IN THE SUPREME COURT OF FLORIDA

JOEY BURTON THOMPSON,

Appellant,

v. CASE NO. 73,300

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BRADLEY R. BISCHOFF
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 714224

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

TABLE OF CITATIONS

TABLE OF CITATIONS /CONTINUED)

TABLE OF CITATIONS (CONTINUED)

TABLE OF CITATIONS (CONTINUED)

TABLE OF CITATIONS (CONTINUED)

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

JOEY BURTON THOMPSON,

Appellant,

v. CASE NO. 73,300

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellant, Joey B. Thompson, defendant below, will be referred to herein as "Appellant". Appellee, the State of Florida, will be referred to herein as either "the State" or as "Appellee".

References to the record on appeal will be by use of the symbol "R", followed by the appropriate page number(s) in parenthesis. References to the transcript of proceedings will be by use of the symbol "T", followed by the appropriate page number(s) in parenthesis.

STATEMENT OF THE CASE AND FACTS

Generally, Appellant's statement of the case and facts is correct. Additions will be made within the argument where needed.

SUMMARY OF ARGUMENT

ISSUE I: The facts of this case warrant imposition of the death penalty where Appellant cold-bloodedly murdered his sleeping girlfriend by an execution-style shot to the head followed by stabbing.

ISSUE 11: The trial court properly determined that the one statutory aggravating circumstance outweighed the one statutory mitigating circumstance where the trial court found that the murder was "cold, calculated, and premeditated without any pretense of moral or legal justification," the "nonstatutory aggravating circumstances" were related to the capitol felony itself, and the finding that Appellant had no prior criminal record did not override the statutory aggravating circumstance.

ISSUE 111: Neither the trial court nor the prosecution made statements diminishing the jury's sense of responsibility in its sentencing recommendation where informing the jury that its sentencing role was advisory is merely an accurate statement of law.

ISSUE IV: The penalty phase instructions properly channeled the jury's discretion in determining that the murder was "cold, calculated, and premeditated'' where the instruction given was that which Appellant himself requested and the instruction was that approved by this Court in the Standard Jury Instructions and in Preston v. State.

ISSUE V: The trial court properly excluded polygraph results from consideration during the sentencing phase where such results are not admissible evidence. Irrelevant evidence need not be considered at the penalty phase.

ISSUE VI: The trial court properly denied Appellant's motion for a mistrial after the victim's father identified the victim as his daughter where 1) no other identity witness was available, and 2) the trial court found that the error was harmless where the witness displayed no emotion.

ISSUE VII: The trial court properly allowed the Appellant's estranged wife to testify at trial where she was listed as a witness six months before trial and through no fault of the State could not be located until the trial had commenced. As she was deposed by defense counsel before testifying there was no surprise and no error.

ISSUE VIII: The trial court properly admitted photographs of the deceased victim where the photographs were relevant to issues required to be proven in the case and their probative value outweighed any prejudicial effect.

ISSUE IX: The trial court properly denied Appellant's motion for discovery of prosecutorial investigations of prospective jurors where the controlling caselaw states that a defendant has absolutely no right to such material.

ISSUE X: The trial court properly removed a prospective juror for cause where the juror stated that she

could never vote to impose the death penalty, showing that her bias would prevent or substantially impair the performance of her duties as a juror.

ISSUE XI: The trial court properly denied Appellant's request to record the proceedings of the grand jury where there is no constitutional or statutory requirement that grand jury proceedings be recorded.

ISSUE XII: The trial court properly denied Appellant's motion to preclude voir dire examination of prospective grand jurors where a party has no vested right to any particular method of selecting a grand jury.

ISSUE XIII: The trial court properly denied Appellant's motion to enjoin grand jury deliberations where this Court has already declared that the denial in this case was proper.

ARGUMENT

ISSUE I

THE FACTS OF THE CASE WARRANT IMPOSITION OF THE DEATH PENALTY.

Appellant herein was convicted of the cold-blooded murder of his girlfriend. In noting his agreement with the jury's recommendation of death, the trial judge stated:

> Mr. Thompson was convicted by a jury on October the 6th of this year of murder in the first degree of Annette Louise Place. On October 6th of this year the same jury in the penalty proceeding advised and recommended by a vote of eight to four that this Court impose the sentence of death for the murder of Annette Louise Place.
>
> The case has been passed until today for the imposition of the court's sentence. The facts that surround the murder of Annette Louise Place are as follows: The defendant and his wife were separated at the time of the murder. The defendant's wife and two children had moved out of the marital home and the defendant and the victim, Miss Place were alone in the defendant's residence. The defendant confessed that he and the victim had argued on the night of February the 9th. The victim wanted to move in with the defendant. The defendant wanted to get back together with his wife. The victim threatened to have the defendant killed or blown up if he stopped seeing her.
>
> The defendant intended to kill the victim and himself and on February 10, 1988 the defendant shot the victim in the back of her head approximately one foot away as she slept. Because she continued to wiggle, and because the defendant did not want her to feel any pain he stabbed her once in the back. The defendant then, according to his statement put the knife in the garbage and it is was taken away that morning. The defendant then decided he could not

> kill himself and he cut his wrists around 7:00 p.m. on the night of February 10 and he wrote a suicide note to his wife on approximately February the 10th, 1988.
>
> At the trial approximately eight months later after the arrest the defendant testified that it was his wife who had murdered Annette Louise Place, and the defendant testified that he was awakened by a noise; that his wife had shot the victim and was standing over Miss Place, the victim, after having stabbed her. The defendant told his wife to leave and he took the weapons.
>
> The jury obviously did not believe Mr. Thompson's version of those facts and found that Joey Burton Thompson killed Annette Louise Place.
>
> The Court finds that this was done in an execution style as Miss Place slept. When she didn't die this defendant then stabbed her, thrusting a knife six and a half inches into her back.
>
> Mr. Thompson remained in his home with the body of Miss Place for over eighteen hours before this crime was discovered. Some eight months after confessing to this brutal murder Joey Burton Thompson blamed his wife for this crime. These acts of the defendant went accordingly: The defendant's victim was defenseless against the defendant. As the victim . . . slept (she) was murdered. The defendant could not follow through with his own suicide, and thinking that his wife who was in hiding who could not be located, the defendant intended to blame her, the mother of his children for this murder. Joey Burton Thompson then believed in the death penalty and he believes that if you commit this type of act you deserve the death penalty.

(T 1185-1188).

The State submits that under the facts of this case, not the least being the execution-style murder itself, that the death penalty is here warranted.

In Way v. State, 496 So.2d 126 (Fla. 1986), this Court upheld a sentence of death where the defendant struck his daughter on the head with a blunt instrument and set her on fire. In Middleton v. State, infra, this Court upheld a sentence of death where the defendant shot the woman he lived with as she awoke. In Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911, 49 L.Ed.2d 1221, 96 S.Ct. 3227 (1976), a sentence of death was upheld where the defendant shot his travelling companion.

Appellant contends that since this Court did not uphold the death sentence in State v. Blair, 406 So.2d 1103 (Fla. 1981), or in Halliwell v. State, 323 So.2d 557 (Fla. 1975), that it should not do so here. The State submits that since death was upheld in Way, Middleton, and Spinkellink, supra, that the brutal murder of Appellant's unsuspecting girlfriend in the instant case likewise merits the death penalty, as the judge and jury below properly determined.

ISSUE II

THE TRIAL COURT PROPERLY DETERMINED THAT THE ONE STATUTORY AGGRAVATING CIRCUMSTANCE OUTWEIGHED THE ONE STATUTORY MITIGATING CIRCUMSTANCE AND THE NON-STATUTORY MITIGATING CIRCUMSTANCES IN THIS CASE.

In sentencing Appellant, the trial court found the following:

> The summarization of the statutory: Before imposing this sentence this Court has carefully studied and considered all of the evidence and the testimony at trial and in an advisory sentencing proceeding, the applicable Florida Statutes, the case law and all other factors touching upon this case. The statutory aggravating circumstances that the court found was the one aggravating factor that the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> Based upon the facts that were submitted the statutory mitigating circumstance that the court found only one, that being that the defendant has no significant history of prior criminal activity and it was shown to the court that the defendant had no criminal prior record.
>
> The court then considered the non-statutory mitigating circumstances and found A, there was testimony that the defendant was separated from his wife and, C, suicide after murder. The testimony showed that the defendant may have been suffering from emotional stress. B, the testimony showed that the defendant had maintained employment during his marriage to his wife. C, the testimony showed that the defendant although had lost touch with his family but that as a teenager living and going to school was a considerate son. The testimony then, D, shows that the defendant while he has been in custody that he has been a good inmate.

> The court having considered both the statutory and the non-statutory mitigating and aggravating circumstances finds that the mitigating circumstances in this case although greater in number than the aggravating factors found in this case do not outweigh the cold, calculated, and premeditated manner in which you, Mr. Thompson, this crime that you committed, Mr. Thompson's complete defense blamed his wife, the mother of two young children coupled with the execution style killing of Miss Place, the defenseless victim.

(T 1188-1190).

Appellant first contends that the trial court improperly found that the instant murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, as set forth in §921.141(5)(i), Florida Statutes.

The State submits that the cold-blooded execution style murder of Appellant's girlfriend clearly merited the application of the "cold, calculated and premeditated" statutory aggravating factor in this case. The record on appeal demonstrates that Appellant argued with his girlfriend on the night of February 9th. She threatened to have him killed and/or blow up his house if he stopped seeing her. They went to sleep together that night. On the morning of February 10th, Appellant awoke at 8:00 a.m., having decided to kill his girlfriend. At 8:30 a.m. he shot her in the back of the head as she slept. The gun was one foot away from her head when fired. After the shot, she was still wiggling so Appellant took a hunting knife and thrust

it 6-1/2 inches into her back, killing her (T 638-639, 1185-1187). Appellant kept a number of guns around the house but chose to use a handgun his grandfather gave him (T 842).

This Court has held that the "cold, calculated, and premeditated" aggravating circumstance is properly applied " . in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." McCray v. State, 416 So.2d 804 (Fla. 1982). Where a murder can properly be characterized as an execution, imposition of the death penalty on the basis of the "cold, calculated, and premeditated" aggravating circumstance is not improper. Routly v. State, 440 So.2d 1257 (Fla. 1983 , cert. denied, 82 L.Ed.2d 888. See also Kokal v. State, 492 So.2d 1317 (Fla. 1986). The trial court in the instant case accurately characterized the murder of Annette Place as an "execution style killing" (R 1189). See also Herring v. State, 446 So.2d 1049 (Fla. 1984) (two shots evince heightened premeditation); Eutzy v. State, 458 So.2d 755 (Fla. 1984).

The record in this case shows that Appellant contemplated murdering Miss Place for at least 1/2 hour on the morning of the killing, and possibly during the preceding night as well. Appellant had various guns to choose from (T 842). There is no evidence of a suicide pact. His conduct in executing the victim by a shot to the

head followed by stabbing her once in the back with a knife establishes the heightened premeditation required for finding the "cold, calculated, and premeditated" aggravating circumstance. See Lennings v. State, 453 So.2d 1109 (Fla. 1984); Herring v. State, supra. Premeditation may be established by circumstantial evidence. Heiney v. State, 447 So.2d 210 (Fla. 1984).

This was clearly not a morally justifiable self defense killing. Although the victim may have threatened Appellant the night before, she was asleep and presented no danger when he killed her. After their argument, they made love. The next morning he shot her.

Regarding Appellant's attempts to avoid the consequences of his actions, the record demonstrates that Appellant disposed of the knife in the garbage outside the house, knowing it would be picked up that morning (T 841). Further, the trial court found that Appellant attempted to avoid the consequences of the murder by trying to kill himself. He did not try hard enough. Later, he attempted to blame his wife for the murder.

The case of Middleton v. State, 426 So.2d 548 (Fla. 1982), is particularly instructive. Middleton received the death penalty for the shooting death of the woman with whom he resided. Middleton had contemplated murdering his sleeping victim for about an hour before he finally killed her with one shot to the back of the head as she awoke. In

affirming the application of the "cold, calculated, and premeditated" aggravating factor, this Court held that "(P)roof of the element of premeditation does not require that thought or reflection of any specific minimum duration be shown". Middleton, supra at 550. Surely, the approximately half an hour that this Appellant contemplated Miss Place's murder in this case demonstrated no less premeditation than the "about an hour" in the Middleton case, supra. Waking up in an angry mood is no basis for assuming a crime of passion herein. The record clearly demonstrates that the argument between Appellant and Miss Place which precipitated the murder took place the evening before, thereby dissolving any fear, passion or the like the Appellant might have had. He had the whole night to premeditate the murder of his sleeping victim.

Appellant cites the case of Rogers v. State, 511 So.2d 526 (1987) as a typical example of the type of case in which this Court specifically rejected the application of "cold, calculated, and premeditated" as an aggravating circumstance. As in most of the cases cited by Appellant, Rogers concerns a murder committed during a robbery. In Rogers, supra, this Court found where the victim was shot as the defendant was fleeing an aborted robbery attempt, that "cold, calculated, and premeditated" did not apply as there was no plan to shoot anyone before the attempted robbery took place. In the instant case, however, the Appellant had a predetermined motive to kill his girlfriend and ample time

in which to contemplate doing so. In Rogers this Court concluded that "calculation" consists of a careful plan or prearranged design. The evidence in this case shows that Appellant had a prearranged design. See also Banda v. State, ____ So.2d ____, 13 F.L.W. 451 (Fla. July 14, 1988).

Appellant maintains that since there was not a "lengthy series of atrocious events" in this case that "cold, calculated, and premeditated" is not applicable (Appellant's Brief, p. 33). The State has demonstrated herein that there is sufficient evidence of a "cold, calculated, and premeditated'' design to kill. If in addition there had been a "lengthy series of atrocious events" in this case that would also support the application of the "heinous, atrocious, and cruel" aggravating factor.

Consequently, it is evident that the trial court properly applied the "cold, calculated, and premeditated" aggravating circumstance in Appellant's case, as there was an "execution-style" killing accompanied by a "heightened premeditation". See also Henderson v. State, 463 So.2d 196 (Fla. 1985), cert. denied, 473 U.S. 665 (1985).

Next, Appellant contends that the "nonstatutory aggravating circumstances" cited by the trial court were not "related to the capital felony itself, Trawick v. State, 473 So.2d 1235 (Fla. 1985), however, Appellant has failed to demonstrate that the circumstances alluded to were considered in support of the imposition of the "cold,

calculated, and premeditated" statutory circumstance, and were therefore improperly considered. In Barclay v. Florida, 463 U.S. 939, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (1983), the United States Supreme Court found that there is no constitutional defect in a sentence based on both statutory and nonstatutory aggravating circumstances. See also California v. Ramos, 463 U.S. 992, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983).

In affirming this Court's finding that the use of nonstatutory aggravating circumstances was harmless, the United States Supreme Court stated:

> There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance. . . . "What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." Barclay, supra at 1149.

In this case, however, the Appellant mistakenly refers to the facts considered by the trial court in arriving at the conclusion that the murder was "cold, calculated, and premeditated" as nonstatutory aggravating factors. In Appellant's written sentence the trial judge stated:

> I) The Capital Felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

FACT:

> Joey Burton Thompson shot Annette Louise Place execution style as she slept. When she didn't die, he stabbed her thrusting a knife 6-1/2 inches into her back. Joey Burton Thompson disposed of the knife.
>
> Joey Burton Thompson wrote a suicide note but did not end his own life.
>
> Approximately seven months after giving a full confession, Joey Burton Thompson blamed his wife for this brutal murder.
>
> **CONCLUSION:**
>
> There is an aggravating circumstance under this paragraph.

(R 300).

Thus it is evident that the "nonstatutory aggravating factors" referred to by Appellant are in reality only the facts relied on by the trial court in determining the applicability of the "cold, calculated, and premeditated" statutory aggravating circumstance.

The additional facts set forth, that Appellant failed to commit suicide and that he later blamed his wife for the murder, are legitimate circumstances of the crime which the trial court was bound to consider. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978).

> Findings of a judge are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings. *Hargrave v. State*, 366 So.2d 1 (Fla. 1978), *cert. denied*, 444

U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); *Lucas v. State,* 376 So.2d 1149 (Fla. 1979).

Sireci v. State, 399 So.2d 964, 971 (Fla. 1981).

Appellant finally contends that the statutory aggravating circumstance in this case is outweighed by the statutory mitigating circumstance. The instant case is distinguishable from the cited case of Songer v. State, ____ So.2d ____, 14 F.L.W. 262 (Fla. June 2, 1989), primarily because in Songer, one statutory aggravating circumstance was outweighed by three statutory mitigating circumstances. It is important to note, however, that this Court stated:

> We have in the past affirmed death sentences that were supported by only one aggravating factor, [citation omitted], but those cases involved either nothing or very little in mitigation.

Songer, supra at 263.

This Court has held that:

> . . . the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Rogers v. State, 511 So.2d 526, 534 (Fla. 1987).

In upholding the jury's recommendation of death, the trial judge in this case found the existence of only one statutory mitigating circumstance: That Appellant had no prior criminal record (R 301). One valid aggravating circumstance may be sufficient to support a death sentence in the absence of at least one overriding mitigating circumstance. State v. Dixon, 238 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 40 L.Ed.2d 295, 94 S.Ct. 1950 (1974).

In Dixon, supra, this Court recognized that the capital sentencing procedure

> is not a mere counting process of X number of aggravating circumstances and number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
>
> *Id.* at 10.

See also Randolph v. State, 463 So.2d 186 (Fla. 1984).

The record in this case shows that the trial court balanced the statutory aggravating factor against the statutory mitigating factor and the four non-statutory mitigating factors and found, based on a reasoned judgment of the factual situation, that a sentence of death was approximate, affirming the jury's recommendation. The

recommended sentence of a jury should not be disturbed if all relevant data was considered. Tedder v. State, 322 So.2d 908 (Fla. 1975); Ross v. State, 386 So.2d 1191 (Fla. 1980). See also LeDuc v. State, 365 So.2d 149 (Fla. 1978) (a jury's recommended sentence of death should not be disturbed); Grossman v. State, 525 So.2d 833 (Fla. 1988) (a jury recommendation of death, reflecting the conscience of the community, is entitled to great weight).

Consequently, this Court should not substitute its sentencing judgment for that of the trial judge and jury, and should therefore affirm Appellant's sentence.

ISSUE III

THERE WAS NO ERROR AS NEITHER THE TRIAL COURT NOR THE PROSECUTION MADE STATEMENTS WHICH MISCHARACTERIZED OR DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY IN ITS SENTENCING RECOMMENDATION.

The Appellant is procedurally barred from raising a claim based on Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985). The record in this case clearly demonstrates that no objection, timely or otherwise, was raised based on the mischaracterization or diminution of the jury's sense of responsibility in its advisory sentencing recommendation. The only comment (not objection) made by defense counsel concerned the jury's perception of the effect of the appellate process on a defendant sentenced to death (T 1069).

This Court has consistently held that where no objection is interposed at trial, a Caldwell claim is not preserved for review. Jones v. Duqqer, ____ So.2d ____, 13 F.L.W. 667 (Fla. Nov. 10, 1988); Preston v. State, 528 So.2d 896 (Fla. 1988); Mitchell v. State, 527 So.2d 179 (Fla. 1988). The instant issue is thus procedurally barred from review.

Even so, this Court has held that:

> . . . we have previously held that *Caldwell* is distinguishable from the Florida procedure which treats the jury's recommendation as advisory only and places the responsibility for

> sentencing on the trial judge. Advising the jury that its sentencing recommendation is advisory only is an accurate statement of Florida law. *Combs v. State*, No. 68,477 (Fla. Feb. 18, 1988) [13 F.L.W. 142]; *Grossman v. State*, No. 68,096 (Fla. Feb. 18, 1988) [13 F.L.W. 127].

Cave v. State, 529 So.2d 293, 296 (Fla. 1988). See also Mitchell v. State, 527 So.2d 179 (Fla. 1988); Foster v. State, 518 So.2d 901 (Fla. 1987) (Barkett, J., specially concurring); Pope v. Wainwright, 496 So.2d 798 (Fla. 1986).

This Court has recognized that

> . . . Caldwell stands only for the proposition that the constitution is violated if the jury receives erroneous information that denigrates its role.

Banda v. State, ____ So.2d ____, 13 F.L.W. 451, 452 (Fla. July 14, 1988).

It should be noted also that throughout the voir dire of prospective jurors that defense counsel repeatedly referred to the jury's penalty phase decision as a "recommendation" (T 443, 456, 479).

Consequently, no error is apparent and Appellant's conviction and sentence must be affirmed.

ISSUE IV

THE PENALTY PHASE INSTRUCTIONS PROPERLY CHANNELED THE JURY'S DISCRETION IN DETERMINING THAT THE MURDER WAS "COLD, CALCULATED, AND PREMEDITATED".

Appellant contends that the jury instructions given at the penalty phase of his trial were unconstitutionally vague because they failed to inform the jury of the findings necessary to support the aggravating circumstances of "cold, calculated, and premeditated".

The instructions Appellant refers to are the following:

> The aggravating circumstances that you may consider are limited to the following that are established by the evidence:
>
> 1. The crime for which the Appellant' is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> The phrase "cold, calculated and pre-meditated" refers to a higher degree of pre-meditation than that which is normally present in a pre-meditated murder. This aggravating factor applies only when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator before the murder.

(R 265).

The first part of the instruction is taken directly from the Florida Standard Jury Instructions in Criminal Cases, 2d Ed., pages **78-79**, as approved by this Court. See Order and Opinions of Supreme Court of Florida Adopting Florida Standard Jury Instructions in Criminal Cases, **431** So.2d 594 (Fla. **1981).**

The second portion of the instruction is precisely that which was requested by the Appellant himself (R 262). Appellant cannot now complain that the instruction he requested was somehow faulty.

Based on the case of Maynard v. Cartwright, 486 U.S. ____, 100 L.Ed.2d 372, 108 S.Ct. ____ (1988), Appellant claims that the instruction he requested is so vague that it tainted the jury's recommendation. Maynard dealt with an instruction on "heinous, atrocious and cruel". Notwithstanding the fact that Appellant now claims as error the instruction that he was responsible for, the definition of "cold, calculated, and premeditated" that was given has been approved by this Court in Preston v. State, 444 So.2d 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981); and Hardwick v. State, 461 So.2d 479 (Fla. 1984). In Preston, supra, this Court stated:

> The level of premeditation needed to convict in the guilt phase of a first-degree murder trial does not necessarily rise to the level of premeditation required in section 921.141(5)(i). This aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator.

Preston, supra at 946.

Consequently, there is no error and Appellant's conviction and sentence must be upheld.

ISSUE V

THE TRIAL COURT PROPERLY EXCLUDED POLYGRAPH RESULTS FROM CONSIDERATION DURING THE SENTENCING PHASE OF THIS CASE.

Appellant contends that the trial court improperly excluded the admission of polygraph results during the sentencing phase. Appellant calls this "critical evidence". (Appellant's Brief, p. 65). Polygraph results have not been recognized as reliable. Delap, infra.

First, polygraph results are not "evidence". Absent consent by both the State and the defendant, polygraph evidence is inadmissible in an adversary proceeding. Walsh v. State, 418 So.2d 1000 (Fla. 1982). See also Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, 49 L.Ed.2d 1220, 96 S.Ct. 3226 (1976).

This Court has held that:

> Where evidence is based solely upon scientific tests and experiments, it is essential that the reliability of the test be recognized and accepted by scientists or that the demonstration pass from the stage of experimentation to that of reasonable demonstrability. *Rodriguez v. State,* 327 So.2d 903 (Fla. 3d DCA), *cert. denied,* 336 So.2d 1184 (Fla. 1976). Polygraph testing has not passed the reliability threshold. *State v. Curtis,* 281 So.2d 514 (Fla. 3d DCA 1973), *cert. denied,* 290 So.2d 493 (Fla. 1974).
>
> The use of a polygraph examination as evidence is premised on the waiver by both parties of evidentiary objections as to lack of scientific reliability. The evidence fails to show that the

> in Florida as to warrant its admissibility. The Florida rule of inadmissibility reflects state judgment that polygraph evidence is too unreliable or too capable of misinterpretation to be admitted at trial. However, the court does recognize that the parties may waive their evidentiary objection. Defendant's constitutional rights have not been violated by the exclusion of inadmissible polygraph evidence.

Delap v. State, 440 So.2d 1242, 1247 (Fla. 1983). Consequently, the polygraph results were properly excluded.

Appellant urges that the results are admissible pursuant to Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), wherein the United States Supreme Court wrote:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, supra at 604.

It is clear that the polygraph results do not concern Appellant's character or record or the circumstances of the offense, as the polygraph examination was conducted long after the murder was committed. In footnote 12 of Lockett, the Court recognized that

> Nothing in this opinion limits the traditional authority of a court to

> exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.

Lockett, supra at **604.**

In excluding the polygraph results, the trial court stated:

> All right. Mr. Chipperfield, I don't feel that it is relevant or has any bearing. The jury has made their finding, and this is not admissible evidence, and the Court doesn't feel that it has any relevance to this or any other proceeding.

(T 1048). Absent an abuse of discretion, a trial court's ruling on the admissibility of evidence will not be disturbed. Blanco v. State, **452** So.2d **520** (Fla. **1984),** cert. denied, **469** U.S. **1181 (1985).**

The trial court did not abuse its discretion, indeed its ruling is consistent with this Court's ruling in Christopher v. State, **407** So.2d **198** (Fla. **1981),** wherein this Court stated:

> Section **921.141,** Florida Statutes **(1977),** is not ambiguous with respect to what evidence is admissible at the sentencing hearing. The statute provides that evidence as to any matter the court deems relevant to sentencing may be admitted. It is within the discretion of the trial court to determine what is relevant in the sentencing proceeding. *Provence v. State,* **337** So.2d **783, 786** (Fla. **1976),** *cert. denied,* **431 U.S. 969, 97** S.Ct. **2929, 53** L.Ed.2d **1065 (1977).** Absent a showing of abuse of this discretion we will not disturb the finding of the trial judge.

> of abuse of this discretion we will not disturb the finding of the trial judge. No such abuse has been shown in the case *sub judice.* The granting of the state's motion to preclude the introduction of the polygraph results was proper.

Christopher, supra at 202. See also Perry v. State, 395 So.2d 170 (Fla. 1981).

Thus the polygraph results were properly excluded.

ISSUE VI

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A MISTRIAL AFTER THE VICTIM'S FATHER IDENTIFIED THE VICTIM AS HIS DAUGHTER.

The record in this case shows that before the victim's father was allowed to identify the victim, that the following bench conference took place between defense counsel Chipperfield, Assistant State Attorneys Blazs and De La Rionda, and the trial court:

> MR. CHIPPERFIELD: Your Honor, this is the victim's father I think being called for no other reason than to identify the victim and the general rule in Florida is that you can't call a member of the victim's family to identify the deceased victim provided there are available non-related people who can identify the victim.
>
> MR. BLAZS: I couldn't agree more. That's the general rule, Judge, and as the Court is well aware. In fact, as I indicated to Mr. Cofer before we started, I was going to have another witness to identify Miss Place and that witness is not able to identify that photograph as being the victim.
>
> THE COURT: I'm sorry, who did you say that was?
>
> MR. BLAZS: That was the Reverend Fulton that I mentioned to the Court yesterday and to Mr. Cofer and Mr. Chipperfield. The fact that this is the father of the victim and is the only person that can identify the victim, we have no other witness, and I have case law on that.
>
> THE COURT: Let me ask you something, did I misunderstand the opening statement, is the identity of Annette Place, is that in issue that that is not the person who was killed on February the 10th?
>
> MR. BLAZS: No, sir, that's not in issue at all.

THE COURT: Well, if you stipulate that she is, in fact, is the person who is dead and agree that she is then do we need to have the this man's testimony?

MR. CHIPPERFIELD: Well, no, we don't, Your Honor, and if your ruling is that you will allow him to testify, then we will stipulate to avoid that. The problem is that that is the case and in any case the State's identification witness can't be a member of the victim's family, and that is forcing the defendant to stipulate to a material fact if we have to stipulate to that. This lady, the victim, worked in Jacksonville. I think it would be impossible to say that she didn't know anybody else in Jacksonville who knew who she was if she was employed here. What the State is doing by bringing the father in is forcing us to stipulate. We will if the Court is ruling that otherwise you will allow this man to testify.

THE COURT: Well, Mr. De La Rionda, and Mr. Chipperfield, recite the law in Florida.

MR. DE LA RIONDA: Yes, sir. Judge, we have some law, but that is the general rule as Mr. Chipperfield stated, but we do not have any other credible witness and that is the case law. We don't have any other witness, period, that can identify this victim. I asked the victim's family to go find people and they came up with a Reverend Fulton, and I had my investigator go out there to be sure he could identify the photograph.

THE COURT: Well, let me ask this question, is there any reason to reveal that he is related?

MR. BLAZS: I wasn't planning to do that. He has a different name.

THE COURT: Well, how would they know that he is even related?

MR. CHIPPERFIELD: Well, there is a danger, of course, that he will break down in the process, and rather than have him even put on the stand we will stipulate if your ruling is that otherwise he would be allowed to testify.

THE COURT: I don't even know, though, that it will be brought out that he is, in fact, related.

MR. CHIPPERFIELD: I would ask that it not be brought out, but there is still a danger that when he sees the photograph of the victim he will break down.

MR. DE LA RIONDA: Judge, that could happen with anyone that would have known the victim, and I asked Mr. Tienter not to break down but, obviously, I can not control that, but Mr. Tienter first of all does not have the very same last name as the victim. Number two, I was not going to ask him how you knew the victim, but the fact that he knew her. I rather not stipulate, but if the Court is inclined to rule that way, I will.

THE COURT: Well, Mr. De La Rionda, if you are telling me that you are not going to reveal the theory that he is related, then 1 see no problem with that. Now, if you want to stipulate, that's something else.

MR. DE LA RIONDA: I am not going to ask him how he knows her, just do you know her, and that's it. I can't control his emotions on the stand.

THE COURT: Well, then the jurors will not know that there is any relationship whatsoever.

MR. CHIPPERFIELD: Well, Your Honor, is that your ruling that he would be allowed to testify?

THE COURT: yes, sir.

(T 561-565).

When called to testify, the victim's father unexpectedly mentioned that the victim was his daughter (T **567).**

In ruling on Appellant's motion for mistrial, the trial court stated:

> THE COURT: All right. The Court finds in this case that error has occurred and Mr. Tienter after being instructed and was informed not to reveal his relationship with the deceased did, in fact, testify that he was the father after being instructed and advised not to do *so.* However, the Court finds that the error is harmless, that Mr. Tienter did not display any emotion of any kind whatsoever and at this point the Court feels that the error is harmless in that no emotion or any interjection was made into that. If, however, we proceed further with the State and it does become *so,* then I will revisit the defendant's motion for a mistrial and will grant that.

(T 572).

The State submits that the trial court properly denied Appellant's motion for mistrial. First, the prosecution showed that only one other identification witness who knew the victim had been found, a Reverend Fulton. It was asserted, however, that Reverend Fulton was unable to identify a photograph of the victim (T 561). Under these circumstances it was proper for the victim's father to testify as to her identity. Lewis v. State, 377 So.2d 640 (Fla. 1980); Adan v. State, 453 So.2d 1195 (Fla. 3rd DCA 1984); Furr v. State, 229 So.2d 269 (Fla. 2d DCA 1969).

In Randolph v. State, 463 So.2d 186 (Fla. 1984), this Court stated:

> While it is true that the court must guard against the possibility that sympathy will be injected in the trial, and that is why, normally, a family member should not be called to identify the victim, such evidence is admissible

> if other witnesses could not perform that function as well. If the family member has relevant testimony which is peculiarly within his knowledge, such testimony is always admissible.

Randolph, supra at 189, 190.

Thus the trial court properly allowed the victim's father to testify. The State recognizes however that the witness' unexpected and unfortunate statement that the victim was his daughter could be viewed as being somewhat prejudicial. The trial court found that error occurred but that the error was harmless in that the witness displayed no emotion whatsoever (T 572).

In Jackson v. State, 419 So.2d 394 (Fla. 4th DCA 1982), the Fourth District Court of Appeal recognized that

> Florida case law clearly states that a motion for a declaration of a mistrial is addressed to the sound discretion of the trial judge. *Strawn v. State ex rel. Anderberg,* 332 So.2d 601 (Fla. 1976); *Paramore v. State,* 229 So.2d 855 (Fla. 1969); *modified on other grounds,* 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972); *Tate v. Gray,* 292 So.2d 618 (Fla. 2d DCA 1974); *Warren v. State,* 221 So.2d 423 (Fla. 2d DCA 1969); *Prokos v. State,* 209 So.2d 484 (Fla. 3rd DCA 1968); *Baisden v. State,* 203 So.2d 194 (Fla. 4th DCA 1967); *Garcia v. State,* 142 So.2d 318 (Fla. 2d DCA 1962). In this State the rule has been long established and continuously adhered to that the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity. *State ex rel. Wilson v. **Lewis,*** 55 So.2d 118 (Fla. 1951); *State ex rel. Alcala v. Grayson,* 156 Fla. 435, 23 So.2d 484 (1945); *King v. State, supra*; *Kelly v. State,* 202 So.2d 901 (Fla. 2d DCA 1967).

Jackson, supra at 395, 396.

The record in this case demonstrates that it was not absolutely necessary for the trial judge to declare a mistrial as the trial had just commenced and the victim's father, who was the first witness, displayed no emotion. The trial judge, in his reasoned discretion, determined that the error was harmless, since clearly the error was so minor that it did not taint the further proceedings and had no effect on the outcome.

The trial court's sound discretion was not abused and Appellant's conviction must stand.

ISSUE VII

THE TRIAL COURT PROPERLY PERMITTED JANICE THOMPSON TO TESTIFY AT TRIAL.

Appellant contends that the State deliberately concealed the whereabouts of Appellant's wife, Janice Thompson, and produced her as a "surprise" witness.

This is not the case. Janice Thompson was listed as a prospective witness on April 5, 1988 (R 99), and again later on September 12, 1988 (R 157). Trial was held on October 4th through the 6th, 1988. The State made every effort to secure Mrs. Thompson's attendance and finally succeeded in locating her in Georgia during the trial. The State flew her to Jacksonville and the defense deposed her before she testified (T 933).

During the trial, Appellant moved to exclude Mrs. Thompson as a witness (R 933). A Richardson hearing was conducted and testimony was taken from prosecutors Blazs and De La Rionda and Detective Dewitt, the investigator who finally located Mrs. Thompson (T 924-932).

In ruling that no Richardson violation had occurred, the trial court stated:

> THE COURT: All right. At this time the Court makes the following finding: One, whether the violation was inadvertent or wilful, the State has presented me with testimony before we adjourned for lunch that they gave you the only address that they had which they went through; that they did not

> know of her whereabouts; did not know how to reach her and provided you with the only address that they had. It would appear that until your opening statement on Monday afternoon, excuse me, Tuesday morning that Mrs. Thompson was an insignificant witness until after your opening statement when the State expressed surprise and expressed that. As to the defense, I can not under any stretch of my imagination see where her coming here today would hamper in any way your ability to prepare for trial being as the defense in this case was that Mrs. Thompson had done this as opposed to Mr. Thompson. So, I don't find that the violation is willful, that they were substantial, or had in any way affected your ability to prepare for trial.
>
> Now, Mr. Cofer, the one thing that I want to satisfy myself with is that you've had an opportunity or a sufficient opportunity to speak with Mrs. Thompson and if you need additional time today, this afternoon, if you need an additional thirty minutes, or if you need an additional hour then I am certainly prepared to give up what ever additional time that you may need here this afternoon.

(T 936-937).

In Richardson v. State, 246 So.2d 771 (Fla. 1971), this Court stated that:

> The point is that if, during the course of the proceedings, it is brought to the attention of the trial court that the state has failed to comply with Rule 1.220(e), CrPR, the court's discretion can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances. Without intending to limit the nature or scope of such inquiry, we think it would undoubtedly cover at least such questions as whether the state's violation was inadvertent or wilful, whether the violation was trivial or

> substantial, and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial.

Richardson, supra at 775.

As demonstrated by the trial court's findings, the alleged "violation," of the discovery rules was not willful. The defense was privy to the same information as the State concerning possible addresses where Janice Thompson might be found. It was through the diligent investigation by Detective Dewitt that she was finally located. This was not something that the defense could not have done. The State in no way attempted to conceal the witness or her whereabouts. The witness concealed herself out of fear and not at the behest of the State (T 948). Detective Dewitt had to convince a friend of Janice's to have her call him if Janice should contact her, which she finally did. Janice Thompson was not a "surprise" witness. The only "surprise" in the trial was Appellant's repudiation of his confession and the new defense that his wife committed the murder. Mrs. Thompson's concealment was not attributable to the State, and it was only through diligent investigation that she was finally located. The trial court thus properly found that the "violation" was not willful.

Any effect produced by the "violation" on Appellant's case was trivial. The defense deposed Mrs. Thompson (T 933) and the trial court even offered the defense an additional hour to further depose her (T 937). Her testimony revealed

nothing which was unanticipated or startling. The trial court properly found that the "violation" was not substantial.

Finally, the trial court properly determined that the "violation" had absolutely no effect upon Appellant's ability to prepare for trial. This is not a situation where the witness' name was not provided on a witness list. Defense was on notice for six months that Mrs. Thompson would testify at trial. Defense also knew that Mrs. Thompson would state that she did not kill the victim. Nothing of substance was brought out by her testimony that was not already covered in the State's case in chief.

In Cooper v. State, **336** So.2d **1133** (Fla. 1976), the prosecution inadvertently left a ballistics expert off its witness list. The trial judge held a hearing and determined that there was no surprise to the defense. This Court wrote:

> Once again the state may have violated a Rule. But when that fact was discovered, the trial judge properly denied the request to exclude the witness or to recess the trial to enable defense counsel to obtain a ballistics expert of his own. Seeking a less drastic remedy, he recessed the court to allow the defense counsel to depose the expert before he was called to the stand. Since the defense should have been aware of the state's proposed proof by reason of information already known to it, the trial judge acted within the scope of his discretion to remedy whatever prejudice might have resulted from the state's breach.

Cooper, supra at 1138, 1139.

In the instant case the trial court similarly determined that there was no surprise to the defense and remedied the alleged "violation" by allowing the defense ample time to depose the witness. Thus there was no prejudice to Appellant. Absent an abuse of discretion, a trial court's ruling on the admissibility of evidence will not be disturbed. Blanco v. State, 452 So.2d 520, 523 (Fla. 1984), cert. denied, 469 U.S. 1181 (1985).

Even if there was a discovery violation, this Court has stated that:

> . . . the Rule in question must be considered by an appellate court in pari materia with the provisions of our harmless error statute, viz, F.S. 924.33, F.S.A. which provides that rulings or proceedings in criminal cases that are not prejudicial or harmful do not require reversal. As stated in Howard v. State, supra:
>
> "The cited statute is but a codification of the 'harmless error' doctrine which has been developed by judicial decision to avoid reversal in cases where it appears that justice has been served and that in all probability a new trial with the same admissible evidence would not alter the end result."

Richardson, supra at 774.

The State submits that there was no error in allowing Janice Thompson to testify, but if this Court should determine that error occurred, the State maintains that the error was harmless.

ISSUE VIII

THE TRIAL COURT PROPERLY ADMITTED PHOTOGRAPHS OF THE DECEASED VICTIM.

Exhibit 1, a standard face view autopsy photograph, was allowed into evidence for identification and to show that it depicted the same person that the testifying doctor performed the autopsy on (T 582). Another photograph of the victim lying dead in Appellant's bed was introduced to show how the victim was found, to show that the position she was found in was consistent with Appellant's confession (T 595, 596), and to aid in the determination of the condition of the body and how long the victim had been dead (T 603). A photograph of the victim from the waist to the top of the head was introduced. Prosecutor Blazs explained:

> Two things, Your Honor, first, Dr. Sander testified that the lividity evidenced in the photograph confirms or supports his contention that it was at least 18 hours prior to discovery of the body that death occurred and it gives credence to his testimony; the other is that he also testified that death could have been instantaneous and if that is correct then there is the position of the body at the time of death, and the State should have the right if it chooses to argue that this is the position of the body at the time of death given the fact that she may have died instantaneously, and that being the case these wounds and position of the wounds become critical in the State's case in our ability to show premeditation, the placing of the wounds, also the length that the assailant would have to *go* in order to inflict the wounds given her position in bed. Your Honor, this shows exactly what was underneath the covers that the

> Court has allowed to go in evidence without objection. It shows exactly what was underneath there, and I don't know if the Court saw the other two photographs by the other witness.

(T 681-682).

In admitting the photograph, the trial court stated:

> Okay. The Court finds there is relevancy, but fails to see as you said a lot of blood. Frankly, I see very little blood on the back, but I guess that's in the eye of the beholder. I do find that it is relevant and the Court will allow it in as State's Exhibit No. 10.

(T 683).

The burden that Appellant carries to show that the photographs were so prejudicial to vitiate the entire trial is heavy indeed. Appellant here fails to make that showing, and similarly fails to demonstrate that the trial judge abused his discretion in admitting the photographs into evidence.

> If a photograph is relevant to an issue required to be proven in a case, the fact that the evidence is gruesome and offensive does not bar admissibility.

Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied, 103 S.Ct. 182, 459 U.S. 882, 74 L.Ed.2d **148.**

> In a murder prosecution, the trial court did not err in admitting into evidence gruesome and offensive photographs, even though there was no question as to the identity of the victim and cause of death.

Foster v. State, 369 So.2d 928 (Fla. 1979), cert. denied, 100 S.Ct. 178, 444 U.S. 885, 62 L.Ed.2d 116.

> Gruesome photographs of a victim's dismembered body were relevant and properly shown to the jury, and did not unduly prejudice the defendant.

Halliwell v. State, 323 So.2d 557 (Fla. 1975).

> Relevancy of allegedly gruesome and inflammatory photographs is to be determined in the normal manner without regard to any special characterization of the proffered evidence. Allegedly gruesome and inflammatory photographs each of which depicted a wound or wounds on the body of the murder victim not depicted by the other were relevant and admissible in murder prosecution.

State v. Wright, 265 So.2d 361, conformed to 271 So.2d 771 (Fla. 1972). See also Straiyht v. State, 397 So.2d 903 (Fla. 1981), cert. denied, 454 U.S. 1022, 70 L.Ed.2d 418, 102 S.Ct. 556 (1981), reh. denied, 454 U.S. 1165, 71 L.Ed.2d 323, 102 S.Ct. 1043 (1982).

The State maintains that admitting the photographs into evidence was well within the trial court's discretion, and that that decision at trial should not be disturbed on appeal.

ISSUE IX

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR DISCOVERY OF PROSECUTORIAL INVESTIGATIONS OF PROSPECTIVE JURORS.

Prior to trial, counsel for Appellant sought discovery of prosecutorial investigations of prospective jurors compiled in conjunction with the Jacksonville Sheriff's Office.

The trial judge properly denied Appellant's motion as he was bound by the authority of the First District Court of Appeal's decision in Monahan v. State, 294 So.2d 401 (Fla. 1st DCA 1974). In Monahan, the court recognized that a defendant has absolutely no right to such material and that there is no legal authority in Florida for that proposition. There is no Florida precedent to the contrary.

The Second District Court of Appeal similarly has held that reports on prospective jurors are not discoverable. Robertson v. State, 262 So.2d 692 (Fla. 2d DCA 1972). In the same vein, this Court has held that

> . . . the prosecuting attorney should not be required to actively assist defendant's attorney in the investigation of the case. Discovery in criminal cases has tended to be heavily weighed in favor of the defendant, and it would be contrary to the general principle of advocacy, as well as fairness itself, to require the prosecuting attorney to perform any duties on behalf of the defendant in the preparation of the case.

Crawford v. Stag, 257 So.2d 898, 900 (Fla. 1972).

Consequently, the trial court was bound by Monahan and was required to deny Appellant's motion. Thus there was no error and Appellant's conviction should be upheld.

ISSUE X

THE TRIAL COURT PROPERLY REMOVED A PROSPECTIVE JUROR FOR CAUSE.

At voir dire defense counsel Chipperfield questioned prospective juror Glover and the following exchange ensued:

> MRS. GLOVER: My beliefs are I feel that I can go in the trial but when that certain day comes to convict him as being guilty or not guilty or having the death penalty or if he is going to prison, I can't make that decision. I mean I can't agree to the death penalty.
>
> MR. CHIPPERFIELD: You could not make a recommendation of death?
>
> MRS. GLOVER: Of the death penalty, but I can go through the trial.
>
> MR. CHIPPERFIELD: Why do you feel that way, can you tell me that?
>
> MRS. GLOVER: I just don't agree with the death penalty.
>
> MR. CHIPPERFIELD: Is it a religious conviction that you have?
>
> MRS. GLOVER: No, not really. I just don't feel that anyone because he might have committed first degree murder, I don't feel that anyone has that right to give anybody the death penalty even though he might have done it.
>
> MR. CHIPPERFIELD: Okay. Let me just go one step further. The test that you have to consider in a death penalty if we get that far, you and the other eleven jurors would have already decided that he committed first degree murder, so at that point there wouldn't be any might about it, if you get to that point then that's established.
>
> MRS. GLOVER: Right.
>
> MR. CHIPPERFIELD: Let me ask you this, can you conceive of any set of circumstances where it was a horrible first degree murder, no mitigation, lots of aggravation, would you vote for the death penalty, and vote to recommend the death penalty?
>
> MRS. GLOVER: No.
>
> MR. CHIPPERFIELD: None at all?

MRS. GLOVER: **No.**
MR. CHIPPERFIELD: And that's because of your conviction against the death penalty is so strong?
MRS. GLOVER: Yes.

(T443-445).

In Witherspoon v. Illinois, 391 U.S. 510 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968), the United States Supreme Court noted that jurors are properly excluded for cause if they make it

> "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. 391 U.S., at 522, (emphasis in original).

In Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985), however the Court wrote:

> We therefore take this opportunity to clarify our decision in Witherspoon, and to reaffirm the above-quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with Witherspoon's reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be

> reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"' these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Foo notes omitted). Witt, supra at 469 U.S. 424-426.

The State submits that prospective juror Glover's bias against the death penalty was *so* strong that her bias would prevent or substantially impair the performance of her duties as a juror. Mrs. Glover's bias is unmistakably clear from the record and fully supports the trial judge's ruling excluding her for cause.

There is ground for excusal for cause when jurors indicate that they would be unable, after finding accused guilty of capital offense, to participate in required weighing of aggravating and mitigating circumstances and to consider death as possible penalty or when prospective jurors' opposition to death penalty might interfere with their deliberations on questions of guilty or innocence. Steinhorst v. State, 412 So.2d **332** (1982).

Exclusion of jurors is a factual issue. A presumption of correctness to a trial judge's finding of fact. Witt, supra.

> . . . excluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias . . .

Witt, supra at 429.

In Herring v. State, infra, a prospective juror, who stated at the beginning of the inquiry that he would have difficulty rendering a verdict of guilty if he knew the death penalty was a possibility and who stated unequivocally that he knew of no circumstance whatsoever in which he would be able to recommend the death penalty, was properly discharged for cause in a prosecution for first-degree murder.

This Court held that it would make a mockery of the jury selection process to allow persons with fixed opinions against the death penalty to sit on jury; to permit such persons to sit as jurors after they have honestly advised the court that they do not believe they can set aside their opinion is unfair to the other jurors who are willing to maintain open minds and make their decision based solely upon the testimony, evidence, and law presented to them. Herring v. State, 446 So.2d 1049 (Fla. 1984), cert. denied, 105 S.Ct. 396.

See also Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983), cert. denied, 104 S.Ct. 1328, 79 L.Ed.2d 723.

> Jurors who stated that they could not, under any circumstances, vote to impose the death penalty after verdict of guilty was returned evidenced their inability to follow the law and were properly excluded by trial court. Downs v. State, 386 So.2d 788 (1980) certiorari denied 101 S.Ct. 387, 499 U.S. 976, 66 L.Ed.2d 238, rehearing denied 101 S.Ct. 932, 449 U.S. 1119, 66 L.Ed.2d 848.

Thus, venirewoman Glover was properly excused for cause. Lockett v. Ohio, supra.

Appellant further contends that the trial court should have let Mrs. Glover sit on the jury at trial and substituted another juror at the penalty phase. Appellant maintains that such a procedure is permitted under §921.141(1), Florida Statutes.

The statute states in pertinent part, however, that

> If, through impossibility or inability, the trial judge is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided by chapter 913 to determine the issue of the imposition of the penalty.

To suggest that a new juror in this situation should be impanelled solely for the penalty phase is ridiculous and is clearly not envisioned by the drafters of the statute who foresaw such a substitution only in the event of

impossibility or inability, not philosophical inflexibility. As stated by this Court in Kokal v. State, supra at 1320, ". . . this notion of seating and substituting jurors is contrary to this Court's case law."

Appellant's conviction and sentence must consequently be upheld.

ISSUE XI

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO RECORD THE PROCEEDINGS OF THE GRAND JURY.

There is no constitutional or statutory requirement of recording grand jury proceedings and failure to do so, standing alone, provides no predicate for reversal. United States v. Robin, 559 F.2d 975 (11th Cir. 1977), rehearing denied. 572 F.2d 320.

There is no constitutional or statutory requirement that grand jury proceedings be recorded. In re Report of the Grand Jury, Jefferson County, Fla., Spring Term 1987, 533 So.2d 873 (Fla. 1st DCA 1988).

It is not required that testimony before a grand jury be reported. United States v. Barson, 434 F.2d 127, appeal after remand, 439 F.2d 128 (11th Cir. 1970). See also State v. McArthur, 296 So.2d 97 (Fla. 4th DCA 1974).

As Appellant demonstrated no "viable need" for recording the grand jury proceedings and since no rights of Appellant, constitutional or otherwise, were abridged by denying same, there was no error.

ISSUE XII

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO PRECLUDE VOIR DIRE EXAMINATION OF PROSPECTIVE GRAND JURORS.

A party does not have a vested right to any particular method of selecting a grand jury. United States v. Hoffa, 205 F.Supp. 710 (D.C. Fla. 1962), cert. denied, 371 U.S. 892, 9 L.Ed.2d 125, 83 S.Ct. 188. Allowing the State to conduct a voir dire examination of prospective grand jurors was a decision firmly within the sound discretion of the trial court. As Appellant has demonstrated no abuse of that discretion, the judgment below must stand.

ISSUE XIII

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO ENJOIN GRAND JURY DELIBERATIONS.

The State would note that this Court has already resolved this issue by denying the Suggestion for Writ of Prohibition on July 6, 1988 (Appendix 1). This Court made it clear in its denial of Appellant's Motion for Rehearing and Clarification that this Court's decision was on the merits (Appendix 2). The Respondent's Brief in that case is included as Appendix 3.

CONCLUSTON

Based on the above cited legal authorities, Appellee prays this Honorable Court affirm the judgment and sentence rendered in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BRADLEY R. BISCHOFF
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 714224

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to William J. Sheppard, Elizabeth L. White, Cyra C. O'Daniel and Matthew P. Farmer, SHEPPARD AND WHITE, P.A., 215 Washington Street, Jacksonville, Florida 32202, this 3rd day of August, 1989.

Bradley R. Bischoff
Assistant Attorney General