether incorrect statement was.

Though the casual reader might get the impression from Appellant that the trial court only glossed over his duty to tell the jury that he alone is responsible for instructing them upon the law, the opposite is true. At the beginning of the proceedings, the court instructed the jury that it was his responsibility to tell them which law applies, that the duties of the court and jury do not overlap, and that it was their responsibility to decide the facts of the case. (R. 215, 216). Naturally, the court told the jury that what the lawyers say is not evidence. (R. 216). At the close of the guilt phase, the court further instructed the jury that it was their duty to determine if the defendant is guilty or not guilty in accord with the law and that it was his job to determine the proper sentence. (R. 664, 665). Naturally, as Appellant has already noted, the court reminded the jury that it was appropriately his job to tell them what the law is. (R. 651, 800). However, Appellant

conveniently overlooks that the prosecutor, the man with the "quasi judicial position of authority", further argued to the jury that the judge was going to tell them that it was their duty to determine if the defendant was guilty and that it was the judges job to determine what the proper sentence would be if the defendant is found guilty. (R. 651).

Based upon such a thorough education by both the judge and the "quasi judicial prosecutor", Appellant still maintains that the jury glommed onto the prosecutor's guilt phase statement, totally disregarded the law as the court instructed, and gave scant thought to the consequences of their verdict even though they had been inculcated from the outset that they were seated on a capital murder case. Moreover, Appellant gives no consideration to the plain truth that, during guilt phase deliberations, guilt or innocence is indeed the central issue and that the potential punishment does not bear upon the truth of the facts adduced at trial. The prosecutor told them the truth, and the judge further told them that it was only he who was responsible for the sentencing decision. Accordingly, it cannot be said that the prosecutor so totally misstated the law as to require reversal and retrial.

Furthermore, the prosecutor employed the phrase "at this point in time" at the end of the allegedly offending remark. This language comports even more closely with the scheme of capital trials in this state inasmuch as during the penalty phase, the jury most appropriately turns their full attention to the consequences of their verdict and passes upon the ultimate

issue of whether a defendant should live or die for his crime. Thus, it is indeed difficult to conclude that the prosecutor either misstated the law or reduced the jury's role in the capital sentencing process, because quite simply, it is only during the second phase of the trial (the "sentencing process") that the juror's turn their full attention to the consequences of their verdict.

When one examines what sort of prosecutorial misconduct that is truly worthy of reversal, Appellant's argument becomes even more specious. For example, in Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984), the prosecutor's comments stretched the outer most bounds of ethical and disciplinary conduct. He flung himself into a tirade in order to inflame the juror's passions and prejudices. He degraded into personal attacks upon opposing counsel, commented on facts plainly not in evidence, and directly commented upon the defendant's right to remain silent. It appeared as if his entire closing comprised a test book example of all that is reversible. So too, in Teffeteller v State, 439 So.2d 840 (Fla. 1983), the prosecutor ranted that the capital defendant will, in fact, be out of jail in 25 years and will come after a couple of people (who must have been trial witnesses) and will kill again. Moreover, the judge refused to even give a cautionary instruction after such flagrantly prejudicial comments.[5] Sub judice, the prosecutor's statements were not necessarily a total misstatement of the law or instructions as

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[5] Likelihood that a capital defendant will be a future danger to society or will kill again is not an aggravating factor in Florida.

given by the court. Furthermore, they shrink and pale in comparison to the sort of conduct and statements that have earned reversals in the past. Such was hardly the stuff of "inexcusable prosectuorial overkill". Teffeteller, at 845. Given the cautionary instruction given by the court upon objection, it cannot be said that the complained of guilt phase comment "was so prejudicial as to vitiate the entire trial". At best, any error was indeed harmless. Ryan, at 1086, 1087, and cases cited therein.

As for the penalty phase comment, the same analysis applies. The judge gave the requisite cautionary instruction that he will tell them what the law is. (R. 800). Moreover, the judge properly instructed the jury on how to weigh and consider the aggravating and mitigating factors. (R. 822-824). Appellant has not taken issue with these instructions. Appellant's comparison of the prosecutor's argument that "the law says that if you kill under such circumstances with these aggravating facts, then you should die" (R. 799-800) to the comments in Garron v. State, 528 So.2d 353 (Fla. 1988) are akin to comparing the proverbial mountain to a mole hill. The totality of the comments in Garron can only be compared in magnitude to those made in Ryan. It was not the comment upon the relationship of the aggravating versus mitigating factors that alone caused reversal. The entire argument was found to be so egregious as to warrant remand for a new penalty phase hearing. To compare the prosecutor's fleeting comment herein to the overly zealous misconduct in Garron is nothing short of utopian. In proper perspective, none of the

alleged statements amount to reversible error and retrial is not required.

ISSUE VII

THE TRIAL COURT PROPERLY ALLOWED THE JURY TO CONSIDER THAT THE MURDER WAS COMMITTED DURING THE COURSE OF A ROBBERY AND WAS COMMITTED FOR PECUNIARY GAIN AND PROPERLY FOUND ONLY ONE OF THESE AGGRAVATING FACTORS WHEN HE SENTENCED APPELLANT.

In an effort to create a multitude of appealable issues in the hopes that this Court will be able to "hang its hat" on something in order to gain a reversal, Appellant here asks this court to reverse itself on the issue of allegedly improper doubling of aggravating circumstances. He says that the jury should not have been allowed to consider both that the murder was committed during the course of a robbery and was committed for pecuniary gain, as aggravating factors, during the penalty phase of the trial. Appropriately, he notes this Court's decision in Suarez v. State, 481 So.2d 1201 (Fla. 1986) wherein the identical factors were considered. Appellee respectfully requests that this Court, in order to promote uniformity and consistency throughout the state, not undertake to overturn the four year old Suarez decision based upon this case.

Sub judice, and as is true in any capital case, the judge makes the final determination as to what factors will ultimately be considered "aggravating" when imposing a death sentence. It is the judge, learned in the law, who is called upon to perform the mental task of separating from consideration those facts which may unfairly twice penalize a defendant for but one set of facts. Thus, the capital sentencing process reflects well known double jeopardy principles, which have consistently been applied

to prevent courts, and not jury's, from imposing convictions and sentences upon defendants who may be found guilty of two crimes arising out of only one act. Herein, the judge, in keeping with this Court's mandate in Suarez, rested his sentencing findings on the fact that the murder was committed while Appellant was in the commission of or in an attempt to commit a robbery. (R. 854). Pecuniary gain was not listed in his findings. Though scholarly and insightful platitudes have long been written about the vital role the jury plays in capital sentencing, the bottom line is that the judge, and not the jury, is the final arbiter of whether a life or death sentence is imposed. Accordingly, it is up to he or she to make sure that the aggravating factor's are not unfairly "doubled" against a capital defendant. The trial judge lived up to his role in this case, and there is no compelling reason to now overturn a decision which adequately prevents a capital defendant from unfair "doubling" of aggravating factors.

ISSUE VIII

THE TRIAL COURT'S INSTRUCTIONS ON THE AGGRAVATING FACTORS WERE NOT ERRONEOUS BECAUSE IT WAS NOT NECESSARY TO INSTRUCT THE JURY ON ALL ASPECTS OF APPELLATE INTERPRETATIONS OF THE LAW SURROUNDING COLD, CALCULATED AND PREMEDITATED AND HEINOUS, ATROCIOUS OR CRUEL.

Appellant takes this opportunity to reargue to this Court that the standard instructions for the aggravating factors of heinous, atrocious or cruel and cold calculated and premeditated are unconstitutionally vague and overboard because the court did not instruct the jury on all the decisions by this Court which have sought to further define these aggravators on appeal. He has also challenged the language the trial court used in the heinous, atrocious or cruel instruction because the record reflects that the judge said "essentially" instead of "especially", in conformity with Section 921.141(5)(h). Both arguments are without merit, but for two different reasons.

As noted in Smally v. State, 596 So.2d 720 (Fla. 1989) failure to object to jury instructions constitutes waiver. Appellant did not object when the judge said "essentially". Ergo, Appellant has not preserved this point for appeal nor has he pointed to any decision indicating that the complained of error is fundamental. Therefore, it should not be considered by this Court.

Appellant adequately points out that this Court has quite recently dealt with the vagueness issues in Smally (heinous, atrocious or cruel not in violation of the principles as laid down in Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100

L.Ed.2d 372 (1988) and Brown v. State, 15 F.L.W. S165 (Fla. 1990) (cold, calculated and premeditated not in violation of Maynard). Appellee will not belabor these points herein, except to note the following, and will rely on the authority laid down in Smally and Brown.

The thrust of Appellant's argument is that he jury was not adequately instructed on the above-mentioned aggravators because the court did not recite for them, in essence, all the decisions of this Court and the United States Supreme Court which have defined them on appeal. Appellee would like to take this opportunity to argue that the same could conceivably be true of virtually any jury instruction or statute governing both criminal and civil law. This Court's recognition of the adequacy of the existing instructions obviously recognizes the role jury's play in applying the law to the facts in a fair and uniform manner. If, as Appellant suggests, a jury were to misapply an instruction, surely legal history more than adequately reflects that both the trial and appellate courts have not hesitated to right such a wrong. Not even capital juries, who are no less laymen than other jurors seated for traffic cases, cannot be expected to grasp an entire body of law during one charge. Consequently, where, as in Florida, the jury serves as an advisory body, the basic instructions are given with the knowledge that it is the judge, learned in the law, who will ultimately pass on the wisdom of the jury's recommendation. Regardless of how any one juror may have arrived at this recommendation, the recommendation as a whole is reconsidered

before sentencing by the trial judge. Even on appeal the defendant has a constitutionally adequate opportunity to persuade the courts that decisional law dictates a different outcome from that which was recommended. Consequently, there is no need to further pass upon the adequacy of the complained of instructions, as has already taken place in Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and its Florida decisional progeny.

Finally, Appellant seems to suggest that it is necessary for those members of a capital jury who recommend the death sentence to only do so in uniform concert based upon each aggravator they find to have been proved. For example, those eight who recommend death must do so based upon the same factor or factors; one juror cannot recommend death based upon cold and calculated while another base his recommendation on heinous and atrocious. Appellant has not cited, and Appellee cannot find any decision that stands for such a proposition. That a life recommendation based upon such an errant requirement is more likely does not, Appellee suggest, mean that this Court should be invited to take this opportunity to dictate to future jury's just what facts they can or cannot be allowed to find true if others of their fellow juror's disagree. Such a law would necessarily invade the fact finding duty of the jury and would, under an infinite set of circumstances, prove to work an unreasonable hardship on all aspects of the jury system. This concept of the jury system should be rejected out of hand.

ISSUE IX

A SENTENCE OF DEATH IN THIS CASE IS PROPER AND THE TRIAL COURT DID NOT FAIL TO CONSIDER ALL OF APPELLANT'S MITIGATING EVIDENCE.

For his first argument, Appellant suggests that it was error for the trial court to have instructed upon, and ultimately found, that the murder of Rama Sharma was cold, calculated and premeditated without any pretense of moral or legal justification. He bases this argument on the erroneous assumption that this Court has mandated that only "execution or contract murders or witness elimination murders" qualify under this factor. He is quite wrong. See Rutherford v. State, 545 So.2d 853, 856 (Fla. 1989), wherein this Court held that "the finding of cold, calculated, and premeditated is not limited to execution-style murders".

Appellant takes exception to the Court's interpretation of the facts supporting a cold and calculated finding. He calls such findings speculative. However, unlike the situation in Hamilton v. State, 547 So.2d 630 (Fla. 1989), the trial court did not make mere suppositions about the facts. Herein, Appellant took a knife to a wooded area behind the store, hid in the bushes at night, attacked Rama Sharma with the knife, let him flee about 20 feet, then finished him off with a gruesome total of 33 or 34 stab wounds, 20 of which were to Sharma's back, the remainder to the front of his body (including "defensive wounds") all after the victim recognized Appellant and began screaming. Why would

anyone take a knife and hide in the bushes[6] just to extract some money out of an older, shorter man unless there was a prearranged intent to kill the victim if need be? Surely not just to frighten. After all, Appellant KILLED Rama Sharma.

Appellant makes much ado about the "frenzy" aspect of this killing and, as the argument goes, a frenzy killing does not contain the sort of heightened premeditation necessary to support this aggravator. However, he overlooks the interpretation that at least within the 20 foot "space of time" between the onslaught of the first plunges to where Rama Sharma eventually suffered the remaining causes of his death, Appellant had the time to think about what he was going to do, regardless of whether he casually strode after Sharma's bleeding torso or ran after it with the intent to make sure he did a good job finishing the task he had already begun. Having the time to contemplate and to choose to kill a person can constitute "cold, calculated and premeditated". Swafford v. State, 533 So.2d 270 (Fla 1988); Phillips v. State, 476 So.2d 194 (Fla. 1985); Scott v. State, 494 So.2d 1134, 1138 (Fla. 1986).

Though Appellant has argued that Randall James' testimony can only be considered impermissible evidence of lack of remorse, he does not understand that his statement, together with his statement to Lowry that the killing was "easy", (R. 307) also demonstrates a lack of any pretense of moral or legal justification. He just plain "killed the mother fucker". That

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6 Murder committed in secluded wooded area familiar to murderer is a factor for cold, calculated and premeditated. Huff v. State, 495 So.2d 145 (Fla. 1986).

he'd "do it again" simply means that he had no reason to have done it this time, save for pecuniary gain. Appellant is just plain wrong in his argument that the state based its prosecution primarily on felony murder. The prosecutor, during the course of his closing argument, spoke directly about the elements of premeditated murder. (R. 601, 602). Shortly thereafter, he made it clear to the jury that they had a choice of how to convict Appellant of first degree murder; either premeditated or during the course of a felony. (R. 603, 605).

Finally, the judges sentencing findings on this factor gives no indication, and Appellee asks this Court not to somehow infer, that the trial court was "transferring" the robbery intent to the murder. As noted above, there was already ample evidence from which to conclude that the killing itself was done with cold calculation and premeditation.

Next, Appellant takes issue with the finding that the murder was heinous, atrocious, or cruel. Appellant's cavalier argument that the 10 minutes Rama Sharm lived in dying agony (even minus "several minutes" in allowance for unconsciousness before death) shocks the conscience. Even three to five minutes of dying agony is sufficient to support a finding of heinous, atrocious or cruel. Johnston v. State, 497 So.2d 863 (Fla. 1986) where only five total stab wounds and strangulation left the victim conscious for several minutes prior to death.

Though Appellant cites a plethora of decisions all in support of his proposition that not all multiple knifing murders qualify as heinous, atrocious or cruel, recent cases suggest that

multiple stabbings of a conscious, resisting victim who survives the attack at least long enough to see it to its conclusion, is sufficient to support heinous, atrocious, or cruel. Turner v. State, 530 So.2d 45 (Fla. 1987), cert denied, ____ U.S. ____, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989) (killer pursued and cornered his victim, then stabbed and cut her to death despite her pleas); Perry v. State, 522 So.2d 817 (Fla. 1988) (victim beaten and stabbed repeatedly in her home); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) (thirty stab wounds, some defensive, showing victim survived to suffer the effects of the repeated goring); Floyd v. State, 497 So.2d 1211 (Fla. 1986) (twelve wounds to the torso and one defensive wound to the hand, indicating victim was conscious during the stabbing, although she died minutes thereafter; Nibert v. State, 508 So.2d 1 (Fla. 1987) (17 total stab wounds, eight to the upper back and four defensive to the hands); Lusk v. State, 446 So.2d 1038 (Fla. 1984) (victim stabbed in back three times in prison lunchroom); and, Morgan v. State, 415 So.2d 6, 12 (Fla. 198), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982):

> Under established precedent interpreting the capital felony sentencing law, the third aggravating circumstance [heinous, atrocious, and cruel] is also supported. The evidence showed that death was caused by one or more of ten stab wounds inflicted upon the victim by appellant [in the victim's cell during sleeping hours]. See Rutledge v. State, 374 So.2d 975 (Fla. 1979), cert. denied, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979).

Appellant's reliance on Demps v. State, 395 So.2d 501 (Fla. 1981), is misplaced. In Demps, the victim was a fellow inmate. He was found bleeding from multiple stab wounds and died after some period of survival. However, this Court's rejection of the heinous, atrocious, or cruel factor was summary. . . "[w]e do not believe this murder to have been so 'conscienceless or pitiless' and thus set 'apart from the norm of capital felonies' as to render it 'especially heinous, atrocious, or cruel.'" 395 So.2d at 506 (footnotes and citations deleted). This constitutes the entire discussion in Demps of the heinous, atrocious, or cruel factor.

Moreover, Appellant's diminutive treatment of the brutal slaughter of the victim does not camouflage the evidence in this case and he further errs in his reliance on Teffeteller v. State, 439 So.2d 840 (Fla. 1983). In Teffeteller, this Court found that the criminal act that ultimately caused the victim's death was a single shot from a shotgun. The relatively impersonal act of firing a single shot from a shotgun at some distance from the victim, despite the fact that it inflicted a painful and slow killing wound, is easily distinguishable from a knife attack at close range where multiple deep wounds were inflicted.

Finally, that Appellant has the gall to posit that he didn't desire Rama Sharma to suffer at all should leave the reader with a sickening pit in the stomach. What the heck does he think 33 stab wounds do? Tickle? If he didn't want Rama Sharma to suffer so much, why didn't he just not kill him!? Appellant didn't just fly into a frenzy and kill Sharma on the spot, he laid in wait

and hunted him down like an animal after he managed to get away from Appellant following the initial lunges. Even worse, this argument presupposes that he had some kind of right to silence the victim or to keep him from testifying against him. Appellee prays that this Court will not suffer such an analysis just because this is a capital case.

Appellant further takes issue with the court's findings that the murder was committed for the purpose of avoiding or preventing a lawful arrest. As Appellant concedes, his confession alone indicates that Rama Sharma saw him, and therefore, Appellant stabbed him in order to "shut him up". (R. 374) However, it is not necessary that intent be proved by evidence of an express statement by the defendant or an accomplice indicating their motives in avoiding arrest, Routly v. State, 440 So.2d 1257 (Fla. 1983), nor is it required that this be the only motive for the murder. Thus, even in light of Hansbrough v. State, supra, there was an ample basis upon which the court could find that Appellant killed Rama Sharma to avoid the possibility that he would identify and testify against him if he were later tried for the robbery.

In Hansbrough, this Court said that "[T]he mere fact that the victim might have been able to identify the assailant is not sufficient to support finding this factor". *Sub judice*, there is no speculation that Rama Sharma "might" have recognized Appellant. After all, Appellant had been in the victim's store before and had asked him for a job on a previous occasion. (R. 346, 347). Appellant deliberately took a knife to the robbery

scene, not merely to peal an orange while laying in wait for his prey, but it use it should it become necessary to quiet someone who might later "squeal" on him. It is undisputed that Appellant told the police that he threw his knife into the water, disposed of his sneakers, and deliberately lost his blood stained shirt. The robbery didn't just "get out of hand", his conduct both before, during, and after the killing indicates sufficiently that he killed Rama Sharma so that he wouldn't tell the police who robbed him, and he further sought to dispose of incriminating evidence in order to further the purpose of not being caught. Appellant did not just "panic" as in Schafer v. State, 537 So.2d 988 (Fla. 1989); he stabbed him enough times to make certain that he was dead and consequently unable to identify him to the police. That Appellant disagrees with the court's interpretation of these facts does not mean that the court's findings were wrong.

Finally, Appellant claims that it was error for the trial court to have found no other mitigating factors, other than his age, and to have failed to articulate what those other reasons may have been and why he did not specifically find them. He is wrong. A trial court does not fail to consider all evidence offered in mitigation merely because he does not specifically enumerate and reject everything that is presented. Mere disagreement with the force to be accorded such evidence is not a sufficient basis to challenge a death sentence. Rose v. State, 472 So.2d 1155, 1158 (Fla. 1985). "Finding or not finding the existence of mitigating factors is within the trial court's

domain, and such findings will not be reserved because an appellant views then in a different light". Hansbrough, at 1086, Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985); Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982). "That the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered. The trial court obviously rejected appellant's showing as having no valid mitigating weight". Brown v. State, 473 So.2d 1260 (Fla. 1985).

Sub judice, at the sentencing hearing, Appellant regaled the court with a detailed summary of the evidence offered in mitigation. (R. 845-847, 852-853) The judge indicate that he carefully considered the mitigating circumstances. (R. 855) Such is all that the law requires.

Moreover, Appellant's sanguine view of the mitigating evidence is, at best, self serving. Appellant was not the direct recipient of any of his father's "child abuse", inasmuch as the only incident so testified to at trial appears more like adolescent roughhousing than deliberate punishment. (R. 736) He moved in with "Joe" (Harry Martin) at his own pleasure. (R. 737) He always had enough food and clothing. (R. 739) He voluntarily left home and lived on his own. (R. 740) His father gave him love and money to buy things, as best he could. (R. 741) His father testified that he never abused either Appellant or his brother Travis. (R. 742) Appellant's father took him on hunting and fishing trips. (R. 743) He continued to have a good

relationship with Mr. Martin after Martin got out of jail, and even borrowed money from Martin. (R. 751) He didn't have to pay rent in his mother-in-law's home at the time of the murder. (R. 763, 764) He and his wife got free, federally funded child care for their infant. (R. 765) He was loved by his wife and her family right up to the time of the murder. (R. 768) Thus, from this balanced view of the evidence, it is quite apparent that Appellant's aunt's assessment of him was correct; he is just an animal who did one day kill someone. (R. 376)

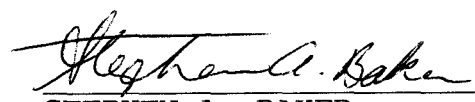
Should this court elect to strike any of the aggravating factors, this Court may still uphold the death sentence. Randolph v. State, 463 So.2d 186 (Fla. 1984). Any remaining factors would, by this Court's decision, be rendered clear, convincing, and established beyond a reasonable doubt. Therefore, they will support a death sentence. See Zeigler v. State, 402 So.2d 365 (Fla. 1981), and cases cited therein. Appellant has waived any attack on the court's finding that the murder was committed during the course of a robbery. Appellee suggests that Appellant's mature age of 20 is radically insufficient to outweigh even this lone aggravator, let alone the other three. The United States Constitution will not be offended if this Court were to affirm this death sentence without remand should, for any reason, an aggravating factor be stricken. Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 725 (1990); Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) at 87. Accordingly, a sentence of death is appropriate in this case.

CONCLUSION

Based on the foregoing facts, arguments and authorities, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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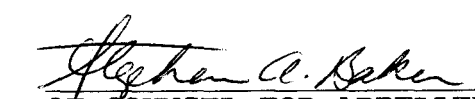
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to ROBERT F. MOELLER, Assistant Public Defender, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830 this 8th day of June, 1990.



OF COUNSEL FOR APPELLEE