IN THE SUPREME COURT OF FLORIDA

ROBERT CRAIG COX,

Appellant,

vs.

CASE NO. 73,150

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts the "Statement of the Case" and "Statement of the Facts" set forth in appellant's brief. See Initial Brief of Appellant, pages 1-9. In lieu of an extensive recitation in this portion of appellee's brief of those facts relied upon by appellee in addition to those cited by appellant, additions and clarifications are noted where such facts are deemed relevant to proper resolution of the issue being addressed.

SUMMARY OF ARGUMENT

POINT ONE: Appellant's conviction for first-degree murder is supported by substantial competent evidence sufficient to support the jury verdict of guilt. The purported "reasonable" hypothesis of innocence provided by the appellant's statement made two weeks after the victim's murder, which version of events appellant elected not to recant as a result of his failure to testify to the contrary at trial, was demonstrated to be inconsistent with the evidence presented against the appellant as well as with the exercise of common sense. Hence, appellant's conviction for the premeditated murder of Sharon Zellers must be affirmed by this Court.

POINT TWO: Although appellee maintains that the trial judge's sua sponte excusal of prospective juror Smith was proper under the circumstances presented, because reasonable men could at least differ as to the propriety of the action taken, no abuse of discretion has been demonstrated. This claim of error is predicated solely upon appellant's speculation that Smith was both qualified to serve and ineligible for mandatory excusal upon request. Appellant was not entitled to have any particular juror serve but was only entitled to fair and impartial jurors. Inasmuch as appellant has suffered no prejudice arising out of the trial court's action, no reversible error has been demonstrated.

POINT THREE: The trial court did not err by excluding for cause prospective juror McKissick whose opposition to the death penalty would have substantially impaired the performance of her duties

as a juror. A trial judge's ruling that a prospective juror may be excluded for cause based upon his views concerning capital punishment is subject to broad discretion and is to be afforded substantial deference on appeal. So long as the trial judge's perception that it would be difficult for McKissick to remain fair and impartial during any penalty proceeding is fairly supported by the record, no relief with respect to this claim is merited.

POINT FOUR: Because the specific legal argument presently advanced on appeal to support the contention that appellant's motion for discharge was improperly denied was never presented to the trial court, and the only claim of error which was properly preserved for appellate review is not before this court by virtue of appellant's abandonment of same on appeal, this Court should decline to review the propriety of the trial court's ruling on the merits. However, since there is no merit to either of appellant's theories for relief, appellant's conviction must be affirmed.

POINT FIVE: The trial court did not err by denying appellant's motion to dismiss predicated upon alleged pre-indictment delay. Inasmuch as appellant is unable to satisfy his initial burden of demonstrating any actual prejudice occasioned by the delay, this Court need not even reach the issue concerning the state's reasons for same. However, assuming that some modicum of actual prejudice can be gleaned from this record, the state's unsuccessful attempt to acquire dispositive evidence of appellant's guilt in an admittedly circumstantial case prior to commencing prosecution does not establish the type of delay which violates constitutional principles of fairness.

POINT SIX: No prejudicial error has been demonstrated concerning appellant's numerous challenges to various evidentiary rulings by the trial court, many of which claims were not even properly preserved for appellate review. None of the claims presented, when considered either individually or collectively, merit relief.

POINT SEVEN: The trial court did not err by admitting the rebuttal testimony of a defense character witness, which testimony established that appellant had confessed his commission of a burglary to the witness. Appellant's previous waiver of the statutory mitigating circumstance of no significant prior criminal history did not preclude the admissibility of such evidence which was not presented to establish the existence of a nonstatutory aggravating circumstance but was instead presented to rebut the opinion of the witness that appellant was a leader by example. Moreover, any asserted error with respect to this claim was harmless beyond a reasonable doubt.

POINT EIGHT: Appellant's challenge to his sentence of death, predicated upon the failure of the jury to expressly determine the applicability of particular statutory aggravating circumstances to his crime, was not properly preserved for appellate review and, even if not procedurally barred, is without merit.

POINT NINE: Appellant's multifarious challenges to the constitutionality of Florida's death penalty statute as applied were not properly preserved for appellate review and, even if not procedurally barred, are without merit.

POINT TEN: Appellant's sentence of death is not unconstitutional on the asserted basis that various jury instructions and arguments were vague, misleading and erroneous. All claims of error with respect to this issue are either without merit, invited or harmless.

POINT ELEVEN: The trial court did not err by denying appellant's motion in limine which purpose was to restrict the state's penalty phase cross-examination of the appellant to the scope of any direct examination. This claim is predicated solely upon conjecture, as the substance of appellant's testimony purportedly forfeited as a result of the trial court's ruling was never proffered below and indeed has not even been disclosed to this Court on appeal.

POINT ONE

APPELLANT'S CONVICTION FOR FIRST-DEGREE MURDER IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE SUFFICIENT TO SUPPORT THE JURY VERDICT OF GUILT.

According to appellant, although the prosecution successfully proved beyond a reasonable doubt that the victim in the instant case, Sharon Zellers, is dead, "the state failed as a matter of law to sufficiently prove either that Zeller's death was caused by the criminal act or agency of Robert Cox or that the killing was premeditated." See, Initial Brief of Appellant, page 22. Appellee must most vociferously disagree.

Appellant correctly points out that all the evidence presented against him at trial was circumstantial; however, inasmuch as the only apparent witness to Sharon Zeller's murder is dead, and appellant never admitted his guilt, any evidence adduced against the appellant is by definition circumstantial. Nevertheless, the absence of direct evidence against the appellant did not preclude the state from proving its case beyond and to the exclusion of every reasonable doubt.

As this Court stated in Heiney v. State, 447 So.2d 210, 212 (Fla. **1984**):

> When a case is based on circumstantial evidence, a special standard of sufficiency of the evidence applies. Jaramillo v. State, 417 So.2d 257 (Fla. **1982**). This standard is: "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of

> innocence." McArthur v. State, 351 So.2d 972, 976 n.12 (Fla. 1977); Jaramillo v. State; McArthur v. Nourse, 369 So.2d 578 (Fla. 1979). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse a judgment based upon a verdict returned by the jury. Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983).

To the state's benefit, appellant provided his hypothesis of innocence just two weeks after the victim's murder and stuck to this version of events by declining to recant his previous statement at trial. See, State's Exhibit 49. This Court has observed that the state is not required to disprove every possible hypothesis or innocence, or even the hypothesis offered by a defendant because to require such "disproof", which would in many cases amount to proof of the existence of a negative, would exact too high a standard from the state:

> We are well aware that the varying interpretations of circumstantial evidence are always possible in a case which involves no eye witnesses. Circumstantial evidence, by its very nature, is not free from alternate interpretations. The state is not obligated to rebut conclusively every possible variation, however, or to explain every possible construction in a way which is consistent only with the allegations against the defendant. Were those requirements placed on the state for these purposes, circumstantial evidence would always be inadequate to establish a preliminary showing of the necessary elements of a crime.

Lincoln v. State, 459 So.2d 1030, 1031-1032 (Fla. 1984), quoting State v. Allen, 335 So.2d 823, 826 (Fla. 1976).

Specifically, that version of events related by the defense must only be believed if circumstances do not show that version to be false. McArthur v. State, 351 So.2d at 976 n.12 (Fla. 1977). Those portions of a defendant's self-serving version of events for which contradictory evidence has been presented need not be believed by a jury at all. Drake v. State, 476 So.2d 210, 215 (Fla. 2d DCA 1985). Moreover, the state is entitled to that interpretation of the conflicting evidence which is most favorable to the jury's verdict because such findings of fact are, as a matter of law, implicit in the determination of the finder of fact. Buenoano v. State, 478 So.2d 387, 390 (Fla. 1st DCA 1985).

Counsel on appeal has adequately set forth in his brief the state's case against the appellant, along with the hypothesis of innocence offered by appellant. See, Initial Brief of Appellant, pages 15-26. However, appellant only acknowledges the existence of two areas of conflict between the statement given on January 19, 1979 and the facts adduced during the state's case-in-chief at trial. To the appellant's detriment, the exercise of common sense reveals many more.

First, as conceded by appellant, the state presented the testimony of two witnesses who were employed at Skate World on the evening of the alleged battery to refute appellant's contention that any disturbance whatsoever, much less a "race riot" involving a man's loss of his tongue, had occurred on the night of the victim's disappearance. Orange County Sheriff's

Deputy Fuller, who was moonlighting as a uniformed security guard for the skating rink, testified that he worked the 8:00 p.m. to 12:00 midnight shift on December 30, 1978 (R 949, 954). Although Deputy Fuller was primarily assigned to the inside of the premises (R 949), a second uniformed guard patrolled the exterior of the building (R 955-956). Fuller checked on the status of the other guard several times that evening and the other guard made contact with him in accordance with standard operating procedure (R 962-963). However, no fights were reported (R 953, 956).

Moreover, even if a disturbance allegedly involving eight persons, four blacks and four whites, had somehow not been personally observed by security, such an occurrence would have been observed by somebody in view of the fact that the situs of the alleged battery was an area where motorists drive up and drop off patrons (R 965-968). In the event of a disturbance, a crowd of children would have developed and other children would have notified security (R 953, 966). In the event of any injury, a report would have been prepared and the proper parents notified (R 953). Fuller had never been apprised of a disturbance after-the-fact (R 953), and there were no reported injuries on December 30, 1978 (R 954).

The testimony of Deputy Fuller was corroborated by that of Robert Butler, a skating rink employee who worked from approximately 7:00 p.m. to 1:30 a.m. on the evening in question (R 968-970). Although several fights occurred at Skate World in the little more than a year that Butler had been employed there prior to December 30, 1978, the witness could recall no such occurrence on that date (R 969-971). If a fight occurred inside

the building, Butler usually personally observed it; if one occurred outside the building, he was usually summoned to assist by either an off-duty deputy or a concerned patron (R **969-970).**

Even if the state had not successfully cast substantial doubt upon appellant's assertion that he was injured in the Skate World parking lot, the balance of appellant's narrative is patently incredible. In the first instance, if appellant's injury were the result of a single blow to the face prompting him to sever his own tongue with his teeth as he hit the pavement, the curvature of the injury would have necessarily corresponded with the arc created by his own bite (R 744). Although the sketch (State's Exhibit **36)** of Betsy Porter, the technician who assisted in the surgery performed on appellant's tongue, is not included in appellee's record on appeal, it is obvious from the testimony presented that the witness', recollection of the injury was inconsistent with appellant's explanation of how the injury occurred:

> It was gone about down to here and this was very ragged or lacerated or chewed looking. This here. This, the small bleeder or the small artery was right about down in there. Just kept spurting even though it was tiny. And back here was a fairly clean cut, like, looked like it had been done with teeth or little indentations back there.

(R 722-723).

While it is certainl feasible th t appe11 nt could have bitten his own tongue under the circumstances related by him (R **915, 944),** it defies human logic that appellant would have bitten

his own tongue twice and then chewed it backwards until it "came all the way off." See, State's Exhibit 49. And even if appellant's jury were prepared to accept such an unlikely scenario as being true, what of the whereabouts of the tongue? Surely this appellant would have had the presence of mind to preserve a severed portion of his own body if he indeed had time to notice the extent of his injury prior to allegedly jumping in his car in search of the Days Inn.

And herein lies yet another glaring inconsistency in appellant's story. Suffice it to say that no one suffering from the injury inflicted upon the appellant by someone, be it himself through the conduct of the mystery assailant or Sharon Zellers, would jump into his car, drive aimlessly around an unfamiliar town, and then return to the "scene of the crime," only to be assisted by an anonymous good samaritan, when the safety of a twenty-four hour grocery store was nearby all the while (R 971). Only someone who was just several hundred feet from the comfort and support of mother and father at the time of injury (according to the state's theory) would forego the necessary emergency medical treatment which was much closer at hand (according to the appellant's theory) (R 683-684, 726-727).

And even if appellant had (imprudently) determined that his mother was more essential than the services of a surgeon, it makes no sense that he was unable to find the hotel, if not a hospital, with the assistance of his map, especially in view of the fact that he apparently had little difficulty in relocating Skate World. See, State's Exhibit 49. Yet interspersed among all of these irrational acts, appellant apparently had the

presence of mind to lock his car before accepting the ride offered by the anonymous older man back to the Days Inn (R 703-704, 976).

Curiously, as noted by the appellant, not even a drop of blood was observed when Deputy Sarver inspected appellant's vehicle with the aid of a flashlight as appellant's father was retrieving the vehicle from the Skate World parking lot (R 975-976). See, Initial Brief of Appellant, page 19. Such evidence is wholly inconsistent with appellant's contention on appeal that anyone suffering from so severe an injury as a severed artery would have shed even more blood that that found in the victim's vehicle. See, Initial Brief of Appellant, pages 35-36.

And finally, even if one assumes that appellant's judgment was distorted by pain and fear, there is no rational explanation for the failure of the mysterious motorist to seek the required medical attention for the appellant irrespective of his stated wishes. The severed artery in appellant's tongue which "just kept spurting'' caused appellant to leave a trail of blood from the second floor to the third floor of the Days Inn (R 648, 722). Even if it is assumed that appellant, who could not talk by the time he reached the motel, was somehow able to communicate his desired destination by "telling him to take me there,'' the conduct of such a concerned citizen in failing to completely satisfy the obligation undertaken makes absolutely no sense. Presumably, the mysterious motorist casually dropped off appellant in the motel parking lot never to be heard from again. Equally amazing is the fact that this concerned citizen failed to come forward when the circumstances of Sharon Zeller's death were

first publicized or when appellant was subsequently prosecuted for her murder (R 2399-2400).

Appellant's conclusion that no motive for the murder of Sharon Zellers was established by the state is falsely premised upon the notion that his pre-trial statement contains at least a particle of truth. Once appellant's explanation concerning the circumstances surrounding his injury was demonstrated to be false, appellant's jury was entitled to conclude that appellant lost a portion of his tongue in some other manner the details of which appellant did not choose to disclose.

Hair comparison analysis established that three hairs found in the victim's vehicle are consistent in all respects with the chest hair of the appellant (R 938-939). While hair comparison evidence does not constitute a means for positive identification,[1] it is relatively unlikely that the hairs did not belong to appellant due to the fact that it is a rare occurrence for the hair of two individuals to be microscopically indistinguishable (R 942). Only with such cases as twins or a mother and daughter is it typically found that two people may have scientifically indistinguishable hair (R 941).

Moreover, it would also only appear logical that hair of the victim's attacker would have been lost during their struggle and that hair identified as being microscopically indistinguishable from the appellant's must have been left in the victim's vehicle during appellant's commission of the crime, since appellant had

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[1] Hair comparison analysis is an imperfect science because no two hairs, even from the same portion of the same person's body, are identical (R 934).

arrived in Florida from Georgia on the very day of the victim's disappearance and no evidence presented at trial even remotely suggests that the two had ever met prior to December 30, 1978. See, State's Exhibit 49.

In addition to the hairs found in the victim's vehicle establishing that the paths of appellant and Sharon Zellers crossed on December 30, 1978, dusty shoe prints left on the interior of the victim's vehicle were consistent with the sandy, military-style boots worn by appellant on the evening of the victim's disappearance (R 627, 687, 696). Although appellant characterizes a portion of the state's boot track evidence as "worthless", once again it appears logical that any boot tracks which might have been left in the victim's vehicle by someone other than the appellant on some unspecified date prior to her murder would not have survived the violence which immediately preceded the victim's death as evidenced by the victim leaving her own shoe print on her vehicle windshield (R 619-620).

The presence of blood in the victim's vehicle belonging to someone other than the victim indicates that the victim's murderer was injured in some manner prior to the victim's death. Blood comparison testimony established that the victim's murderer possesses type O blood as does the appellant (R 516-519, 866, 870).[2]

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[2] Sharon Zellers possessed blood type A (R 854-858). Significantly, a blood sample derived from appellant's hotel bathroom (R 679-682) showed "activity in the A row" during the first test, but because there was insufficient sample to conduct a reliable subsequent test, the result was reported as inconclusive (R 866-868).

Although appellant attempts to capitalize upon the fact that no portion of his tongue was recovered from the victim's teeth, Dr. Hegert, the state's forensic pathologist, had no recollection of being specifically requested to examine the victim's teeth for foreign matter, as there was no suspicion at the time the autopsy was performed that the victim had marked her attacker in such a fashion (R 789, 792-793). Moreover, when Dr. Ford, an expert in forensic dentistry, was subsequently requested to examine the victim's teeth for foreign tissue, it was determined that there was insufficient space between the victim's teeth to allow any such tissue to become impacted (R 822). It should also be noted that, because the victim's body was in a state of moderate to severe decomposition at the time of discovery due to being submerged in human waste (R 751, 793), there is no record evidence to support the contention that any remnants of the appellant's tongue which might have been present in the victim's mouth at the time of her underwater burial in the sewage lift station would have remained intact long enough to be discovered at the time of the autopsy even if such evidence had been specifically sought at that time.

When the hair, blood and boot tracks are viewed as physical evidence of the identity of Zeller's killer, the damning nature of the evidence regarding appellant's proximity to the victim and her vehicle becomes self-evident. While expert medical testimony established that it was theoretically possible for appellant's victim to have still been alive some two days after appellant indisputably came within just several hundred feet of her dead body (R 683-684, 788), Sharon Zellers was already dead prior to

January 1, 1979, according to the uncontradicted testimony of her father that she always kept her family apprised of her plans and would telephone before leaving work or upon reaching her destination on those occasions when she intended to deviate from her standard route between her place of employment and residence (R 484-485, 487-488).

Finally, appellant argues somewhat inconsistently that if Sharon Zellers' death were the result of his criminal act, the fact that she bit off his tongue prior to her death should not be construed to provide motive for her premeditated murder but should instead serve to mitigate the severity of his crime in some unspecified manner suggestive of a depraved mind even approximating legal justification. See, Initial Brief of Appellant, pages 37-38. Sharon Zellers received a total of fourteen blows to the head from two separate unidentified objects, one of which caused blunt force injuries and the other of which possessed a linear component or sharp edge such as a board (R 755-772). Three of these wounds were capable of producing unconsciousness; two were capable of producing death (R 782, 786). Because all of the wounds save one could have been inflicted with the same weapon, it may logically be inferred that appellant either commenced his beating of the victim with a single blow from the first weapon and then selected a second weapon more suitable to his objective or inflicted the majority of the victim's wounds with the first weapon prior to issuing the coup de grace with a separate instrumentality.

The presence of defensive wounds indicates that the victim was alive and conscious during a substantial portion of the

beating (R 773-774, 778-780). One of the injuries sustained by Sharon Zellers while she was still alive split the outer one-third of her right ear (R 759-760). Another of appellant's blows fractured her skull while a separate one was delivered with sufficient force to actually penetrate the cranial cavity of his victim (R 768-772).

The element of premeditation may properly be established by circumstantial evidence. Sireci v. State, 399 So.2d 964, 967 (Fla. 1981). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used and the nature and manner of the wounds inflicted. Id. The fact that appellant's victim lingered some twenty to thirty minutes prior to succumbing to death (R 774-775) serves to aggravate his crime rather than to diminish the state of mind required at the time the fourteen head wounds were inflicted in order to sustain appellant's conviction for premeditated murder.[3] In Nibert v. State, 508 So.2d 1 (Fla. 1987), the murder victim received seventeen stab wounds before the defendant abandoned his attack, leaving the victim (temporarily) alive. Such evidence was held to support the defendant's conviction for premeditated murder. The facts of the instant case require an identical holding with respect to appellant's conviction.

[3] §921.141(5)(h), Fla. Stat. (1987).

POINT TWO

THE TRIAL JUDGE'S SUA SPONTE EXCUSAL OF PROSPECTIVE JUROR SMITH DOES NOT CONSTITUTE REVERSIBLE ERROR.

Contrary to appellant's assertions, the trial judge's sua sponte excusal of prospective juror Smith did not deny appellant due process or the right to trial before a fair and impartial jury. Although appellee contends that the judge's conduct was proper based upon the discussion set forth below, because reasonable men could at least differ as to the propriety of the action taken, no abuse of discretion has been demonstrated. See, Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980) (discretion abused only where no reasonable man would adopt view of trial court).

In the first instance, the record does not support appellant's representation that Judge Cycmanick summarily refused to utilize the juror questionnaire previously approved by Judge Conrad. See, Initial Brief of Appellant, p. 39. The record indicates that the questionnaire was utilized for those individuals who, because of prior knowledge of the case or strong opinions concerning the death penalty, had been selected for individual voir dire (R 14-17).

Likewise, the record does not support appellant's contention that prospective juror Smith met the statutory qualifications for jury service provided under section 40.013, Florida Statutes (1987). Inasmuch as the jury list from which appellant's venire was drawn, as provided under section 40.221, Florida Statutes

(1987), may have contained individuals who were not qualified to serve,[4] it is quite possible that Smith was eligible for mandatory excusal upon request under section 40.013(4), Florida Statutes (1987), given the facts which are apparent from the record.[5] According to the juror ~~voir~~ ~~dire~~ questionnaire executed by Smith, this prospective juror was the single parent of two children, both of which were under the age of two years, and was also employed as a counter helper at a local sandwich shop. See, Appendix "A". Under section 40.013(4), Florida Statutes (1987), any parent who is not employed full time and who has custody of a child under six years of age shall be excused from jury service upon request. Accordingly, the only conditions precedent to Smith's mandatory excusal were establishment of her employment status as a part-time employee and a request for excusal based upon such circumstances.

According to her repeated representations to the court, Smith was required to pick up her child from day care no later than 5:30 p.m. (R 119-120). While these facts are certainly

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[4] Section 40.02(1), Florida Statutes (1987), acknowledges the possibility that jury lists, which are to be compiled from random selection of persons qualified to serve under section 40.01, Florida Statutes (1987), may contain the names of persons who are unqualified to serve.

[5] Jury lists compiled in accordance with section 40.02(1), Florida Statutes (1987), are to contain the names of randomly-selected males and females who are at least 18 years of age and are citizens of the state and are registered to vote in the county in which they may be called upon to serve. As a consequence, persons who are eligible for either mandatory disqualification or excusal from jury service under section 40.013, Florida Statutes (1987), are nevertheless considered eligible for jury service for the purpose of drawing a venire from a compiled jury list.

suggestive of Smith's absence of desire or ability to serve, they in no way support appellant's claim that he was prejudiced by the elimination of "an absolutely neutral juror", inasmuch as Smith's ability, desire and qualifications to serve were not explored in any great detail, as conceded by appellant, by virtue of her excusal following the trial court's limited inquiry but prior to any forthcoming request for excusal as of right to which Smith may have been entitled. See, Initial Brief of Appellant, p. 41.

The instant claim of error is predicated solely upon speculation. Appellant appears to assume that, in the absence of the trial court's action, Smith would have been selected from the original venire consisting of 54 persons, that she did not meet the qualifications for mandatory excusal upon request, that even if so qualified for mandatory excusal she would not have requested same, and that even if mandatory excusal had not been requested she would not have been excused by peremptory challenge of either the defense or the state.

The sole purpose of conducting voir dire examination of prospective jurors is to secure a fair and impartial jury to try the case. Davis v. State, 461 So.2d 67 (Fla. 1984); King v. State, 390 So.2d 315 (Fla. 1980). A reversal based upon the limitation of voir dire examination is improper in the absence of demonstrable prejudice. Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978), cert. denied, 372 So.2d 472 (Fla. 1979). Moreover, the excusal of a prospective juror rarely constitutes reversible error since the adversary parties are not entitled to have any particular juror serve but are only entitled to a jury comprised

of persons qualified to try the case. Piccott v. State, 116 So.2d 626 (Fla. 1959); see ~~also~~, North v. State, 65 So.2d 77 (Fla. 1952); Baker v. State, 7 So.2d 792 (Fla. 1942).

This court has long recognized the wide latitude afforded a trial judge in excusing prospective jurors based upon personal hardship which would result from required service. Calloway v. State, 189 So.2d 617, 621 (Fla. 1966); North v. State, 65 So.2d. Appellant's suggestion that the record evidence of prospective juror Smith's personal circumstances did not establish "even a glimmer of ... hardship" ignores the realities of contemporary parenthood and represents at least as cavalier an approach to Smith's day care dilemma as that alleged to attend the trial court's ruling presently under review. See, Initial Brief of Appellant, page 42.

Judge Conrad expected to conduct the trial at least as late as 6:00-6:30 p.m., or later, until the trial reached a conclusion (R 120, 1438-1439). The very nature of Smith's communication with the judge, involving recurring requests over a period of half an hour to be permitted to leave, amply demonstrates the urgency of the situation indicating that no alternative means for satisfying Smith's responsibility to her offspring, as well as likely contractual obligation to her child care custodian, were available that day. In view of the reasonable expectation that a portion of appellant's trial was going to be conducted on a Saturday and possibly on a Sunday (R 121, 1412), as well as the recognized possibility of jury sequestration (R 126-128), the sheer speculation that Smith would not have been excluded from

appellant's jury but for the conduct of the trial judge is wholly without record support.

In addition, appellant's claim of error ignores the finite nature of judicial resources. Judge Cycmanick had volunteered to conduct voir dire in Judge Conrad's absence, commencing on the afternoon of June 27, 1988, with the objective of completing jury selection so that opening statements could be given the following morning (R 11, 17). Efforts were being made to circumvent the substantial hardship which could attend required jury service over the Fourth of July weekend (R 124-125, 1432-1433). To predicate error upon the trial judge's sincere efforts to balance appellant's right to a fair and impartial jury against the practicalities of the unique time parameters presented in this case would exhault form over substance, particularly in view of defense counsel's willingness, with the personal assent of the appellant, to excuse for cause persons with such "hardship" circumstances as a surprise out-of-town birthday party and family reunion (R 257-259). Surely the responsibilities of parenthood are entitled to share equal if not superior status when compared to such other familial obligations.

While appellant has cited no decisional authority which addresses this unusual if not unique claim of error, and appellee is aware of none, this Court's recent decision in Jennings v. State, 512 So.2d 169 (Fla. 1987), strongly suggests that appellant is entitled to no relief with respect to this issue. In Jennings, supra, the trial judge sua sponte excused a juror selected to hear the case after the jury had been sworn and the

state's case-in-chief commenced. Although neither party objected to the juror's continued service during the guilt phase of trial, due to the juror's belatedly-acknowledged inability to recommend a death sentence, the prosecution announced that it would only request her replacement for any required penalty phase, an arrangement to which defense counsel declined to stipulate. While acknowledging the absence of any "compelling reason why the judge should have excused the juror from the guilt phase", in addition to the fact that neither party requested such action, this Court also observed that no prejudice had accrued to the defendant by virtue of the alleged error, particularly since the juror would have been subject to removal for cause if the newly-revealed facts had been disclosed during voir dire examination of the prospective juror. Jennings v. State, 512 So.2d at 173.

Because appellant has suffered no prejudice arising out of the trial judge's action and reasonable men could at least differ on the propriety of same, no reversible error has been demonstrated with respect to this issue and appellant's conviction must be affirmed. §924.33, Fla. Stat. (1987).

POINT THREE

THE TRIAL COURT DID NOT ERR BY EXCLUDING FOR CAUSE A PROSPECTIVE JUROR WHOSE OPPOSITION TO THE DEATH PENALTY WOULD HAVE SUBSTANTIALLY IMPAIRED THE PERFORMANCE OF HER DUTIES AS A JUROR.

The trial court's exclusion of prospective juror McKissick[6] for cause does not constitute reversible error. A trial judge's ruling that a prospective juror may be excluded for cause based upon his views concerning capital punishment is subject to broad discretion. Wainwright v. Witt, 469 U.S. 412, 429, 105 S.Ct. 844, 855, 83 L.Ed.2d 84 (1985). Because such a function involves a credibility determination based upon what the judge sees as well as what he hears, a ruling that a juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" is to be afforded substantial deference[7] and the evidence supporting such a ruling need not be established with "unmistakable clarity." Wainwright v. Witt, 469 U.S. at 424, 105 S.Ct. at 852. Moreover, the standard of review applicable to the instant claim of error is "not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly

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[6] Although McKissick is spelled "McKessick" throughout the Initial Brief of Appellant, there is no question that the parties are referring to the same prospective juror.

[7] Although Wainwright v. Witt, supra, specifically addressed the presumption of correctness to be accorded state court findings of fact within the context of review of the denial of a federal petition for writ of habeas corpus, such findings of fact are entitled to the same deference upon direct review in the state courts. Wainwright v. Witt, 469 U.S. at 428, 105 S.Ct. at 854; Valle v. State, 474 So.2d 796, 804 (Fla. 1985).

supported by the record.'' Wainwright v. Witt, 469 U.S. at 434, 105 S.Ct. at 857.

To support his position that venireman McKissick was improperly excluded for cause based upon her abstract bias in favor of life imprisonment over imposition of the death penalty, appellant relies upon a two-page excerpt from an examination spanning some seven pages of record transcript. In addition to the representations attributed to her by the appellant, the prospective juror confided that, although her feelings concerning the death penalty would not influence her ability to impartially determine the issue concerning appellant's guilt or innocence (R 241, 243), she could not honestly envision herself being able to make an impartial sentencing determination:

> MS. McKISSICK: I mean, as long as I wasn't handing the sentence down, it wouldn't bother me. But I just don't know if I could come to that conclusion that, I don't know if it wouldn't affect my way of thinking, you know. That's my meaning (R 240).
>
> . . . .
>
> MS. McKISSICK: I really don't think I could. I mean, I don't know. I mean I'm being, I don't really know how to answer. I don't know if I could (R 242)[8].

Even when presented with a hypothetical posed by the trial judge involving a scenario wherein only evidence in aggravation and no

[8] Whether McKissick is referring to her perceived inability to recommend a sentence of death or make any sentencing recommendation whatsoever is not apparent from the context of the examination.

evidence in mitigation was presented, McKissick continued to express doubts concerning her ability to make a recommendation of death, adding that if called upon to weigh aggravating and mitigating factors she would automatically lean toward a recommendation of life (R 242-245).

Following the state's challenge for cause and the summarization by both parties of those portions of the examination which supported their respective positions, the trial judge stated the following:

> THE COURT: Well, I think each of you have [sic] argued aptly certain portions of what she said she said. What the state said she said and she said what you [said]. This lady is struggling, trying to --I think everyone is trying to please and also trying to be as candid with all of us about her feelings.
>
> I have the overall perception, not just [from] isolated sentences, this lady would have a difficult time rendering a fair and impartial verdict with respect to the death penalty. That's the overall perception that I get from all--not isolated answers and questions that each of you have posed to me, but from all of her responses to the question. So I'm going to excuse her for cause.

(R 247-249). The Witt decision expressly acknowledges the existence of situations such as that presented herein where, by virtue of his personal observations during ~~voir dire~~ examination, "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.'' Wainwright v. Witt, 469 U.S. at 426, 105 S.Ct. at 853. Indeed, in Chandler v. State, 442 So.2d 171, 173 n.3

(Fla. 1983), relied upon by appellant despite the fact that it antedates Witt, supra, and was decided under a stricter standard for juror excusal for cause on the basis of opposition to capital punishment,[9] this Court acknowledged the superior capability of a trial judge to assess the depth of a prospective juror's convictions concerning the death penalty. As pointed out by Justice Adkins, "[i]t is impossible for an appellate court to examine the cold words in a record and make an independent judgment that a juror is impartial." Chandler v. State, 442 So.2d at 175 (Adkins, J., concurring in part, dissenting in part).

The prosecution in a capital case is as equally entitled to jurors who are impartial as to penalty as is the defense. Williams v. State, 228 So.2d 377, 379 (Fla. 1969). Appellant has demonstrated no prejudice arising out of the excusal of this prospective juror even if the decision of the lower court could fairly be characterized as error. Even constitutional error may be deemed harmless if it is demonstrated to be so beyond a reasonable doubt. See, Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Although appellant exhausted all peremptory challenges originally available to him, an extra peremptory challenge was granted after it was specifically contended that the defense had been "forced" to utilize a peremptory to excuse prospective juror Newton when a defense challenge for cause should have been granted due to the asserted

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[9] Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

unfitness of Newton to serve based upon a hearing problem (R 418, 425-426).

Moreover, the perceived discrepancy between the trial judge's excusal of prospective juror McKissick and the refusal to strike prospective juror Sosa is likewise unavailing. Defense counsel originally requested that Sosa be stricken for cause upon the basis of a perceived language barrier, a concern which was also expressed by the trial judge along with the stated intention to reconsider the challenge at a later point in the proceedings (R 69-70). Although an additional objection to Sosa's service on appellant's jury based upon the prospective juror's responses to death penalty issues was later raised by defense counsel, the trial judge agreed to "revisit the question of perhaps excusing him for cause if defense counsel runs into a situation where peremptory challenges might be further unavailable or if we get down to that point where we are running out of challenges [and] he might be in serious consideration" (R 71). In point of fact, prospective juror Sosa was subsequently excused for cause on the basis of hardship (R 129-130, 139-140). No reversible error having been demonstrated with respect to the trial court's excusal of prospective juror McKissick for cause, appellant's conviction must be affirmed. 8924.33, Fla. Stat.(1987).

POINT FOUR

THE TRIAL COURT DID NOT ERR BY DENYING APPELLANT'S MOTION FOR DISCHARGE PREDICATED UPON THE STATE'S ALLEGED VIOLATION OF THE INTERSTATE AGREEMENT ON DETAINERS.

Prior to addressing the merits of the instant claim of error, it should be observed that, although appellant filed a "Motion to Discharge--Violation of the Interstate Agreement on Detainers" in the trial court (R 2109-2111), the specific legal argument presently advanced on appeal to support the contention that appellant's motion was improperly denied was never presented below. Accordingly, the instant claim of error was not properly preserved for appellate review. See, Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987); Tillman v. State, 471 So.2d 32 (Fla. 1985).

Even though the specific claim of error presented below is not before this Court for review, by virtue of appellant's abandonment of same on appeal, it is clear that the lower court's ruling on the only issue which was considered below was abundantly correct (R 2187). The gist of the appellant's argument below was that, due to a delay of more than one year from the time appellant had reasonable cause to believe a detainer might be lodged against him by the Florida authorities and the actual occurrence of such an eventuality, appellant was somehow entitled to discharge prior to the transpiration of the condition precedent to the creation of any right which appellant could thereafter invoke. On appeal, appellant concedes that this theory is without merit. See, Initial Brief of Appellant, page

53. ("It was only after Florida placed a detainer on Cox...that Cox was able to demand disposition of the charge".)

Section 941.45(3)(a), Florida Statutes (1987), provides in pertinent part that a prisoner may request final disposition of "any untried indictment, information, or complaint on the basis of which a detainer has been lodged" (emphasis supplied). Therefore, in order for appellant to have been entitled to avail himself of the speedy trial provisions of the interstate agreement on detainers, a detainer must have first been lodged against him. O'Connell v. State, 400 So.2d 136 (Fla. 5th DCA 1981). As conceded by appellant, the State of Florida did not place a detainer on him until December 15, 1987 (R 1962, 1966). See, Initial Brief of Appellant, page 49.

Furthermore, in response to appellant's current theory of error, it is not the date of request for disposition of untried charges which activates the speedy trial period but the date such a request is received by the receiving state. Coit v. State, 440 So.2d 409, 412 (Fla. 1st DCA 1983) (period of 180 days set by statute commences when request containing information required by statute has been delivered to prosecuting officer in receiving state); accord, State v. Minnick, 413 So.2d 168, 169 (Fla. 2d DCA 1982); Pinnock v. State, 384 So.2d 738, 739 (Fla. 5th DCA 1980).

Inasmuch as appellant's request for disposition of the pending Florida charge, although prepared on January 1, 1988, was not received by the Florida authorities until January 22, 1988 (R 1962-1963), appellant's motion for discharge was not only premature when filed on May 13, 1988 (R 2109-2112) but was also

premature when heard on June 14, 1988 (R 1376-1394), and his trial, which commenced on June 27, 1988, was well within the 180-day time frame provided by section 941.45(3)(a), Florida Statutes (1987). Since appellant is not entitled to discharge under either the theory which was advanced below or that which has been presented for the first time on appeal, his conviction must therefore be affirmed.

POINT FIVE

THE TRIAL COURT DID NOT ERR BY DENYING APPELLANT'S MOTION TO DISMISS PREDICATED UPON ALLEGED PRE-INDICTMENT DELAY.

In order to prevail in his assertion that the state's "delay" in indicting appellant for the first-degree murder of Sharon Zellers violated his constitutional rights, appellant must make the following twofold showing:

> (1) actual prejudice to the conduct of his defense, and
> (2) fundamental unfairness after the reasons for such delay are balanced against the demonstrable prejudice occasioned thereby.

Rogers v. State, 511 So.2d 526, 531 (Fla. 1987). Although appellant contends that "evidence was lost as a direct result of the pre-indictment delay" (see, Initial Brief of Appellant, pages 52-53), no bad faith on the part of the government in postponing the prosecution of the appellant or actual prejudice resulting from any delay, be it deliberate or otherwise, has been demonstrated. Since appellant bears the burden of initially establishing the prejudice prerequisite to relief with respect to this claim, and the record does not support appellant's position that such a showing was made below, the decision of the trial court denying appellant's motion to dismiss was undoubtedly correct (R 2200).

Initially, appellee detects some incongruity in appellant's simultaneous assertions that the state should have been required to move forward with appellant's prosecution in 1979 and that the

evidence presented at trial nine years later is legally insufficient to sustain appellant's conviction despite the "tactical advantage" alleged to have accrued to the state as a result of the nine-year delay. See, Initial Brief of Appellant, page 53. Either the state had a prima facie case against the appellant prior to 1988 or it did not.

The prosecution is under no obligation, predicated upon protection of any recognized constitutional right of a defendant, to seek an indictment until satisfied that guilt can be proven beyond a reasonable doubt. United States v. Solomon, 686 F.2d 863, 872 (11th Cir. 1982); see also, United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed 2d 752 (1977). However, if the evidence ultimately presented in 1988 was so tenuous, then it would certainly stand to reason that any delay in appellant's prosecution was prompted by some perceived infirmity in the state's case rather than some cunning stratagem to undermine the opposition. The advantages accorded a criminal defendant through postponement of prosecution have long been recognized by this Court. Acree v. State, 15 So.2d 262, 264, 153 Fla. 561 (Fla. 1943) (motions for continuance should be closely scrutinized in criminal cases because of greater temptation to delay); Brown v. State, 184 So. 777, 778 (Fla. 1938) (recognizing advantage afforded defendant by continuance of criminal prosecution).

It is not as though appellant was unaware of his continuing status as a suspect in the victim's murder, given the fact that a statement by appellant was taken by the Florida authorities in Georgia in the presence of legal counsel on January 12, 1979,

just two weeks subsequent to the victim's disappearance (R 897-899, State's Exhibit 49) and that no statute of limitations exists for the offense of first-degree murder. §775.15(1), Fla. Stat. (1987). Court-ordered blood and hair samples were obtained from the appellant in February of 1979 (R 833-834). Then, at least as early as October of 1986, appellant was apprised, as a result of a visit by Detective Hansen to the California Correction Center where appellant was currently incarcerated, that he was still under investigation for the murder of Sharon Zellers (R 1377-1381). See, Initial Brief of Appellant, page 53. In view of the circumstances that appellant had both immediate and continual knowledge that his prosecution for first-degree murder was a foreseeable possibility at some future uncertain date, the presumption of advantage occasioned by delay should be applied with respect to resolution of the prejudice component of appellant's claim.

Appellant's assertion that, because "[t]he police destroyed the names and statements of people; they failed to preserve blood and hair samples; the names of the guests at the Days Inn Motel were also lost ... Cox's ability to conduct an independent investigation to develop evidence of his own to rebut the state's circumstantial evidence" was hindered, is simply without record support. See, Initial Brief of Appellant, page 53. Appellant primarily blames Detective Hansen, who had been a homicide detective for four years at the time of the commission of the murder and was lead investigator in the case, for appellant's inability to successfully defend the charge against him. Notes

made during interviews with those motel patrons who observed appellant (mistakenly) attempting to enter their rooms were not preserved (R **1340-1341**); however, it was the recollection of the witness that such individuals could not even describe appellant beyond the fact that he was boisterous and bloody (R **1346**). Samuel Works, the Days Inn Security Officer who responded to the guest complaints and followed the trail of blood to the appellant's room, testified that the guest in room **2305** had described a short male wearing a military-style haircut and green shirt (R **634-637**). By the time Works arrived upstairs, a very bloody appellant clad only in sweat pants was exiting the bathroom with a green shirt and towel in hand (R **637-640**). Inasmuch as the identity of the injured motel guest as the appellant has never been in dispute and the testimony of the lost witnesses would appear to have only been cumulative of that offered by state witness Works, no prejudice with respect to Detective Hansen's destruction of these witness interviews has been demonstrated.

Appellant likewise points out that some statements of Walt Disney World employees were also destroyed (R **1341**); however, the statement of the last employee to see the victim alive was preserved (R **1347-1348**), and that individual testified on behalf of the state at trial (R **488-497**). Moreover, no statement of any Walt Disney World employee who might have had a motive to murder the victim was destroyed until after such person had been eliminated as a suspect (R **1348**).

Appellant also complains that the names of an original pool of sixty suspects were not preserved by Detective Hansen (R **1341).** Significantly, most **of** these individuals were subject to hair comparison analysis and were subsequently eliminated as suspects because the hair samples obtained did not compare favorably with any of the hairs found in the victim's vehicle (R **1341-1342).** Even more importantly, the names of all suspects from which hair samples had been obtained were preserved on a property receipt list which still existed in **1988** (R **1344).** Again, no actual prejudice has been demonstrated. Finally, Detective Hansen's interview with Dr. Taggart, the surgeon who repaired the appellant's tongue, could not have been especially probative (R **1346)** in view of the fact that the witness' own operative notes shed no more light on the issue whether appellant's injury could have been self-inflicted other than to indicate that the surgeon's post-operative recollection of the injury was not inconsistent with the recollection of Betsy Porter (R **908-911).** Again, no actual prejudice has been demonstrated.

Detective Hansen testified that no information which could be characterized as exculpatory of the appellant was destroyed (R **1349).** Notes were only destroyed as suspects were eliminated (by such means as confirming alibis) and as reports were completed (R **1345-1346).**

The state's handling of certain blood samples is also sharply criticized by appellant. However, according to Mark Pellham, a serology expert employed by the Florida Department of Law Enforcement, the procedures utilized to handle the evidence

submitted for analysis in the instant case were standard operating procedures[10] (R **1351, 1356**). Moreover, although an enzyme test was requested by the Orange County Sheriff's Office on unknown samples "**Q-1**" through "**Q-5**" and such tests were not conducted for some unspecified reason, "enzymatic tests were not being done routinely at that time" (R **1355-1358**). Such tests were not possible in **1988** as a result of the conditions under which the samples had been stored **(R 1356)**.

Interestingly, no enzyme tests whatsoever were possible in January of **1979** due to the condition of the sample of the victim's blood prompted by the victim's corpse having floated in a sewer containing human waste for several days prior to its discovery **(R 858, 1359-1360)**. Moreover, even if enzyme analysis of the victim's blood had been possible, there was no suspect sample at that time to which enzymes could be compared (R **1360**). When the appellant's known blood sample was received in August of **1979**, enzymatic tests were not considered feasible; therefore, even if appellant had been indicted and tried shortly thereafter, appellant would not have had the (speculative) benefit of such test results **(R 1360-1361)**.

Although it is certainly easy for appellant to allege that these tests would have proven to be exculpatory, since the state will never be able to prove otherwise, the record does not support such a bald assertion. Pellham steadfastly refused to indicate that the results of any tests which were not actually

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[10] Liquid blood samples were stored under refrigeration; dried samples were stored at room temperature and returned to the submitter after tests were completed **(R 1356)**.

performed would have eliminated appellant as a suspect (R 1355). Such tests could have either proven to be inculpatory, exculpatory or inconclusive:

> If I had sufficient quantity, if it had been preserved under proper conditions, if it was not contaminated, if everything works properly, I might have been able to get a result.

(R 1362) (emphasis supplied).

Even if appellant had successfully demonstrated that the state's failure to adequately preserve certain samples hindered preparation of his defense, established precedent does not require preservation of that evidence by the state which is merely potentially beneficial to a defendant. See, California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). In the absence of any showing of bad faith on the part of the state, the failure to preserve potentially useful evidence does not constitute a denial of due process of law. See, Arizona v. Youngblood, 109 S.Ct. 333 (1988). Moreover, this Court has held that the Sixth Amendment right of an accused to confront the witnesses against him does not encompass physical evidence. See, G.E.G. v. State, 389 So.2d 325 (Fla. 5th DCA 1980), affirmed, 417 So.2d 975 (Fla. 1982).

Inasmuch as appellant is unable to satisfy his initial burden of demonstrating actual prejudice occasioned by the pre-indictment delay, this Court need not even reach the issue concerning the state's reasons for such delay. However, assuming that some modicum of actual prejudice can be gleaned from the

record, this Court must then "balance the demonstrable reasons for delay against the gravity of the particular prejudice on a case-by-case basis." Rogers v. State, 511 So.2d at 531. Detective Hansen testified that DNA analysis had emerged as a scientific tool in the apprehension of criminals during the interval between appellant's commission of the murder and his indictment for same; unfortunately, the results were inconclusive (R 1343). The state's effort to acquire dispositive evidence of appellant's guilt in an admittedly circumstantial case prior to commencing prosecution cannot fairly be characterized as violating "the fundamental conception of justice, decency and fair play" required to entitle appellant to the relief sought. Id. Consequently, appellant's conviction must be affirmed.

POINT SIX

NO PREJUDICIAL ERROR HAS BEEN DEMONSTRATED CONCERNING APPELLANT'S NUMEROUS CHALLENGES TO VARIOUS EVIDENTIARY RULINGS BY THE TRIAL COURT, MANY OF WHICH CLAIMS WERE NOT EVEN PROPERLY PRESERVED FOR APPELLATE REVIEW.

Appellant asserts that numerous erroneous evidentiary rulings by the trial court, when considered either "individually and/or cumulatively", flawed appellant's trial to such an extent as to render the proceeding unfair. See, Initial Brief of Appellant, page 71. Each of these claims will be addressed in the order in which they have been presented by the appellant.

THE TRIAL COURT DID NOT ERR BY PERMITTING THE PROSECUTION TO MISCHARACTIZE THE EXPERT TESTIMONY OF A STATE WITNESS; MOREOVER, THIS ISSUE WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

During the conviction phase of trial, an expert witness called by the state testified that a blood sample derived from appellant's hotel bathroom (R 679-682) showed "activity in the A row" during the first test; however, because there was insufficient sample to conduct a reliable subsequent test, the result was reported as inconclusive (R 866-868). After the prosecutor requested that the witness denote his observations concerning this particular blood. sample on State's Exhibit 44, which although not contained in the appellee's record on appeal has been designated as a drawing of blood types, defense counsel interposed the following objection:

> MS. CASHMAN: I am going to object, Your Honor. I believe the expert has told us it was inconclusive.

(R 868). After the prosecutor explained that he simply wanted the expert testimony that the initial test had produced some A activity to be reflected on the chart, the objection was overruled and State's Exhibit 44 was subsequently admitted into evidence without objection (R 868, 871). Likewise, the prosecutor's reference to such evidence in closing argument prompted no objection whatsoever (R 1094-1095). Instead, for the first time on appeal, appellant argues that the closing argument of the prosecutor mischaracterized the expert testimony of the witness. See, Initial Brief of Appellant, page 57.

In the first instance, this Court should decline to review a claim of error which was never presented to the trial court. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). However, even if this issue is considered on the merits, the closing argument of the prosecutor did not in any way contradict the evidence which had been presented during the state's case-in-chief. The prosecutor did not argue that the test result on the blood sample derived from appellant's hotel bathroom was conclusive; to the contrary, the prosecutor accurately stated that the test had indicated "some A activity" (R 866-867, 1095).

Even if error could be gleaned from this unpreserved claim, the prosecutor's suggestion that the presence of blood in appellant's bathroom which could have belonged to the victim was "another fact for you to consider" was harmless at most (R 1095). Prior to commencement of closing arguments, appellant's jury was properly instructed that "what the attorneys say to you is not evidence" (R 1060). At the conclusion of closing arguments, the

jury was instructed that its verdict must be based solely upon "the evidence introduced at this trial" (R 1127). In view of the strength of the state's circumstantial evidence against the appellant (see, Point I, supra), appellant in entitled to no relief with respect to this claim. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); §924.33, Fla. Stat. (1987).

THE TRIAL COURT DID NOT ERR BY LIMITING THE SCOPE OF CROSS-EXAMINATION OF A STATE WITNESS, PRESENTED TO ESTABLISH THE CHAIN OF CUSTODY OF CERTAIN EXHIBITS, TO THOSE MATTERS WHICH WERE THE SUBJECT OF TESTIMONY DURING DIRECT EXAMINATION OF THE WITNESS.

During voir dire of a state witness who handled some hair samples extracted from the appellant, defense counsel attempted to ascertain whether the witness had conducted a comparative analysis on the exhibits sought to be introduced by the state (R 879-883). The prosecutor's objection predicated upon improper voir dire was subsequently sustained by the trial court (R 883). Thereafter, the state successfully moved in limine to restrict the appellant's cross-examination of the witness to those matters which were the subject of testimony on direct (R 890-894).[11] Such a ruling was undoubtedly correct. §90.612(2), Fla. Stat. (1987). It is inappropriate for a defendant to attempt to use cross-examination as a vehicle for presenting defensive evidence. Lambrix v. State, 494 So.2d 1143, 1147-1148 (Fla. 1986); Steinhorst v. State, 412 So.2d at 337. Accordingly, no error

[11] Although the trial court technically deferred ruling, the admonition concerning adherence to the general rules of evidence had the practical effect of granting the state's motion (R 894).

whatsoever, reversible or otherwise, has been demonstrated with respect to this claim.

THE TRIAL COURT DID NOT ERR BY ADMITTING THE OPINION TESTIMONY OF A LAY WITNESS CONCERNING HIS ACTIVE RECOGNITION OF SHOE PRINTS DEPICTED IN CERTAIN PHOTOGRAPHS AS HAVING BEEN MADE BY MILITARY-STYLE BOOTS.

The state proffered the testimony of retired United States Army Major James Pierpoint, Jr. following the filing of a motion in limine by the appellant (R 560-574, 2241-2260). Following the state's argument that it was not offering the witness as an expert but as a lay witness "to testify as to [his] recognition of some object or some thing based on past experience" (R 575), the trial court denied appellant's motion as follows:

> This man is attempting to, to tell us here, that he's looked at four photographs, or as you brought out, maybe more. That he's familiar with the type of sole, military, it's a military-type sole. As you pointed out, it could be worn by anyone. And that it is nothing more, the photograph is nothing more than a similar shoe worn by military. That's all he's saying.
>
> It seems to me that it goes to the weight of the evidence as opposed to the admissibility, so I distinguish the experimental case that you talked about and I quite agree with the, with the court in the Gilliam case.
>
> I think that it seems to me that it, he can tell based upon his experience, that it's a type. I don't think he can go into any more detail than that, and let the jury decide, for what it's worth, the weight of that testimony.

(R 581).

Significantly, in another portion of his brief, appellant has argued that the subject testimony is "absolutely useless" and "simply worthless". See, Initial Brief of Appellant, pages 25-26. Appellant presently asserts that although the testimony of this witness was irrelevant, it was nevertheless "extremely prejudicial". See, Initial Brief of Appellant, page 62.

In the first instance, it would seem to appellee that whether a shoe print found on the interior of the victim's vehicle could be identified as having been made by a military-style boot is highly relevant to the ultimate issue of appellant's guilt in view of the fact that appellant was observed to be wearing sandy, military-style boots on the evening of the victim's disappearance (R 627, 687, 696). §90.401, Fla. Stat. (1987). The significance of Pierpoint's testimony is that it explains why the indentations or marks made by the shoe print found in the victim's vehicle would not necessarily correspond to the original sole found on the type of footwear which was responsible for leaving the print (R 686-689). Based upon his twenty years' experience in the military, as well as his opportunity to observe the soles of boots typically worn by Airborne Ranger and Special Forces troops during the late 1970's, this witness was amply qualified to render the lay opinion elicited (R 687-689). Accordingly, no reversible error with respect to this claim has been demonstrated.

THE TRIAL COURT DID NOT ERR BY PERMITTING TESTIMONY CONCERNING A PERSONALITY CHARACTERISTIC OF THE VICTIM WHICH WAS DIRECTLY RELEVANT TO THE ISSUE CONCERNING APPELLANT'S GUILT FOR THE OFFENSE CHARGED AS WELL AS THE APPROPRIATE SENTENCE WHICH SHOULD BE IMPOSED UPON CONVICTION.

During both phases of appellant's trial, testimony was presented by the state to establish that the victim was a cautious individual (R 484, 1691, 1698-1701).[12] Although a motion in limine filed by appellant predicated upon Booth v. Maryland, 482 U.S. ____, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), had previously been granted by the trial court (R 2338-2361), it is clear from the record that evidence pertaining to the victim's "propensity to be cautious" was not intended to be excluded by virtue of the trial court's ruling (R 1686-1690, 1697).[13]

Appellant misreads Booth, supra, to preclude the presentation of any evidence regarding the personal characteristics of a victim even when such personal habits may be directly relevant to the ultimate determination by the finder of fact. Relevant evidence is that which tends to prove or disprove a material fact. 890.401, Fla. Stat. (1987). All relevant evidence is admissible unless deemed inadmissible by law. §90.402, Fla. Stat. (1987).

Whether or not Sharon Zellers would have voluntarily accompanied the appellant to the site where her vehicle and corpse were eventually found is vitally relevant to the issue concerning appellant's guilt for her murder based upon a theory

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[12] However, it is interesting to note that it was the appellant who first elicited such information during cross-examination of the victim's father (R 481).

[13] Contrary to appellant's assertions, testimony of Kevin Ciullo which was the subject of objection below was not intended to establish any particular character trait of the victim but was instead offered to demonstrate that the witness was competent to testify that there was nothing unusual about Sharon Zellers' behavior on December 30, 1978 (R 490-493).

of felony murder. §782.04(1)(a)(2)(f), Fla. Stat. (1987). Moreover, the likelihood that the victim consented to be in the company of the appellant is likewise relevant to the issue concerning the appropriate punishment for appellant's crime (R 1697), and was not used to establish a nonstatutory aggravating circumstance as argued by appellant. §921.141(5)(d), Fla. Stat. (1987). Consequently, no reversible error has been demonstrated with respect to this claim.

THE TRIAL COURT DID NOT ERR BY ADMITTING THE TESTIMONY OF THE VICTIM'S FATHER CONCERNING THE VICTIM'S USUAL ROUTE TO AND FROM WORK.

The victim's father testified that he drove from the victim's residence to her place of employment and then returned home by the same route twice on the evening of the victim's disappearance (R 465-467). When asked about his basis for knowledge of the course that his daughter would have travelled from work en route to her home, the witness replied that it was the route that he had taught her when she first became employed at Walt Disney World and the one that his daughter "always told us she took" (R 480). Indeed, the victim's father was so sure in his own mind of the course his daughter had travelled that evening that he did not deviate from it during his two searches (R 482).

The subject testimony was admissible over either the objection which was interposed in the trial court (that the question assumed a fact which was not in evidence) or appellant's current contention on appeal (that the question called for speculation). However, even if the trial court's ruling were in error, appellant is entitled to no relief with respect to his

current claim since the specific basis for appellant's present objection was never presented below. Steinhorst v. State, 412 So.2d at 338; §90.104(1)(a), Fla. Stat. (1987).

THE TRIAL COURT DID NOT ERR BY OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR'S COMMENT DURING GUILT PHASE CLOSING ARGUMENT CONCERNING APPELLANT'S FAILURE TO CALL HIS FATHER AS A WITNESS.

In the first instance, although appellant maintains that a motion for mistrial predicated upon this claim of error was improperly denied by the trial court, the record on appeal does not reflect that any such motion was ever made. See, Initial Brief of Appellant, page 68. The record merely reflects an objection (on the basis of improper argument) without more (R 1099). Although appellant accuses the state of "intentional disregard of the precedent clearly establishing that such is an improper argument'' (see, Initial Brief of Appellant, page 67), the specific reference to any such precedent is conspicuously absent from appellant's brief, and this Court's decision in State v. Michaels, 454 So.2d 560 (Fla. 1984), appears to be dispositive of the issue in favor of the state.

One of the most glaring inconsistencies in appellant's alibi concerning his whereabouts on December 30, 1978 was the absence of any observable blood in appellant's vehicle, according to the testimony of Deputy Sarver, who accompanied appellant's father to the Skate World parking lot to retrieve the appellant's vehicle (R 975-976). Had appellant's father indeed observed any blood whatsoever after unlocking the vehicle in preparation of driving it, such a fact would have proven extremely helpful in lending credibility to appellant's version of events. Inasmuch as

appellant's own father was competent[14] and available[15] to testify, appellant's failure to produce him as a witness was properly subject to comment by the state under Michaels, supra. Consequently, no reversible error has been demonstrated with respect to this claim. Alternatively, any error with respect to this claim was invited by the prior closing argument made by the defense which was designed to cast doubt upon the credibility of the only witness to testify concerning the presence or absence of blood in the appellant's vehicle (R 1078).

THE TRIAL COURT DID NOT ERR BY PROVIDING A MAGNIFYING GLASS UPON REQUEST OF THE JURY DURING DELIBERATION.

Appellant cites no case authority, and appellee is aware of none, which would prohibit a juror from considering all of the evidence available to other jurors by virtue of their superior vision. The trial court correctly analogized the substance of the request made by the jury to a request for a brighter light (R 1229-1230). While neither a magnifying glass nor adequate light

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[14] Because the testimony of appellant's father would have been relevant and material and based upon direct knowledge, such evidence would have been considered competent in the event that it had been offered. See, Hall v. State, 470 So.2d 796, 798 (Fla. 4th DCA 1985), reversed and remanded on other grounds, 517 So.2d 678 (Fla. 1988).

[15] Availability as defined within the context of the propriety of a comment concerning the opponent's failure to call a witness "does not refer either to geographical proximity or to the physical or mental capacity of the witness to testify. It has reference, rather, to one party's superior knowledge of the existence and identity and the expected testimony of the witness.'' Id. The existence of the parent-child relationship, which would ordinarily be expected to create a bias in the witness in favor of supporting the defense offered by the accused family member, has been recognized to render such a witness less available to the prosecution. State v. Michaels, 454 So.2d at 562.

are expressly permitted in the jury room under Florida Rule of Criminal Procedure 3.400, the trial court's ruling was clearly within both the spirit and the letter of the procedural law (R 1230).

THE TRIAL COURT DID NOT ERR BY INSTRUCTING APPELLANT'S JURY UPON THE STATUTORY AGGRAVATING CIRCUMSTANCE PROVIDED IN SECTION 921.141(5)(i), FLORIDA STATUTES (1987), NOTWITHSTANDING THE FACT THAT SUCH LEGISLATION DID NOT EXIST AT THE TIME OF APPELLANT'S COMMISSION OF THE OFFENSE FOR WHICH HE WAS TO BE SENTENCED.

As conceded by appellant, Stano v. Dugger, 524 So.2d 1018 (Fla. 1988), and Combs v. State, 403 So.2d 418 (Fla. 1981), are controlling with respect to this claim of error. Even if this Court were inclined to recede from its own precedent, the elimination of this factor from the jury's consideration would not have diminished the severity of appellant's sentence, inasmuch as the trial judge did not find that the prosecution had proven the existence of this statutory aggravating circumstance beyond a reasonable doubt (R 2517).

THE TRIAL COURT DID NOT ERR BY DENYING APPELLANT'S MOTION FOR AN EVIDENTIARY HEARING IN ORDER TO DEMONSTRATE THAT FLORIDA'S DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The oft-repeated assertion that the death penalty constitutes cruel and unusual punishment has been rejected by this Court in a multitude of decisions. Diaz v. State, 513 So.2d 1045 (Fla. 1987); Marek v. State, 492 So.2d 1055 (Fla. 1986); Medina v. State, 466 So.2d 1046 (Fla. 1985); Booker v. State, 397 So.2d 910 (Fla.), cert. denied, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981). Other decisions of this Court passing upon the "cruel and unusual punishment" question include: Halliwell v. State, 323 So.2d 557 (Fla. 1975); Washington v. State, 362

So.2d 68 (Fla. 1978), cert. denied, 441 U.S. 937, 98 S.Ct. 2063 (1979); Harqrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239 (1979); Thompson v. State, 389 So.2d 197 (Fla. 1980); Menendez v. State, 419 So.2d 312 (Fla. 1982); Lightbourne v. State, 438 So.2d 380 (Fla. 1980) and citations therein; Clark v. State, 443 So.2d 973 (Fla. 1983); and Thomas v. State, 456 So.2d 454 (Fla. 1984). No error arising out of the trial court's reliance upon well-settled decisional authority has been demonstrated.

Because none of the alleged errors addressed herein, when considered either individually or cumulatively, resulted in the appellant suffering prejudice, no relief predicated upon these claims is warranted.

POINT SEVEN

THE TRIAL COURT DID NOT ERR BY ADMITTING THE REBUTTAL TESTIMONY OF A DEFENSE CHARACTER WITNESS, WHICH TESTIMONY ESTABLISHED THAT APPELLANT HAD CONFESSED HIS COMMISSION OF A BURGLARY TO THE WITNESS, DESPITE APPELLANT'S WAIVER OF THE STATUTORY MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT PRIOR CRIMINAL HISTORY; MOREOVER, ANY ASSERTED ERROR IN THE TRIAL COURT'S RULING WAS HARMLESS BEYOND A REASONABLE DOUBT.

As indicated by appellant, prior to commencement of the penalty phase, appellant waived the statutory mitigating circumstance pertaining to no significant history of prior criminal activity (R 1537). §921.141(6)(a), Fla. Stat. (1987). At the time such a waiver was received and accepted by the state, the prosecutor observed that "[t]he question is what significance does it have and we are going to read the case and do the research to find out that" (R 1537).

During the defense case-in-chief, David Bickett, a witness who knew appellant from junior high school through the time appellant joined the army right after high school and characterized appellant as his best friend, testified concerning appellant's work habits and leadership qualities (R 1817-1819). According to Bickett, appellant was a natural leader in the workplace as well as on the softball field because he, in essence, practiced what he preached (R 1819-1821). The witness also testified that he and appellant attended church "all the time" and that church was a major focal point for their association since the two attended different high schools (R

1819). During subsequent cross-examination, Bickett testified that it was his impression that appellant's Christian ethics were as strong as his own (R **1826-1827).**

Although the prosecution attempted to impeach Bickett's testimony by establishing that the witness had personal knowledge that appellant had committed a burglary of an automobile parts store at the age of sixteen, as evidenced by appellant's confession of same to the witness, the trial court refused to permit such testimony during cross-examination of the witness based upon the limitation of direct examination "to a very narrow area" by the defense (R **1821-1825).** The state argued that appellant's admission to the witness was directly relevant to the credibility of Bickett's opinion of the witness and that whether appellant had indeed confessed to having committed a crime during a period of time when he was characterized by the witness as having been a leader "by example" was directly relevant to the issue whether appellant was a good leader (R **1819-1826).** However, in specific response to the contention of the defense that the state was attempting to establish an impermissible nonstatutory aggravating circumstance, the court stated as follows:

> THE COURT: No....That's not true. I don't believe that's the case. I think what they're doing, saying is that this is a matter of impeachment, going to the predicate of, of any opinions these people have with respect to the character of the defendant. And that's probably, a character is a very broad term.
>
> . . . .

> I'm not ruling that I disagree with the premise upon which [the state] is proposing. I am saying that based upon the testimony of this witness on direct examination, that it's very narrow.

(R 1824-1825). Thereafter, the state was permitted to call the witness in rebuttal (R **1847-1849).**

Although cognizant of the case authorities relied upon by appellant to support his contention that the trial court reversibly erred by permitting such testimony, several decisions of this Court appear to support the ruling of the lower court. In Parker v. State, **476** So.2d **134** (Fla. **1985),** this Court declined to glean any impropriety in the state's cross-examination of a defense mental health expert which inquiry included the case history utilized in formulating the opinion of the witness and any admission made by the defendant to the witness concerning commission of any criminal offenses. When the witness responded that the defendant had admitted having burglarized a school at the age of nine, the state inquired whether the witness had any knowledge concerning other offenses which had been committed by the defendant.

In response to Parker's claim on appeal that the admission of such testimony constituted reversible error in the presence of a waiver of intent to rely on the mitigating circumstance of no significant prior criminal history, this Court held as follows:

> In the instant case, the testimony of the defense expert that he based his opinion regarding appellant's

> non-violent nature on the appellant's past personal and social developmental history, including a prior criminal history, opened the door for this cross-examination by the state. We find that it is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis.

Parker v. State, **476** So.2d at **139** (citations omitted). Parker, supra, was subsequently held to control the correct disposition of Muehleman v. State, **503** So.2d **310** (Fla. 1987), wherein three state witnesses testified on rebuttal concerning previous crimes committed by the defendant despite the defendant's waiver of the no significant criminal history mitigating factor:

> We find this case controlled by Parker, in which the evidence was properly admitted in response to the extensive exploration by the defense of "appellant's past personal and social developmental history, including a prior criminal history." **476** So.2d at **139.** The presentation of the previous crimes in Parker through cross-examination is functionally equivalent to the evidence here presented in rebuttal. In the instant case, unlike in Maggard, the trial court exercised its discretion in admitting the testimony not to rebut a phantom, waived mitigating factor, but to expose the jury to a more complete picture of those aspects of the defendant's history which had been put in issue.

Muehleman v. State, **503** So.2d at **316.** (emphasis supplied).

Moreover, the significance of the Muehleman decision does not end with the foregoing holding:

> Parker made clear that the mere existence of a strategical waiver by the defense of the mitigating factor does not end the analysis. In order to evaluate the alleged error, we must consider the evidence admitted, any prejudice accruing to the defendant therefrom, and the purpose for its admission. See Jennings v. State, **453** So.2d **1109, 1114** (Fla. **1984),** cert. granted and judgment vacated on other grounds, **470** U.S. 1002, **105** S.Ct. **1351, 84** L.Ed.2d **374 (1985).**

Id.

The state's objective in seeking to admit the subject testimony has already been addressed extensively in a previous portion of this point. In the event that this Court is inclined to find an abuse of discretion concerning the decision of the trial court to permit such testimony, it is still incumbent upon this Court to consider the substance of the evidence presented and any prejudice accruing to the appellant as a result thereof.

Stated succinctly, after hearing evidence that appellant had previously been convicted of the offenses of kidnapping and assault with a deadly weapon (two counts) arising out of two separate incidents, appellant's jury was also presented with evidence from which it could logically be inferred that his leadership by example according to Christian ethics was a hypocrisy. Had the prosecution been unable to establish the existence of the prior violent felony statutory aggravating circumstance, the fact that appellant was not the person either he professed to be or others perceived him to be might have carried some weight with appellant's jury. However, faced with

the quantity and the quality of the evidence presented by the state to establish the applicability of section 921.141(5)(b), Florida Statutes (1987), to appellant's crime, appellant in reality forfeited nothing by waiver of the statutory mitigating circumstance enumerated in section 921.141(6)(a), Florida Statutes (1987). Despite the waiver, appellant did not "give up the opportunity to convince the trier of fact that he did not have a prior significant criminal history" (see, Initial Brief of Appellant, page 82), because no such opportunity actually existed under the facts presented.

In this regard, it is respectfully submitted that the state's proof of appellant's prior violent felonies by definition precluded appellant from establishing the converse mitigating circumstance that he had no significant prior criminal history. As this Court stated in Wasko v. State, 505 So.2d 1314, 1317 (Fla. 1987):

> These two circumstances are mutally exclusive. It would be illogical to find no significant prior history when there has been a prior conviction of another capital felony or a felony involving the use, or threat, of violence to a person. Such a conviction, by the nature of the crime, would be significant.

Since the substance of the subject testimony was harmless in comparison to the other evidence presented against the appellant during both phases of trial, any contention that appellant's jury based their sentencing recommendation upon appellant's burglary of an automobile parts store at the age of sixteen to the exclusion of appellant's horrendous adult criminal record is

wholly unreasonable. See, Rogers v. State, 511 So.2d 526 (Fla. 1987) (admission of evidence insufficient to establish existence of statutory aggravating circumstance [defendant's alleged violence in a restaurant] harmless error). Accordingly, appellant's sentence of death should be affirmed. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); §924.33, Fla. Stat. (1987).

POINT EIGHT

APPELLANT'S CHALLENGE TO HIS SENTENCE OF DEATH, PREDICATED UPON THE FAILURE OF THE JURY TO EXPRESSLY DETERMINE THE APPLICABILITY OF PARTICULAR STATUTORY AGGRAVATING CIRCUMSTANCES TO HIS CRIME, WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW AND, EVEN IF NOT PROCEDURALLY BARRED, IS WITHOUT MERIT.

As conceded by appellant, the instant claim of error, or a substantially verbatim version thereof, has previously been presented to this court by counsel for appellant in Wright v. State, 473 So.2d 1277 (Fla. 1985); Peede v. State, 474 So.2d 808 (Fla. 1985); Provenzano v. State, 497 So.2d 1177 (Fla. 1986); Remeta v. State, 522 So.2d 825 (Fla. 1988); Hildwin v. State, 531 So.2d 124 (Fla. 1988); Cherry v. State, 14 F.L.W. 225 (Fla. April 27, 1989); and Jones v. State, FSC Case No. 72,461[16]. See, Initial Brief of Appellant, pgs. 84-85. In this Court's latest decision passing upon the claim, this issue was summarily rejected without further identification as merely one of six challenges pertaining to the penalty phase of the defendant's trial which this Court found to be "meritless". Cherry v. State, 14 F.L.W. at 226.

Prior to addressing the merits of the instant claim of error, appellee disputes appellant's assertion that the substance of such a claim was adequately presented to the trial court so as to properly preserve the issue for appellate review. This court has previously observed that, unless the constitutionality of a

[16] Oral argument was heard in this case on May 5, 1989.

statute as applied is first raised at the trial court level, the claim of error has not been properly preserved for appellate review. Eutzy v. State, 458 So.2d 755 (Fla. 1984); Trushin v. State, 425 So.2d 1126 (Fla. 1982).

Inasmuch as appellant is currently asserting that the provisions of section 921.141, Florida Statutes, are matters of substantive law insofar as they define those capital felonies for which a sentence of death may constitutionally be imposed (see, Initial Brief of Appellant, p. 87), it cannot reasonably be concluded that appellant's motion to have section 921.141 declared unconstitutional, premised upon the contention that the "essential elements of [s]ection 921.141 governing the imposition of capital punishment are procedural...in nature" (R 2073) (emphasis supplied), fairly presented to the trial court the claim currently raised on appeal. Moreover, the mere request that a special penalty verdict form reflecting all statutory aggravating circumstances upon which jury instructions were given be utilized in lieu of a standard verdict form should ~~not~~ serve to confer preservation in any instance where the trial court was never afforded an opportunity to rule upon the allegations of constitutional impropriety presently asserted to attend appellant's sentence of death. Appellee would therefore urge this Court to decline to review this issue on the merits.

In the event that this Court elects to entertain this claim on the merits in spite of its procedural default, appellant's reliance upon Burch v. State, 522 So.2d 810 (Fla. 1988), is unavailing inasmuch as the majority opinion simply underscores

the correctness of the current application of Florida's capital sentencing structure. Contrary to appellant's assertion, there is no constitutional requirement that a jury sentencing recommendation of death be accompanied by express findings in aggravation. "Appellant's argument that due process requires that a jury's recommendation for life or death be accompanied by reasons in writing is without merit. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)." Brown v. State, 473 So.2d 1260, 1271 (Fla. 1985).

In the first instance, the aggravating circumstances set forth in section 921.141(5), Florida Statutes, are not elements of the offense of capital murder. This Court has defined a capital crime as one in which the death penalty is possible. Rusaw v. State, 451 So.2d 469, 470 (Fla. 1984). Every conviction for first-degree murder in Florida involves a potential sentence of death. See, State v. Bloom, 497 So.2d 2 (Fla. 1986). The elements required to be proved to support a conviction for first-degree murder remain the same; section 921.141 does not alter the maximum possible penalty upon conviction of such an offense.

While the sentencing criteria enumerated in section 921.141(5), Florida Statutes, define those instances in which imposition of the maximum possible penalty for the offense of capital murder is appropriate, Florida's capital sentencing scheme does not require that express findings in aggravation, be they unanimous or otherwise, accompany a jury's sentencing recommendation. A jury recommendation, be it for death or for life imprisonment, is not binding on a trial judge in Florida,

with whom the ultimate responsibility for determining the appropriate sentence is reposed by statute. Thomas v. State, 456 So.2d 454 (Fla. 1984); Lusk v. State, 446 So.2d 1038 (Fla. 1984); Thompson v. State, 456 So.2d 444 (Fla. 1984); Clark v. State, 443 So.2d 973 (Fla. 1983); Engle v. State, 438 So.2d 803 (Fla. 1983); Hoy v. State, 353 So.2d 826 (Fla. 1977); §921.141(3), Fla. Stat. (1987).

As this court observed in Lightbourne v. State, 438 So.2d 380 (Fla. 1983), the aggravating circumstances ultimately required to support the imposition of a sentence of death need not be alleged in an indictment charging a defendant with a capital felony in order to confer jurisdiction on the trial court to subsequently impose a sentence of death. Moreover, a trial judge's ultimate rejection of a jury recommendation for life imprisonment does not subject a convicted capital defendant to double jeopardy. Brown v. State, 473 So.2d 1260 (Fla. 1985); Cannady v. State, 427 So.2d 723 (Fla. 1983). Inasmuch as a criminal defendant possesses no constitutional right to be sentenced by a jury, State v. Bloom, 497 So.2d 2 (Fla. 1986), and unanimity with respect to the jury's majority sentencing recommendation is not even required, James v. State, 453 So.2d 786 (Fla. 1984), appellant's proposed capital sentencing scheme invades the province of the trial judge and contravenes existing Florida law by which the appellant purports to desire capital sentencing to be governed, albeit in accordance with his own novel interpretation of the obligations imposed upon the jury under Florida's bifurcated system.

Significantly, appellant has failed to acknowledge the United States Supreme Court decisions which control resolution of this issue. In Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the permissibility of a death sentence imposed in the absence of any jury finding in aggravation or recommendation of death was upheld against multifarious constitutional challenges. In resolving Spaziano's claim of double jeopardy predicated upon the trial judge's override of a jury recommendation of life imprisonment, the Court found no constitutional impropriety in the ultimate sentencer's rejection of the jury's advisory verdict. If a jury sentencing recommendation does not constitute a "judgment" for the purpose of double jeopardy analysis, then it would hardly seem to follow that findings of fact attending such a determination is constitutionally mandated. Clearly, Spaziano stands for the proposition that a sentence of death need not involve express findings in aggravation made by a jury, inasmuch as Spaziano addressed the constitutionality of a sentence of death imposed solely upon the findings of the sentencing judge, as an "override" of a jury recommendation of life.

Any remaining ambiguity in the holding in Spaziano was effectively eliminated in Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 698 n.4, 88 L.Ed.2d 704 (1986), wherein Spaziano was expressly cited for the proposition that the constitutional role of a jury in capital sentencing is not synonymous with its role in determining the issue of guilt or innocence. Finally, in McMillian v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 2420, 91

L.Ed.2d 67 (1986), the court observed that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact. See, Spaziano v. Florida, 468 U.S. at ___, 104 S.Ct. at ____ "

Although appellant appears to find marginal support for his claim in the recent decision of Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1989), further litigation would appear likely in view of its controversial holding[17] as well as the recent decision of the United States Supreme Court in Hildwin v. Florida, 45 Crim. L. Rptr. (May 30, 1989), which would appear to be finally dispositive of this issue. See, Appendix "B". Because this issue was not adequately preserved for appellate review and is without merit in any event, no relief should be granted by this Court.

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[17] Although Adamson is an en banc decision, of the eleven members of the court, only six joined the majority as to this holding; four member specifically dissented on the grounds that the majority had misapplied Spaziano and McMillan. See, Adamson v. Ricketts, 865 So.2d at 1045, 1053-1055 (Brunetti, C.J., joined by Alarcon, Beezer and Thompson, J.J.J., concurring in part, dissenting in part).

POINT NINE

APPELLANT'S MULTIFARIOUS CHALLENGES TO THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE AS APPLIED WERE NOT PROPERLY PRESERVED FOR APPELLATE REVIEW AND, EVEN IF NOT PROCEDURALLY BARRED, ARE WITHOUT MERIT.

Initially, it should be observed that appellee disputes appellant's contention that the substance of the instant claim of error was adequately presented to the trial court so as to properly preserve the issue for appellate review. Although appellant asserts that the substance of the instant claim of error was presented for the trial court's consideration in a "Motion to Declare Florida Statute Section 921.141 Unconstitutional" cited in appellant's brief as appearing on pages 2084-2088 of the record on appeal (see, Initial Brief of Appellant, page 106), many of the claims presented to the trial court were couched in terms of the prima facie unconstitutionality of the death penalty statute.[18]

As this Court has previously observed, unless the constitutionality of a statute as applied is first raised at the trial court level, the claim of error has not been properly preserved for appellate review. Eutzy v. State, 458 So.2d 755

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[18] It was alleged in such motion that Section 921.141, Florida Statutes (1987) is unconstitutional on its face because: the aggravating and mitigating circumstances enumerated therein are vague and overbroad (R 2084), and the death penalty is not the least restrictive means available to further a compelling state interest (R 2086). The only claims predicated upon the unconstitutionality of the statute as applied involved alleged violations of Lockett v. Ohio, 438 U.S. 586 (1978) (R 2086), and Furman v. Georgia, 408 U.S. 238 (1972) (R 2087).

(Fla. 1984); Trushin v. State, 425 So.2d 1126 (Fla. 1982). Moreover, in order for an argument to be cognizable on appeal, the specific contention asserted as the legal ground for relief must have been presented in the motion below. Steinhorst v. State, 412 So.2d at 338.

Appellee does not read Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987), to stand for the proposition attributed to such decision in appellant's brief that "an Eighth Amendment challenge must be raised on direct appeal, even when not raised previously." See, Initial Brief of Appellant, page 106. In Copeland, supra, this Court merely declined to address in the context of a petition for writ of habeas corpus those issues challenging the constitutionality of Florida's death penalty statute as applied to Copeland which had previously been determined adversely to him on direct appeal. Copeland v. Wainwright, 505 So.2d at 429. Significantly, the specific constitutional claims which this Court declined to readdress on collateral review[19] were reviewed on the merits by this Court in Copeland's direct appeal from judgment and sentence. Copeland v. State, 457 So.2d 1012, 1015-1016, 1019 (Fla. 1984). Therefore, the only logical conclusion which can be drawn from this Court's consideration of such issues on the merits is that such claims had been adequately preserved for appellate review by proper presentation in the trial court.

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[19] Copeland argued that his death sentence violates Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), was subject to arbitrary imposition, and denied due process to black defendants accused of murdering white victims. Id.

Even if it is assumed that an allegation concerning the prima facie unconstitutionality of Florida's death penalty statute citing the vagueness and overbreadth of enumerated aggravating and mitigating circumstances adequately preserved for appellate review a similar claim alleging the unconstitutionality of the statute as applied (see, Initial Brief of Appellant, page 95), this appellant lacks standing to challenge the constitutionality of those aggravating circumstances which are not applicable to the instant case. See, Clark v. State, 443 So.2d 973, 978 n.2 (Fla. 1983). Accordingly, appellee will not even address appellant's arguments pertaining to the statutory aggravating circumstances of great risk of death to many persons[20] (see, Initial Brief of Appellant, pages 97-98), and cold, calculated and premeditated homicide without any pretense of moral or legal justification[21] (see, Initial Brief of Appellant, pages 98-100).

With respect to appellant's assertion that the bare wording of the especially heinous, atrocious or cruel[22] statutory aggravating circumstance is unconstitutionally vague (see, Initial Brief of Appellant, page 96), Maynard v. Cartwright, 486 U.S. ____, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), does not entitle appellant to any relief on appeal even though the trial court expressly relied upon the existence of this aggravating factor in sentencing appellant to death (R 2514-2516). As observed in Maynard v. Cartwright, 108 S.Ct. at 1858,

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[20] §921.141(5)(c), Fla. Stat. (1987).

[21] §921.141(5)(i), Fla. Stat. (1987).

[22] §921.141(5)(h), Fla. Stat. (1987).

"[v]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis (citations omitted)." As previously noted, the unconstitutionality of the subject aggravating circumstance as applied to this appellant was never considered by the trial court, thereby barring this claim from appellate review.

Moreover, even if this claim were subject to review on the merits and not procedurally barred by the appellant's failure to argue below the unconstitutionality of the statute as applied, Maynard v. Cartwright, supra, is inapposite because, when Cartwright's conviction and sentence were reviewed on direct appeal, applicable Oklahoma state law would not permit a sentence of death to be affirmed in the event that any of several aggravating circumstances found by the jury was subsequently found to be invalid or unsupported by the evidence. Although the state argued that, since two aggravating circumstances had been found (one of which was completely unchallenged), the death sentence should simply be affirmed, the Cartwright decision observed that the significance to Cartwright of a recent state appellate court ruling that sentences of death would no longer be set aside on appeal if one of several aggravating circumstances was found to be invalid or unsupported by the evidence was a matter to be decided by the state courts, thereby preserving the viability of the reimposition of a sentence of death upon resentencing.

In the first instance, no such impediment to affirming appellant's sentence, even if one of the two aggravating circumstances found by the trial court were stricken, exists under Florida law. In Florida, where the existence of at least one valid aggravating circumstance is not outweighed by the evidence presented in mitigation, death is presumed to be the proper sentence. White v. State, 446 So.2d 1031 (Fla. 1981); White v. State, 403 So.2d 331 (Fla. 1981). Inasmuch as the trial judge's findings of fact expressly indicate that the aggravating circumstances "jointly or severally'' outweigh the mitigating circumstances in appellant's case, this Court may confidently affirm appellant's sentence of death without the necessity of remand for resentencing as required in Maynard v. Cartwright, supra.

Furthermore, the applicability of the Cartwright decision to Florida's capital sentencing scheme is unclear, given the fact that it is the judge and not the jury who is the ultimate sentencer in Florida. Written findings of fact upon which any sentence of death imposed is based, as required by section 921.141(3), Florida Statutes (1987), enable this Court to conduct an independent proportionality review, as provided by section 921.141(4), Florida Statutes (1987). Thus, the discretion of the sentencer is not unfettered under Florida's capital sentencing scheme.

Although appellant has not specifically challenged the trial court's finding with respect to the existence of the subject aggravating circumstance, it is clear that appellant's murder of

Sharon Zellers was appropriately determined to be especially heinous, atrocious or cruel. The application of this aggravating circumstance was recently upheld in Lamb v. State, 532 So.2d 1051 (Fla. 1988), wherein the victim, who was struck six times with a claw hammer which penetrated the skull, sustained defensive wounds, and did not die instantaneously. Other cases which have held that the subject finding is supported by the evidence include: Roberts v. State, 510 So.2d 885 (Fla. 1987) (defensive wounds with numerous blows to the back of the head), cert. denied, ____ U.S. ____, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988); Wilson v. State, 493 So.2d 1019 (Fla. 1986) (defensive wounds and brutal beating with blows to victim's head); Thomas v. State, 456 So.2d 454 (Fla. 1984) (bludgeoned skull); and Heiney v. State, 447 So.2d 210 (Fla.) (defensive wounds and seven claw hammer blows to victim's head), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984).

With respect to appellant's criticisms concerning the alleged misapplication of the prior conviction of violent felony[23] aggravating circumstance, once again it should be observed that appellant has not alleged that same has been misapplied ~~in the~~ instant case. Appellant's 1986 convictions for kidnapping and assault with a deadly weapon (two counts) can hardly be said to violate Hardwick v. State, 461 So.2d 79 (Fla. 1984), cert denied, 471 U.S. 1120, 105 S.Ct. 2369, 86 L.Ed.2d 267 (1985), or Patterson v. State, 513 So.2d 1263 (Fla. 1987), in which this Court expressly receded from Hardwick, supra, to the extent that

[23] §921.141(5)(b), Fla. Stat. (1987).

such decision conflicted with Wasko v. State, 505 So.2d 1314 (Fla. 1987).

Appellant's suggestion that this Court cannot adequately review capital cases without also reviewing all other cases in which a life sentence has been imposed would have the practical effect of making this Court the sentencer in all capital cases. This argument is difficult to reconcile with the claim presented in Point VIII, supra, that Florida's death penalty statute is unconstitutional because the jury does not make express findings regarding the existence of aggravating and mitigating circumstances. See, Initial Brief of Appellant, pages 83-90. Apparently, in appellant's view, everyone but the trial judge should have a role in Florida's capital sentencing structure. Appellant's complaints regarding the alleged need for this Court to consider noncapital cases as well was rejected in Copeland v. State, 457 So.2d 1012 (Fla. 1984), and his arguments regarding the manner in which this Court reviews death sentences would seem totally contrary to prior precedent. See, e.g., Hudson v. State, 538 So.2d 829 (Fla. 1989).

For all the foregoing reasons, no relief with respect to this claim is warranted.

POINT TEN

APPELLANT'S SENTENCE OF DEATH IS NOT UNCONSTITUTIONAL ON THE ASSERTED BASIS THAT VARIOUS JURY INSTRUCTIONS AND ARGUMENTS WERE VAGUE, MISLEADING, AND ERRONEOUS.

Contrary to the assertions of the appellant, the standard jury instruction given by the trial judge in the instant case, which informed appellant's jury that mitigating circumstances must "outweigh" aggravating circumstances in order for imposition of the death penalty to be unwarranted (R 1921) is not unconstitutionally vague and does not shift the burden of proof to the appellant. In response to the defendant's claim that the trial court's denial of a special requested jury instruction that aggravating circumstances must outweigh circumstances in mitigation, this Court in Kennedy v. State, 455 So.2d 351, 354 (Fla. 1984), expressly held that the "trial court acted properly by reading the standard jury instructions."

Similarly, the standard jury instruction given (R 1923) in lieu of a special requested instruction defining "heinous, atrocious, or cruel" in accordance with the language found in 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), has been held by this Court to be adequate in an instance where the heinious, atrocious or cruel aggravating circumstance is subsequently found to be

applicable to a defendant's crime.[24] Lemon v. State, 456 So.2d 885, 887 (Fla. 1984).

With respect to appellant's claim of error predicated upon Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), any objection interposed during voir ~~dire~~ (R 9) can hardly be said to confer preservation of this issue upon preliminary instructions given and comments made during penalty phase opening statement which were not the subject of objection (R 1542-1543). Fla.R.Crim.P. 3.390(d); see also, Jackson v. State, 522 So.2d 802, 809 (Fla. 1988); Douqan v. State, 470 So.2d 697, 699-700 (Fla. 1985); Middleton v. State, 465 So.2d 1218, 1226 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

On the merits, the penalty phase instructions initially approved by this Court in In re Standard Jury Instructions in Criminal Cases, 327 So.2d 6 (Fla. 1976), and utilized "in virtually every death penalty case in this state since 1976" do not diminish the jury's role in the sentencing process. See, Combs v. State, 525 So.2d 853 (Fla. 1988). This Court has previously addressed and rejected the argument presented by appellant. In Grossman v. State, 525 So.2d 833, 840 (Fla. 1988), this Court observed the following:

> In the penalty phase of a capital proceeding, the jury is instructed, in pertinent part, that although the final responsibility for

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[24] For a discussion of the application of Maynard v. Cartwright, 486 U.S. ____, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), to Florida's capital sentencing scheme, see, Point IX, supra.

> sentencing is with the judge, that it should not act hastily or without due regard to the gravity of the proceedings, that it should carefully weigh, sift, and consider evidence of mitigation and statutory aggravation, realizing that human life is at stake, and bring to bear its best judgment in reaching the advisory sentence. We are satisfied that these instructions fully advise the jury of the importance of its role and correctly state the law.

Accord, Banda v. State, 536 So.2d 221 (Fla. 1988) (present standard instructions not erroneous statements of the law); Jackson v. State, 522 So.2d at 809 (standard jury instructions fully advise the jury of the importance of its role and correctly state the law); Smith v. State, 515 So.2d 182, 185 (Fla. 1987) (jury instructions indicating that jury recommendation is advisory and that the judge is the ultimate sentencer properly stress the importance of the jury role in making its advisory recommendation).

Finally, with respect to appellant's current assertion that the standard jury instruction on the aggravating circumstance pertaining to appellant's commission of the murder while "in the commission of, or an attempt to commit, or flight after committing or attempting to commit'' certain specifically enumerated felonies[25] should not have been given, it should be observed that defense counsel concurred in the state's request that instruction on all statutory aggravating circumstances be read (R 1865). The fact that all such circumstances were read

[25] §921.141(5)(d), Fla. Stat. (1987).

was not error. Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). Moreover, defense counsel also agreed with the state that all of the enumerated felonies should be read (R 1857-1858). Even if any claim of error arising out of the trial court's giving of the instructions ~~as~~ requested had not been waived as a result of appellant's failure to timely object to same, any alleged error arising out of the prosecutor's argument in favor of the application of this aggravating circumstance (R 1891) is harmless in view of the fact that such a circumstance was not found to be applicable to appellant's crime (R 2513-2514). Hence, no reversible error has been demonstrated. See, Daugherty v. State, 533 So.2d 287 (Fla. 1988).

POINT ELEVEN

THE TRIAL COURT DID NOT ERR BY DENYING APPELLANT'S MOTION IN LIMINE WHOSE PURPOSE WAS TO RESTRICT THE STATE'S PENALTY PHASE CROSS-EXAMINATION OF THE APPELLANT TO THE SCOPE OF ANY DIRECT EXAMINATION.

Prior to addressing the merits of the instant claim of error, it should be observed that the appellant's assertion that the trial court's denial (R 1504) of his motion in limine (R 2381-2382) "in fact tainted" appellant's decision not to testify during the penalty portion of his trial is completely unsupported by the record. See, Initial Brief of Appellant, page 121. Moreover, because there was no attempt to proffer the testimony which was purportedly forfeited as a result of the trial court's ruling, this Court is being ,requested to predicate reversible error upon conjecture. See, Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976). Indeed, appellant has chosen not to disclose the specific subject matter of the testimony which he would have purportedly presented in his own behalf but for the trial court's ruling even to this Court on appeal.

However, even if this Court were inclined to predicate reversible error upon a claim whose foundation consists of nothing more than sheer speculation, it is clear that the trial court's ruling was not in error. Thomas v. State, 249 So.2d 510, 512 (Fla. 3d DCA 1971), citing Daly v. State, 67 Fla. 1, 64 So. 358 (1914). Accordingly, no reversible error has been demonstrated.

CONCLUSION

WHEREFORE, for the aforementioned reasons, appellee moves this Honorable Court to affirm the judgment and sentence of death in all respects.

Respectfully submitted,

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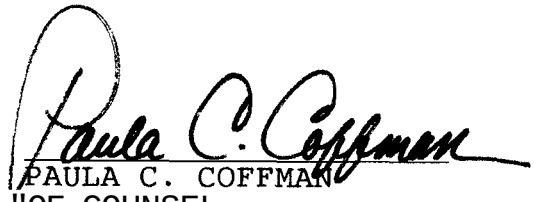
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief of appellee has been furnished by U.S. Mail to: Larry B. Hendrson, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014 on this 6th day of June, 1989.



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